Case Name:

Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.

Between
Carleton Condominium Corporation No. 21, plaintiff (respondent), and
Minto Construction Limited, defendant (appellant), and
J. Stuart Hall & Associates Ltd., Bellai Brothers Limited and Central Precast Products (1979) Ltd., third parties (appellants)

[2004] O.J. No. 597
Docket Nos. C37608, C37594 and C37637

Ontario Court of Appeal
Toronto, Ontario
Labrosse, Abella and Laskin JJ.A.

Heard: January 19-20, 2004.
Judgment: February 17, 2004.
(18 paras.)

On appeal from the judgment of Justice Catherine D. Aitken of the Superior Court of Justice dated December 21, 2001.

Counsel:

P. Donald Rasmussen and Heather L. Acton, for the plaintiff (respondent).
Paull N. Leamen and Tara M. Sweeney, for the defendant (appellant).
J. Bruce Carr-Harris and David Sherriff-Scott, for the third party (appellant), J. Stuart Hall & Associates Ltd.
John Hollander and Marc C. Doucet, for the third party (appellant), Bellai Brothers Limited.

The following judgment was delivered by

¶ 1 **THE COURT** :— This was an action for damages for deficiencies in the block back-up wall of a seven-storey condominium apartment building constructed in 1973. The appellants are respectively the builder, Minto Construction Limited ("Minto"), the engineers, J. Stuart Hall & Associates Ltd. ("Hall & Associates"), and the masonry contractor, Bellai Brothers Limited ("Bellai Bros."). The respondent, Carleton Condominium Corporation No. 21 ("the Condominium Corporation"), is the owner of the building.

¶ 2 At the opening of the trial, counsel informed the trial judge that she was not required to deal with the respective liability of the appellants.

¶ 3 In this court the appellants advanced the following six submissions:

1. The trial judge erred in failing to find that this action was barred by res judicata, issue estoppel or abuse of process.

2. The trial judge erred in failing to find that the action was barred by the six year limitation period in the Limitations Act, R.S.O. 1990, c. L-15.

3. The trial judge erred in finding a breach of warranty.

4. The trial judge erred in permitting recovery in negligence for economic loss.

5. The trial judge erred in her rulings on the scope of the examination and cross-examination of the expert witnesses.

6. The trial judge erred in her assessment of damages.

¶ 4 We would dismiss the appeal essentially for the excellent reasons of the trial judge. Apart from the appellants' fourth submission - relating to liability in negligence for pure economic loss - we agree with the trial judge's analysis. Her finding of negligence is an alternative basis of liability, which yields the same damages award as her principal basis of liability, breach of contractual warranty. Because we agree with her finding of breach of warranty we do not think it necessary to address the alleged error in her finding of negligence.

¶ 5 We note that after a twenty-four day trial, the trial judge issued detailed reasons which generally reflect a proper consideration of the voluminous and technical evidence and applicable jurisprudence.

¶ 6 In her judgment, the trial judge included a chronology of the events from 1977 with respect to water leakage and moisture in the walls of the building. She extensively reviewed the investigations, observations, and efforts and costs to remedy the problems with the walls. She considered the different and sometimes conflicting opinions of the numerous experts, and she made findings of fact which, in our view, are all supported by the evidence.

1. Res Judicata, issue estoppel and abuse of process

¶ 7 The appellants submit that the present action, begun in 1995, was barred by res judicata, issue estoppel or abuse of process. They contend that the claims in the present action could have been asserted in the 1986 action, which was eventually settled. This submission cannot succeed in the face of the trial judge's findings of fact.

¶ 8 Res judicata and the related doctrines on which the appellants rely preclude claims that were raised or, by reasonable diligence, could have been raised in the earlier proceedings. The trial judge found that the 1986 action related to a moisture problem in the external wall, while the 1995 action related to a structural problem in the block back-up wall of the building. The subject matter of each action was different. Importantly, the trial judge found - at paras. 189-93 of her reasons - that in 1986 the Condominium Corporation could not have discovered by reasonable diligence the structural problems in the back-up wall.

¶ 9 At paras. 190-91 she wrote:

> Prior to 1993, there is no evidence that CCC21 was advised that the block wall might somehow be implicated in the moisture and/or brick problems. There is no evidence that CCC21 knew of or suspected any deficiencies with the block back-up wall, or that it had been warned by qualified professionals to have that wall checked for suspected deficiencies. Until 1993, none of the professionals consulted by CCC21 ever advised the Condominium Corporation that there could be deficiencies with the block back-up wall. None ever suggested to the Corporation that the

> external brick cladding should be removed in order to expose the block back-up wall so that suspected deficiencies could be discovered.
>
> Until 1993, at the very earliest, there was no reason why CCC21 would have questioned the structural integrity of the back-up wall or whether it had been built in a good and workmanlike fashion in accordance with the plans and specifications and the pertinent building code, aside from the fact that it had been built by the same parties who built what CCC21 believed was a defective brick wall.

