C.A. No. 113926

NOVA SCOTIA COURT OF APPEAL

Cite as: MacCulloch v. McInnes, Cooper & Robertson, 1995 NSCA 81
Freeman, Matthews and Roscoe, JJ.A.

BETWEEN:

PATRICIA B. MACCULLOCH	)	Patricia B. MacCulloch
	)	appeared in person
Appellant	)	
	)	
- and -	)	John P. Merrick, Q.C.
	)	for the respondent
	)	
MCINNES, COOPER & ROBERTSON a registered partnership and STEWART MCINNES	)	
	)	
Respondent	)	Appeal Heard:
	)	March 28, 1995
	)	
	)	Judgment Delivered:
	)	April 20, 1995

THE COURT: Appeal in respect to the action in tort and the appeal in respect to the contention are allowed per reasons for judgment of Matthews, J.A.; Freeman and Roscoe, JJ.A. concurring.

MATTHEWS, J.A.:

This is an appeal from a decision of a Supreme Court justice dated December 30, 1994 and the order thereunder, concluding that the appellant should not be granted an extension of time to bring an action against the respondents.

The application before the chambers judge was heard prior to trial. It is dated May 6, 1994. The parties agree that the appellant's action is based upon breach of contract and the tort of negligence. They also agree that by virtue of the provisions of the **Statute of Limitations**, R.S.N.S. 1989, c. 258 (the **Act**) the appellant had six years after the cause of action arose (s. 2(1)) to bring her action.

There is no question: the six year period had expired prior to the date of the application. However, a court may disallow a defence based upon the time limitation and permit the action to proceed in certain circumstances:

> **Application to proceed despite limitation**
>
> 3(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
>
> > (a) the time limitation prejudices the plaintiff or any person whom he represents; and
> >
> > (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

Application to terminate right of action

(3) Where a time limitation has expired, a party who wishes to invoke the time limitation, on giving at least thirty days notice to any person who may have a cause of action, may apply to the court for an order terminating the right of the person to whom such notice was given from commencing the action and the court may issue such order or may authorize the commencement of an action only if it is commenced on or before a day determined by the court.

Factors considered

(4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to

> (a) the length of and the reasons for the delay on the part of the plaintiff;
>
> (b) any information or notice given by the defendant to the plaintiff respecting the time limitation;
>
> (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action has been brought or notice had been given within the time limitation;
>
> (d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

> (e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.
>
> Jurisdiction of court restricted
>
> (6) A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired. [emphasis added]

Thus it was necessary for the chambers judge to determine when the cause of the actions arose and, if the action was commenced within the additional four years, to then decide whether or not to terminate the right of the appellant from commencing the actions.

The chambers judge expressed the issues before him in this fashion:

> Issue 1
>
> Did the limitation period begin running more than ten years ago, thus bringing the claim outside the six year limitation period mandated by 2(1)(e), and, pursuant to s. 3(6), the four year period within which the court may disallow the limitation defence?
>
> Issue 2
>
> If time on the limitation period began running between

> May 6, 1984 and May 6, 1990, is the applicant entitled to an extension pursuant to s. 3(2) of the **Act** having regard to the factors outlined in s. 3(4)?

ISSUE 1:

He noted that the respondent "bears the burden of proving that the limitation period has expired".

Before the chambers judge the respondent urged that the appellant ought to have known of the existence of a possible cause of action by April 17, 1984 when she was examined on discovery concerning what was later found to be a breach of her fiduciary relationship to the executors and beneficiaries of her late husband's estate. That date would have deprived the appellant of her cause of action. The chambers judge rejected the respondents' submission.

He cited **Central Trust Co. v. Rafuse et al**, [1986] S.C.R. 147 for the proposition that in a tort action this limitation period runs from the date when the material facts upon which it is based have been discovered or ought to have been discovered by the exercise of reasonable diligence. (see LeDain, J. at pp. 535-6).

He noted that a previous solicitor for the appellant was the first to canvass with the appellant the potential liability of the respondents to the appellant in late December, 1986.

He found as a fact:

> I find on the material presented that I am not persuaded that Mrs. MacCulloch knew or ought to have known of her possible cause of action by May of 1984. I find that Mrs. MacCulloch became aware of a possible claim in late December, 1986.

He concluded "that time began to run respecting the limitation period from ...late December, 1986". Thus, he found in favour of the appellant on the first issue.

However, be denied the appellant the right to extend the time limitation beyond the 6 year period.

ISSUE 2:

The factual evidence before the chambers judge was by way of affidavits.

