CITATION: Grey Condominium Corporation No. 27 v. Blue Mountain Resorts Limited, 2008 ONCA 384
DATE: 20080514
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COURT OF APPEAL FOR ONTARIO

MacPHERSON, ARMSTRONG and EPSTEIN JJ.A.

BETWEEN:

GREY CONDOMINIUM CORPORATION NO. 27
on its own behalf and on behalf of all unit owners of
Grey Condominium Corporation No. 27

Plaintiff (Respondent)

and

BLUE MOUNTAIN RESORTS LIMITED, TOWN OF THE BLUE MOUNTAINS, ROBERT HALSALL AND ASSOCIATES LIMITED, HALSALL ASSOCIATES LIMITED, ROBERT HALSALL, ALAN PETER HALSALL, MATSUI BAER VANSTONE INC., JOHN VANSTONE, JAMES BAER, AND ROY MATSUI

Defendants (Appellant)

Hillel David for the appellant

Jonathan D. Speigel for the respondent

Heard: January 7, 2008

On appeal from the judgment of Justice D. Corbett of the Superior Court of Justice, dated January 31, 2007, with reasons reported at (2007), 277 D.L.R. (4th) 644.

Epstein J.A.:

INTRODUCTION

[1] The central question in this appeal is whether independently discoverable construction defects caused by a single act of negligence may give rise to separate causes of action.

[2] These issues arise in the context of a claim brought by Grey Condominium Corporation No. 27 in September 2001, following its discovery of three serious construction deficiencies – one in 1993, and the other two in 1996. If all three defects give rise to only one cause of action, then Grey Condo's claim is statute barred. However, if each defect gives rise to a separate and distinct cause of action, then, in light of the trial judge's unchallenged findings concerning discoverability, Grey Condo's claim for the costs of repairing two of the three construction defects is brought within the limitation period provided in s. 45(1) of the *Limitations Act*, R.S.O. 1990, c. L.15.

[3] The trial judge held that each deficiency gave rise to a separate cause of action. Therefore, Grey Condo's claim for the costs associated with repairing the two deficiencies that the appellant, the Town of the Blue Mountains, negligently failed to identify when it reviewed the plans and buildings was brought within the prescribed time. This finding, together with the Town's admissions concerning liability and damages, entitled Grey Condo to judgment against the Town in the amount of $298,707.32.

[4] For the reasons that follow, I am of the view that the trial judge was correct in concluding that Grey Condo's claim for the costs of repairing the two defects in question was not statute barred. Accordingly, I would dismiss the appeal.

FACTS

(i) The History of the Dispute

[5] The facts are straightforward and not in contention.

[6] Grey Condo, comprised of 55 residential units in 7 free-standing buildings, was built during a building boom in Collingwood in the late 1980s. The building permit for Grey Condo was issued in April 1988 and construction was completed in December 1989. The Town was responsible for issuing the building permit, and for inspecting, reviewing and approving the construction.

[7] Unknown to Grey Condo, at the time of completion, there were several serious problems with its buildings:

a) The condominium buildings were located too close together and the exterior walls were not designed to create a sufficient fire barrier (the "EIFS problem"[1] or "exterior walls");

b) Some of the walls and floors did not provide a proper fire barrier (the "internal fire separation problem"); and

c) Some of the load-bearing steel beams were not properly insulated and therefore did not provide a proper fire barrier (the "structural beams problem").

[8] Each of these problems constituted a breach of the Ontario Building Code and, in the event of a fire, represented a serious risk to people and property. None was apparent to a non-professional. The Town has admitted that it should have found these defects during its inspection and review.

[9] In October 1993, Grey Condo was notified that there could be defects with the exterior walls. At that time, another project, known as Sierra Lane, built by the same person who built Grey Condo, became notorious for its construction deficiencies. In response to the deficiencies at Sierra Lane, Grey Condo's property manager wrote a letter to the president of the Grey Condo board of directors warning of potential construction deficiencies.

[10] In the letter, the property manager specifically expressed concern about a "potential lack of one hour fire retardant material on the exterior panels," and recommended a review of Grey Condo's fire separations. For various reasons, no steps were taken to investigate the concerns raised.

[11] The letter made no reference to the internal fire separation problem or the structural beams problem (the "interior defects").

[12] It was not until 1996 when it received two more letters about possible construction problems that Grey Condo learned of the interior defects.

[13] In 1998, the plaintiff retained a consulting firm to undertake an investigation. In September 1999, the firm's report specifically identified all three deficiencies.