And at para. 192:

> In the absence of some reason to suspect deficiencies in the back-up wall, CCC21 was under no obligation to go searching for such deficiencies, and in fact would have been foolhardy and irresponsible to do so.

These findings are unassailable on appeal.

2. Limitation period

¶ 10 The appellants' submission on limitation period is, in substance, the same argument that they advanced on res judicata. The trial judge dealt with it in a similar way at para. 213 of the reasons:

> The alleged facts on which this action is based, as distinct from the 1986 action, relate to the block back-up wall. I have already found that CCC21 did not have any suspicions, let alone information, relating to possible defects in the block back-up wall until 1993 at the very earliest. I have also found that there is no reason why they should have discovered any such defects prior to that date. For the reasons given when dealing with the issue of res judicata, I cannot conclude that CCC21 would have discovered any such defects prior to 1993 had they exercised reasonable diligence. This action was commenced in September 1995, well within six years from the date the defects were or should have been discovered.

We see no error.

3. Breach of contractual warranty

¶ 11 After an extensive review of the evidence, the trial judge concluded that the construction of the building did not conform to a significant extent to the design plans and specifications, building by-laws and building code minimum requirements and was not consistent with standard construction practices at the time, particularly with respect to missing rebars and grouting. This finding is also well supported by the evidence.

¶ 12 The appellants' main argument is that para. 13 of Minto's agreement of purchase and sale gave the unit owners only a one year warranty. But the trial judge, correctly in our view, considered the paragraph open to the alternative interpretation that a breach of warranty claim could be asserted at any time. As Minto drafted the agreement, the contra proferentum rule of interpretation applied. Therefore, the trial judge properly gave effect to the alternative interpretation favouring the unit owners.

4. Recovery in negligence for economic loss

¶ 13 After an extensive review of the expert evidence and applicable jurisprudence, the trial judge concluded

that Minto was liable in negligence and that Minto breached its duty of care by failing to meet a reasonable standard of safe construction on certain aspects of the block back-up wall. As we have said, because the trial judge concluded that the same calculations of damages under breach of warranty applied to the negligence claim, we do not feel it is necessary to deal with this issue and, in light of the existing jurisprudence, we refrain from making any comment.

5. Rulings on the expert evidence

¶ 14 We are not persuaded that the trial judge made any error with respect to the admission or exclusion of evidence that had any impact on the results of this litigation.

6. Assessment of damages

¶ 15 With respect to the damages for breach of warranty, the trial judge found that the Condominium Corporation had retained recognized experts to do the studies on the building and had acted reasonably in the circumstances and in accordance with the advice of its experts in having the deficiencies repaired. As to the quantum of damages, the trial judge reviewed the various scenarios offered by the experts on what should have been done, at what time and at what cost. She relied, as she was entitled to do, on the report of the Condominium Corporation's expert, Wayne Woods. Her approach to the calculation of damages is reflected in para. 2 of her supplementary reasons:

> My award of damages was based on the finding that in the normal course it would have been in 2004 that CCC21 would have been required to re-clad the building at 373 Laurier Avenue East, Ottawa, but that as a result of Minto's breach of warranty and negligence, CCC21 was required to re-clad the building in 1995. My goal is to exclude from an award of damages the cost of re-cladding that CCC21 would have incurred in any event, but to include in damages the costs associated with having to pay this expense in 1995 instead of 2004. The evidence which I accepted as to the cost of re-cladding was that such a project would have cost $750,000 in 1995.

We agree with this approach.

¶ 16 The trial judge applied this approach, and after imposing an appropriate adjustment and discount for betterment, arrived at an amount that included: removal and re-cladding of the outside wall; additional rebar to the block wall, balcony supports, grouting joints; and other necessary expenses. Although the assessment of damages was a difficult issue, the trial judge arrived at an amount that was fair to all parties. We see no error in her assessment of damages.

¶ 17 Overall the trial judge committed no palpable and overriding error and there is no basis for this court to interfere with her findings and her conclusion.

¶ 18 The appeal is dismissed with costs, on a partial indemnity basis, fixed at $63,352.23, inclusive of disbursements and GST.

LABROSSE J.A.
ABELLA J.A.
LASKIN J.A.

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