The cause of the intended actions relates to events which occurred in the latter part of 1981. At that time she purchased a farm property in Nova Scotia and a Toronto condominium from the estate of her husband Charles MacCulloch and subsequently resold them at a profit. At all relevant times she was an executrix and trustee of that estate. The other executors and the trustees made no complaint.

The estate was placed in bankruptcy in June, 1982. The trustee in bankruptcy sued the appellant alleging she had breached her duty as an executrix and claimed recovery of the monies she had obtained on the resale of the properties.

The trial judge dismissed the trustees' action. By judgment dated January 20, 1986, this court allowed the appeal, finding that the appellant had breached her duties as an executrix and trustee and thus committed a breach of trust; ordered that she held the proceeds of the sales in trust for the trustees; and ordered an accounting.

Since that time the appellant has been engaged in many lawsuits, sometimes as plaintiff and others as defendant. She asserts that they all emanate from the difficulties she has experienced at the time of entering into the agreements and subsequent thereto. The

history of the various proceedings up until 1990 is found in **Re: MacCulloch (Bankrupt)** (1990), 93 N.S.R. (2d) 226 (N.S.T.D.). In her affidavit of October 10, 1994 she states:

> 23. That I believe that, if I had been advised to resign my position as Executrix prior to executing the Agreements of Purchase and Sale, dated December 15, 1981, and December 21, 1981, aforesaid, that many of the problems, litigation and damages faced by me since 1981 would have been avoided.

At the time that the agreements respecting the intended sales and the subsequent sales were consummated in 1981, the appellant was represented by the respondents.

It is now the intention of the appellant to pursue actions against the respondents alleging they, and in particular the respondent, Stewart McInnes, failed in their obligations to her and that such failure resulted in the subsequent judgment against her and the damages which flowed therefrom.

The main issue on this appeal is whether the chambers judge erred in denying the appellant an extension of time under s. 3 of the **Act** in which she could bring an action against the respondents.

In this case, as in most, an extension of the time limit prejudices both parties. The legislators recognized that fact. That is why the words "...and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which..." there is prejudice to each party, are in s. 3(2). [Emphasis added) In so doing a court must "have regard all of the circumstances of the case and in particular" to the seven factors set out in s. 3(4). The weighing of the degrees of prejudice is an important and required prerequisite to any conclusion which may be reached by a court.

In **Anderson v. Co-op Fire & Casualty** (1983), 58 N.S.R. (2d) 163, Hallett, J., as he then was, was confronted with the same issue. After setting out the provisions of the **Statute of Limitations**, previously quoted, at p. 167 he commented:

> ...The issue before the Court on this application is whether it is equitable to disallow the time limitation defence, having regard to the degree to which (1) the time limitation prejudices the plaintiff or any person whom he represents and (2) any decision to disallow the time limitation pursuant to this amendment would prejudice the defendant or any other person. In determining the issue, the Court must have regard to all the circumstances of the case and, in particular, the seven matters referred to in s. 2A(4) (a) to (g).
>
> In any case, there is great prejudice to a plaintiff if a time limitation defence succeeds as the plaintiff loses his cause of action. On the other hand, there is great prejudice to the defendant who loses a perfect defence if the order is granted. The Legislature in enacting this amendment must have recognized that there was prejudice to each party when the word 'degree' was used in s. 2A (2). The Court has been directed to consider not simply whether there is prejudice but to weigh the degree of prejudice to the parties. The intention of the Legislature as expressed is to give the Court the authority to disallow a defence based on time limitation considering the criteria set forth in ss. 2A (2) and (4). [Now s. 3(2) and (4)].
>
> The degree of prejudice to a plaintiff caused by a valid time limitation defence could not be greater as the cause of action is lost. ...
>
> What the Legislature must have meant when it authorized the Court to disallow the defence if it appeared equitable to do so, having regard to the degree to which any such decision would prejudice the defendant, was whether the defendant was prejudiced in the defence of the action on its merits because of the failure of the plaintiff to have proceeded in time. The

> Legislature could not have intended that the Court consider the fact that the defendant loses a perfectly good defence in assessing the degree of prejudice to the defendant if the order were granted, as, otherwise, it would be somewhat pointless for the Legislature to have enacted the amendment. There would be virtually no basis upon which to weigh the degree of prejudice to the parties as if the relief is refused, the plaintiff is totally prejudiced in the case and to allow the relief, the defendant is totally prejudiced. In summary on this point, in determining the degree of prejudice that would be suffered by the defendant if a decision were made to disallow the time limitation defence, the Court should not give much weight to the fact that the defendant loses its defence.

I agree with those comments. They are of utmost significance to this appeal. It is a given: each party will suffer prejudice depending upon whether the decision is to allow or disallow the time limitation defence. Thus, the necessity to weigh the degree of prejudice suffered by each.

I am not losing sight of the lead words in s. 3(2)(2) "the time limitation ...", stressed by respondents' counsel. It will be noted that Hallett, J. referred to them in the above quotation, but those words do not derogate from the necessity of the chambers judge to weigh the degree of prejudice suffered by each party.

With deference, in argument before the Chambers judge, the parties engaged in discussions concerning matters not relevant to the issue before him leading him to consider them. In an application such as this, it is understandably easy to discuss evidence which is relevant, not to the motion to dismiss the action or intended action under the provisions of s. 3, but to the issues which must be considered by a judge at trial. Consideration of such issues

on the application before the chambers judge are constrained to those permitted under s. 3.

The issue here is narrow: should the defence based upon the time limitation be disallowed and the action be allowed to proceed by virtue of the provisions of s. 3? In considering that issue the focus is upon the events which occurred at the time that the appellant purchased the farm property and the Toronto condominium from the estate (and later sold them). At those times Mr. McInnes was the appellant's solicitor. The evidence as to the extent of his retainer is not clear from the material before the Court. That, in essence, is a matter to be determined by a trial judge.

From the material placed before this Court we do know however, that Mr. McInnes acted as solicitor for the appellant in the execution and closing of the agreements by which the farm property was acquired by the appellant and on her behalf as vendor in the subsequent sale of that property. He also was her solicitor at the time of the purchase and sale of the Toronto condominium although a Toronto solicitor was also acting for her in that respect.

The respondents submit that the extent of Mr. McInnes' retainer is unknown to us. They say we should not speculate as to that fact nor as to what transpired between the parties at those relevant times. I agree. Those facts are for a trial judge.

In another action, **Price Waterhouse Limited v. Patricia Bredin MacCulloch**, Mr. McInnes was subpoenaed to give evidence. He was then a Minister in the federal cabinet and out of the province on business. Upon agreement of counsel on the urging of the trial judge, an "Agreed Statement of Facts With Respect to Evidence of Stewart McInnes" was prepared by the appellant's then solicitor and vetted by Mr. McInnes. The parties agree that

this document was properly admitted into evidence before the chambers judge. Thus, we may consider it, subject to the weight which should be given to the information contained therein.

The relevant portions of that document are:

> 2. Stewart McInnes acted generally as solicitor for Mrs. MacCulloch since shortly after her husband's death until the spring of 1983.
>
> 3. Specifically, Stewart McInnes acted as solicitor for Mrs. MacCulloch in the execution and closing of the agreement by which Monte Vista property was acquired by Mrs. MacCulloch, and on her behalf as vendor in the sale of the Monte Vista property to M & M Developments Limited.
>
> 4. To the best of the knowledge of Stewart McInnes, Mrs. MacCulloch did not participate in any way in the decision making process by the other Executors in the settlement agreement or gain any advantage or opportunity by reason of her appointment as Executrix in the estate of her late husband.
>
> 5. Stewart McInnes at no time advised Mrs. MacCulloch to resign as Executrix by reason of her participation in the Monte Vista purchase transaction, this question or issue did not arise at any point in the course of the transaction and I did not direct my mind to this point.
>
> 6. Stewart McInnes at no time advised Mrs. MacCulloch to make any disclosure to the estate of the fact or terms of a potential or actual resale of the Monte Vista property, this question or issue did not arise at any point in the course of the transaction and I did not direct my mind to this point.
>
> 7. Stewart McInnes did not advise Mrs. MacCulloch at any time that her participation in the purchase transaction and resale might constitute a potential

> breach of a fiduciary duty or result in a liability to account for any profit shown to have been produced upon the resale, this question or issue did not arise at any point in the course of the transaction and I did not direct my mind to this point.
>
> 8. The agreement of settlement between the estate, the beneficiaries and Mrs. MacCulloch was executed by Mrs. MacCulloch in her capacity as Executrix solely as a matter of formality and not with the intention of giving rise to any fiduciary or trust obligations on the part of Mrs. MacCulloch.
>
> 9. To the best of the knowledge of Stewart McInnes throughout the transaction with respect to the conveyance of the Monte Vista property to Mrs. MacCulloch all parties, including the solicitors, were of the view that the settlement was in the best interests of all concerned. No question of any improprietary or disability on the part of Mrs. MacCulloch to acquire the property by reason of her appointment as Executrix was raised during the course of the transaction.
>
> 10. At no time from the involvement of Stewart McInnes in the transaction on behalf of Mrs. MacCulloch until he ceased to represent her in the matter in or about the spring of 1983 was any complaint or objection brought to his attention from any party with respect to the sale of the Monte Vista property or its resale pertaining to the appointment of Mrs. MacCulloch as an Executrix.

I agree with the appellant, this document is both relevant and important to the issue before the Chambers judge. However, he made no reference to it whatsoever. In failing to consider the effect of that information when determining the issues concerning the time limitation, he erred.

This document proves, among other things, that Mr. McInnes acted for the appellant at the time that the Monte Vista (the farm) property was both purchased from the

estate and subsequently sold and that at no time did he advise her as to her "potential breach of a fiduciary duty".

The appellant says that she "trusted the respondents and relied completely upon the respondents' legal advice "in making the agreement". Had she been advised of the ramifications of her conflict of interest in the purchase and sale, she says she would have acted differently and the subsequent events and losses to her would not have occurred.

In response to the assertions respecting her delay in suing the respondents she says that she held Mr. McInnes in high regard, trusted and relied upon him. She therefor sought several alternate routes to achieve her desired results, but when they failed, she had no alternative but to sue the respondents. Between December 1992 (the expiry date of the six year limitation period) and the commencement of the application in May, 1994, the appellant says she has been attempting to obtain funds from the Probate Court in her claim for dower, all without success.

Had the appellant begun her action against the respondents within the six year limit the action would have to be heard even though the respondents may have suffered some prejudice by the delay. A trial judge would have to consider any submissions in that respect and weigh them accordingly but the action would proceed for it would have been taken within the six year time limit.

That the appellant has been persistent in attempting to obtain redress there can be no doubt. The numerous lawsuits attest to her determination.

Conversely the respondents say that they relied upon statements made by

solicitors acting on behalf of the appellant that the appellant did not intend to take action against them. They introduced before the chambers judge an affidavit of Mr. McInnes sworn to September 21, 1994. There he swore in part:

> 3. THAT to the best of my recollection in the latter part of 1981, Mrs. MacCulloch consulted me for the purposes of effecting a transfer of the farm property from the Estate to herself and there were negotiations over a period of time with the other executors and their solicitors concerning the terms of a proposed agreement. Sometime after the execution of this agreement, Mrs. MacCulloch asked me to provide her with a standard real estate agreement that she could use in a proposed resale of all, or a portion, of the property to a prospective purchaser in Germany. I have no recollection of any discussions with her about the particulars of the transaction and especially the purchase price. Sometime later, and I cannot recall specifically the period, she returned from Germany with an executed Agreement of Purchase and Sale with M & M Developments Limited. I have no recollection of any involvement in the negotiations in any way prior to the execution of this Agreement.
>
> 9. THAT during the whole of the legal proceeding commenced by the Trustee, Mrs. MacCulloch was represented by Mr. David A. Copp. In the latter part of 1986, I became aware that Mr. Copp was considering the possibility of commencing legal proceedings against myself as a result of my involvement with Mrs. MacCulloch at the time of the property transaction in December of 1981.
>
> 10. THAT at that time, I retained Mr. John P. Merrick to represent my interests in relation to the potential of any such claim and to defend such a claim. At no time prior to this application have I ever been given notice that such legal proceedings were in fact to be commenced.
>
> 11. THAT I am advised by Mr. Merrick and do verily

believe that in the year 1989 Mrs. MacCulloch had then retained Mr. Richard A. Murtha, a Barrister of this Court, in relation to the various legal proceedings involving herself and the Estate. In or about October of 1989, Mr. Murtha advised Mr. Merrick that he had received written instructions from Mrs. MacCulloch that she did not intend to commence legal proceedings against me.

14. THAT in the course of my various conversations with Mrs. MacCulloch over the intervening years, she has repeatedly advised me that she has never held me responsible for any of her difficulties and that she at no time had any intention of commencing legal proceedings against me or my Firm.

15. THAT almost thirteen (13) years have now elapsed since the time when the various transactions occurred and from the time of my retainer on behalf of Mrs. MacCulloch. Ten (10) years have elapsed since the time that the Trustee in Bankruptcy commenced legal proceedings against Mrs. MacCulloch.

16. THAT at the end of 1986, five (5) years after my involvement in the farm transaction, I provided a statement to Mr. Copp for the purpose of assisting him in representing Mrs. MacCulloch in the proceedings commenced against her by the Trustee. In the subsequent years it was my understanding, based on the information provided by Mrs. MacCulloch and her various counsel, that no claim was to be asserted against myself or my firm and I did not consider it necessary to make further efforts to preserve my recollection or any documents or memorandum that may have existed. I am now very concerned after the passage of thirteen (13) years that I may not have retained notes relative to the instructions and discussions involving Mrs. MacCulloch and with respect to these issues. I do not have complete assurance that all of the relative documents have been preserved and I consider there may be very significant prejudice as a result of my not being able to recall particular conversations relating to all of the events in

question.

The appellant orally vehemently disagrees with some of the assertions in that affidavit and has set out some of her disagreements in her affidavit of October 10, 1994. There is no need here to comment upon all of them.

As to the Toronto condominium, there is evidence that Mr. McInnes acted for the appellant in respect to that property. It was undoubtedly that evidence which led the Chambers judge to say, after mentioning the agreements respecting both the farm and condominium properties, in the first page of his decision:

> Mrs. MacCulloch now plans to sue Mr. McInnes who represented her during the time she made the relevant agreements.

The appellant sets out in her affidavit that Mr. McInnes not only was retained to effect the "transfer" of the properties, but that he knew that she intended to sell the farm property prior to the time of the purchase of that property. I will not set out the other areas of disagreement: those conflicts are interesting but not particularly relevant to the issue at hand. They may properly be considered should this matter proceed to trial.

Of relevance, however, is the final paragraph of her affidavit which I previously mentioned:

> THAT I believe that, if I had been advised to resign my position as Executrix prior to executing the Agreements of Purchase and Sale dated December 15, 1981, and December 21, 1981, aforesaid, that many of the problems, litigation and damages faced by me since 1981 would have been avoided.

It seems that Mr. McInnes' affidavit was carefully drafted, that which would be

expected from a senior solicitor represented by able senior counsel. The appellant emphasizes para. 16 of Mr. McInnes' affidavit. She correctly and eloquently underlines what the affidavit does not say. The paragraph does not say whether Mr. McInnes did or did not check his file. As discussed in argument before this Court, competent counsel would be expected to do that when first informed that the appellant had been advised of the possibility of suit against the respondents after late December, 1986. Mr. McInnes merely says "I may not have retained notes" and that "I do not have complete assurance that all of the relevant documents have been preserved". (emphasis added) Those are far from definitive statements. There is no assertion that the files do not exist. It may thus be presumed they do. Nor does the affidavit state whether or not Mr. McInnes knew that there existed a conflict of interest if the appellant as an executor and trustee were to purchase the properties. Nor does he say whether or not he perused the law pertaining to such a sale. See Feeney, **The Canadian Law of Wills, Probate** First edition, Butterworths, 1976. This affidavit is deficient in information pertinent to the issue before the chambers judge. The chambers judge made no comment upon those deficiencies.

Earlier I set out the two issues before the chambers judge as he expressed them. When he dealt with issue 2 he rephrased it:

> Having found that time runs from late December 1986 it remains to determine if Mrs. MacCulloch can avail herself of the provisions of section 3(2) of the **Act** given that more than six years had passed prior to this application.

Importantly, although each version placed the burden on the appellant, neither expression of this issue mentions the crucial consideration: the necessity on the part of the

chambers judge to weigh the degree of prejudice to each party.

Although he quoted from **Anderson** and from **Rushton v. Registrar of Motor Vehicles (N.S.)** (1992), 118 N.S.R. (2d) 107 and referred to some of the factors set out in s. 3(4), he concentrated upon the prejudice to the respondents caused by the delay. He referred to the fact that the appellant chose not to proceed in a timely manner against the respondents and considered the likelihood that the passage of time has affected the cogency of the evidence likely to be adduced by the plaintiff or the defendant. He found "particularly significant" the fact that in October, 1989 the appellant indicated to her then solicitor she would not pursue a claim against Mr. McInnes, lulling him into a false sense of security.

In denying the extension of time, he found that Mr. McInnes would be prejudiced in the defence of the action on its merits due to the extraordinary length of time which has passed since the making of the impugned agreements.

Each party alleges prejudice depending upon whether or not the extension of time to proceed is granted. Section 3(2) of the **Act** dictates that court must have "regard to the degree" of prejudice to the parties.

As earlier mentioned, Hallett, J. in **Anderson** considered the sections of the **Act** at issue here. He stressed the importance of weighing the degree of prejudice suffered by each party.

Davison, J. in **Rushton**, **supra**. at p. 110 referred to **Anderson**. After setting out pertinent quotations from **Anderson** which I have earlier set out he remarked:

> Mr. Justice Hallett pointed out that the **prejudice to the plaintiff couldn't be greater in that his action would be dismissed.** Mr. Robinson properly submits that the

> extent of the prejudice to the plaintiff is the same - the plaintiff's cause of action fails. **The variable is the extent of prejudice to the defendant by disallowing the statutory defence and that is the issue which should receive the attention of the court when exercising its discretion.** [Emphasis added]

In failing to concentrate on that issue, but in permitting other factors to sway him, the chambers judge erred.

That the appellant will suffer prejudice if the extension of the time limit is not permitted admits no doubt: her action is prescribed. Consideration must then be given to the prejudice suffered by the respondent should the action be permitted to continue. The chambers judge did consider that prejudice to the respondent due to the length of time which passed since the making of the agreements, but he failed to weigh the contrasting prejudices. If it can be said that the process the chambers judge followed was weighing the degrees of prejudice, then he failed to take into consideration the crucial facts which I have mentioned; the deficiences in the affidavit of Mr. McInnes and the failure to consider the effect of the information contained in the "Agreed Statement of Facts with Respect to the Evidence of Stewart McInnes".

Hallett, J. in **Anderson** at p. 170 spoke of the purpose of the time limitations:

> ...The purpose of time limitations within which to bring actions is to see that matters are brought on expeditiously within reasonable time frames considering the nature of the claim. The purpose is not to defeat bona fide claims through a technical failure to have commenced action within a specific time period. The Legislature has obviously intended to grant some relief to sleepy or negligent litigants subject to certain safeguards, the chief of which relates to any prejudice to the defendant caused by the delay in defending the

> case on its merits, taking into consideration the conduct of the plaintiff. The Legislature apparently perceived there were inequities arising out of the defence of time limitation and has provided a mechanism to resolve such inequities.

The respondents assert that the passage of time will prejudice them and urge that the extension of time should not be granted. Conversely, by denying the extension, the appellant's action is at an end; she will have suffered very great prejudice.

For emphasis, I reiterate that which Hallett, J. expressed in **Anderson** at pp. 167-8:

> The degree of prejudice to a plaintiff caused by a valid time limitation defence could not be greater as the cause of action is lost.

I repeat: it is the degree of prejudice which is the governing factor.

The order issued by the chambers judge is discretionary. As this Court has repeatedly said: we will not interfere with a discretionary order, especially an interlocutory one unless wrong principles of law have been applied or a patent injustice would result. See among others: **Exco Corporation Limited v. Nova Scotia Savings and Loan et al** (1983), 59 N.S.R. (2d) 331; **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54 and **Minkoff v. Poole et al** (1991), 101 N.S.R. (2d) 143 (N.S.A.D.). Are we concerned with an interlocutory order? In my opinion we are not.

In **Minkoff**, Chipman, J.A. after citing the above noted cases at p. 145-6 remarked:

> ...Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized

> situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. **The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case,** are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters. See **Charles Osenton and Company v. Johnston** (1941), 57 T.L.R. 515; **Finlay v. Minister of Finance of Canada et al.** (1990), 71 D.L.R. (4th) 422; and the decision of this court in **Attorney General of Canada v. Foundation Company of Canada Limited et al**. (S.C.A. No. 02272, as yet unreported). [emphasis added]

Justice John Sopinka and Mr. Mark A. Gelowitz in their text **The Conduct of an Appeal,** Butterworths 1993, set out an overview of the distinction, both real and perceived, between interlocutory and final orders. The authors comment at p. 6:

> One who has not been introduced to the intricacies of the matter could be forgiven for speculating that an 'interlocutory' order is one delivered in the course of litigation, prior to final judgment, and that a 'final' order is one that concludes litigation. Such an interpretation would be logical and in accordance with the common law understanding of final judgment; it is, however, sadly unsophisticated. What should be a straightforward application of a simple principle has never been anything of the kind. Every previously untested order appears to raise the question anew, with unpredictable and inconsistent results - so much so that the judges themselves have been driven to despair.

They remark further at p. 15:

> It emerges from the cases that the distinction between interlocutory and final orders is not strictly parallel to

> the distinction between substance and procedure. Pleadings and joinder of claims and parties, for example, are generally regarded as matters of procedure, but orders in such matters can have drastic effects on what and against whom a party can claim. **Where such orders have a terminating effect on an issue or on the exposure of a party, they plainly 'dispose of the rights of the parties' and are appropriately treated as final**. Where such orders set the stage for a determination on the merits, they do not 'dispose of the rights of the parties' and are appropriately treated as interlocutory. [emphasis added]

See also **Canada (Attorney General) v. Foundation Company of Canada Ltd. et al** (1990), 99 N.S.R. (2d) 327 (N.S.A.D.) and **Saulnier v. Dartmouth Fuels Ltd.** 106 N.S.R. (2d) 425 (N.S.A.D.)

Here, as earlier mentioned, the order of the chambers judge results in the final disposition of the case; the consequence is grave. The chambers judge, in my opinion, did not consider this factor and, if it could be asserted he did, he gave insufficient weight to it and in doing so he erred. He did not do what the statute and relevant case law required of him: "disallow the defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree" of prejudice suffered by the plaintiff and the defendants.

In determining the degree of prejudice suffered by the respondents and comparing that with the prejudice which the appellant would suffer if the extension of time were not granted it is therefore relevant to consider what prejudice the respondents suffered after the six year period expired and the applications for extension made some one year and five months later. The respondents have not alleged any in the material placed before us, other

than simply the additional passage of time. In my opinion that is not significant in order to tip the scale in favour of the respondents.

The chambers judge primarily based his decision on this finding:

> ...I find that Mr. McInnes would be prejudiced in the defence of the action on its merits due to the extraordinary length of time which has passed since the making of the impugned agreements.

That may be so, but that does not determine the issue.

If the appellant were not permitted to extend the time to pursue her action a patent injustice would result: the action would be at an end. The Chambers judge erred in not weighing the degree of prejudice which may be faced by the respondents against the very great prejudice to the appellant and thus applied a wrong principle in reaching his conclusion. He failed to apply the proper principle. I would allow the appeal and permit the action in tort to proceed.

NOTICE OF CONTENTION

By notice of contention the respondents assert "that the application of the Appellant for leave to commence an action against the Respondents based on breach of contract should be dismissed because the limitation period for such cause of action commenced as of the date of breach of contract in December of 1981 and expired in December of 1987".

Early in his decision the chambers judge commented:

> ...Both parties have also assumed that the applicant's intended cause of action could be based on both breach of contract and the tort of negligence.

It appears that he concluded that, having determined that the discoverability rule applied in respect to the action in tort, it was not necessary to consider whether the appellant could proceed with her action in contract. He remarked:

> In light of the nature of this application and my disposition of the matter I find it unnecessary to decide if the discoverability rule outlined in **Central Trust v. Rafuse** applies in contract as well as tort.

The respondents agree that the limitation period for a tort action runs from the date when the material facts on which it is based have been discovered or ought to have been discovered by the appellant by the exercise of due diligence. They do not cross-appeal from the chambers judge's finding that time began to run on the limitation period for tort in late December, 1986. They urge that in an action based on contract, the cause of action existed from the period when the breach of contract occurred, that is, here, in the latter part of 1981, when the respondents were the appellant's solicitors respecting the agreements to sell the two properties. If that submission were valid, the action in contract would be statute barred as some 12 to 13 years passed from that date in 1981 and the notice of application in this action.

Central Trust Co. v. Rafuse (supra), dealt only with an action in tort. There LeDain, J. remarked at p. 532:

> ...If the discoverability rule were not to apply, I would agree that the cause of action in tort arose when damage occurred, according to the established rule affirmed in **Cartledge** and applied in **Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp, supra**, at p. 433, and **Forster v. Outred & Co.**, [1982] 2 All E.R. 753, to the concurrent liability in tort of solicitors to clients.

In **98956 Investments Ltd. v. Fidelity Trust Co.** (1988), A.R. 151 (C.A.) the

court considered whether the counterclaim based in contract was timely. After reviewing the law in Alberta, Harradence, J.A., speaking for the court discussed **Central Trust v. Rafuse, (supra)**, at p. 158:

> ...Although the general principle of the injustice of an unknown cause of action expiring without awareness on the part of the plaintiff is identical for both actions framed in contract and actions sounding in tort, I am of the opinion that the fact that there was concurrent tort liability in **Central Trust** was critical to the decision.
>
> The parties to the litigation in **Central Trust** were in agreement that the discoverability rule was not applicable to contractual actions (p. 158). Mr. Justice LeDain said nothing in **Central Trust** which would appear to cast doubt on the wisdom of that concession. In fact, he proceeded to discuss the question of whether there was concurrent tort liability in a professional negligence action against a solicitor at great length, since the traditional position as held in **Groom v. Crocker**, [1939] 1 K.B. 194, was that such actions rest only in contract. His review of the authorities was comprehensive. With that discussion, undoubtedly Mr. Justice LeDain saw himself as either breaking new ground, or at least clarifying an uncertain area of the law. Similarly, the traditional position is that the discoverability rule is not applicable to contractual actions. Any variation from that position would seem to require the same sort of thorough analysis by Le Dain, J., that he undertook with respect to the concurrent tort-contract liability issue. Especially in light of the plaintiff's position in **Central Trust** with respect to the applicability of the discoverability rule in contractual actions, I am convinced that Le Dain, J., would have provided a deeper analysis of the contractual situation had he wished to comment on it. I am unable to impugn the validity of **Ruzicka** on the basis of dicta extracted from a single passage from **Central Trust** which itself recognizes that the action under consideration was framed in tort.

He then remarked:

> Some provincial legislatures have adopted limited statutory forms of the discoverability rule (see, for example, **Limitations Act**, R.S.B.C. 1979, c. 236, ss. 3,6,8(1)). It is open to the legislature of this province, if it wishes to do so, to choose a similar course. Given the present jurisprudence of the Supreme Court of Canada, while bearing in mind the underlying policy arguments, I have come to the conclusion that the discoverability rule does not apply to actions in contract in Alberta. The result is that **Ruzicka v. Costigan, supra,** remains good law in this province with respect to limitation periods for causes of action in contract.
>
> Since in the case at bar the agreement closed around July 4, 1979, that is the date that any contractual breach of warranty with respect to the standing of the Abacus loans would have occurred. In the result, the plaintiff by counterclaim's action would appear to be barred by the **Limitation of Actions Act**, R.S.A. 1980, c. L-15.

This province, similarly to Alberta, has not adopted a statutory form of the discoverability rule.

There have been decisions in Nova Scotia courts subsequent to **Rafuse**, in which the discoverability rule has, arguably, been applied to breach of contract actions. See **Velcoff v. Nova Scotia** (1986), 73 N.S.R. (2d) 41 (T.D.); **Bolivar v. Hirtle's Estate** (1990), 93 N.S.R. (2d) 279 (N.S. Probate Court); **Beaver v. Metropolitan Authority** (1990), 94 N.S.R. (2d) 250 (T.D.); **Clarke v. Milford** (1987), 78 N.S.R. (2d) 337 (C.A.) and **Johnson v. Johnson Estate et al**, (1991), 103 N.S.R. (2d) 256 (T.D.)).

Velcoff preceded the judgment of the Supreme Court of Canada in **Rafuse** but was subsequent to the judgment of this Court. It concerned an action in tort. There Hallett, J., then of the Trial Division, held that the time for the action did not begin to run until the

plaintiff learned of the alleged defamation.

Bolivar concerned an action in contract. The court found that the plaintiff's action was not statute barred. Although subsequent to **Rafuse**, **Rafuse** was not considered.

In **Beaver**, it appears that the trial judge did not consider whether different time limits may apply to issues of contract and those of tort. He applied what he termed as "a general rule":

> ...a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence...

Johnson, in my opinion is not relevant to the issues on this appeal.

Clarke is a judgment of this court. The trial judge held that the defendant solicitors "...failed to perform the basic obligation of solicitors acting for a purchaser on a real estate transaction" and that "There was a breach of the solicitors' obligations to the plaintiff in failing to obtain and register a proper deed that was effective to convey title to the plaintiff". The trial judge held that the action against the solicitors was barred by the **Statute of Limitation**. This court held that the trial judge based his finding on the judgment of this court in **Rafuse** where it was held that an action against solicitors for negligence either in tort or contract must be brought within the period of limitation which commenced at the time the negligence occurred. That decision has, however, been reversed by the judgment of the Supreme Court of Canada in respect to an action in tort. There was no determination by that court respecting an action in contract.

In my opinion the law in respect to the applicable rule respecting actions in

contract survives the judgment of the Supreme Court of Canada in **Rafuse**, that is, the time begins to run as of the date of the breach. The breach here occurred in the latter part of 1981.

It follows that the six year period provided for in the **Act** in the contract action expired at the end of 1987 and that the additional four year period permitted for relief under s. 3 expired at the end of 1991.

In consequence the appellant's right of action against the respondents in tort survives but that based upon contract does not.

I would allow both the appeal in respect to the action in tort and the contention in respect to the action in contract with costs in the cause to the appellant in the amount of $1500.00 plus disbursements.

J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.