[14] Grey Condo then incurred substantial expense to remedy these defects.

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[1] EIFS is an acronym for Exterior Insulation Finish System.

[15] Grey Condo did not immediately start legal proceedings because it felt it was more prudent to try to resolve the matter through other avenues. Finally, in August 2001, Grey Condo commenced this action, claiming reimbursement for the costs of remedying the three defects.

[16] The Town admitted liability and damages, but submitted that the claim was statute barred. Against this background, the Town brought a motion for summary judgment.

(ii) The Summary Judgment Motion

[17] On the summary judgment motion, the Town argued that the plaintiff was aware or ought to have been aware of the three deficiencies well before August 1995 – i.e. six years prior to the issuance of the statement of claim. Grey Condo took the position that it was not aware of the problems until it received the consultant's report in 1999. The motion judge granted summary judgment in relation to the EIFS defect and struck that portion of the claim. His conclusion was based on the finding that the October 1993 letter gave Grey Condo notice of that defect and, therefore, the plaintiff's claim for reimbursement for the costs associated with repairing the EIFS deficiency was statute barred.

[18] The balance of the motion, relating to the internal fire separation and structural beams deficiencies, was dismissed. The issue of whether Grey Condo's claim for reimbursement of repair costs associated with the interior defects was commenced within the limitation period proceeded to trial.

THE TRIAL JUDGE'S REASONS

[19] The trial judge began by recognizing that Grey Condo had the onus of establishing that it commenced its action with respect to the interior defects within the relevant limitation period. Based on the discoverability principle, he stated that the limitation period did not begin to run until the earlier of when Grey Condo knew or ought to have known that it had a cause of action against the Town.

[20] Next, he outlined the Town's position, which is the same as on appeal: separate deficiencies do not give rise to separate causes of action; rather, each deficiency is a distinct measure of damages. According to the Town, since Grey Condo was aware of the external defects in October 1993, its cause of action, in relation to all defects became statute barred as of October 1999. In support of this position, the Town cited *Cahoon v. Franks*, [1967] S.C.R. 455; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; and *Winnipeg Condominium Corp. No. 36 v. Bird Construction*, [1995] 1 S.C.R. 85

[21] On the other side of the equation, the trial judge considered *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.* (2001), 47 R.P.R. (3d) 32 (Ont.

S.C.J.) aff'd (2004), 15 R.P.R. (4th) 161 (Ont. C.A.), which held that distinct construction deficiencies not discoverable by due diligence may give rise to separate causes of action.

[22] After discussing these cases, the trial judge synthesized the law and responded to the Town's argument as follows at paras. 64-68:

> If we stand back from the decisions in *Winnipeg Condominium*, *Cahoon* and *Peixeiro*, there is no conflict with *Carleton Condominium*. *Winnipeg Condominium* holds that a cause of action will lie against [a] builder by a subsequent purchaser for pure economic loss caused by negligence that gives rise to serious danger. The pure economic loss in *Carleton Condominium* was found to be recoverable. *Peixeiro* holds that a plaintiff is not deprived of his right to sue by operation of the limitations law before he has actual or constructive knowledge of his claim. That is what Justice Aitken held in *Carleton Condominium*. *Cahoon* stands for the proposition that a plaintiff may amend after a limitations period to add claims for different heads of damage arising out of the same set of facts that gave rise to the original claim. Justice Aitken held that different defects in a construction project are different factual bases for claims, and thus different causes of action.
>
> Many things can go wrong in the construction of a building. Builders have a duty to their customers, and to anyone using the building, to take reasonable care to ensure the building is safe. Others share this duty with the builder, including architects, sub-trades, inspectors, and the like.
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> ...
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> As time passes, new things come to light. If they are matters of workmanship, and not safety, then the owner may be restricted to a remedy in contract, and subsequent owners may not have a right of action. But if something comes to light that poses a serious risk to the occupants of the building, a tort claim may be made. That is the principle in *Winnipeg Condominium*.
>
> If the Town's position is correct, as soon as the first deficiency comes to light, the limitations clock starts to tick in respect to all deficiencies, known or unknown. In my view,

> the principle in *Winnipeg Condominium* would be unduly narrowed if discovery of one deficiency triggers the limitations period for all deficiencies. As stated in *Winnipeg Condominium*, the duty to take care is owed to all occupants of the building during its useful life, and not just to the original owner until the time of discovery of the first latent defect in the project.
>
> Therefore, separate deficiencies do give rise to separate causes of action. The holding in *Carleton Condominium* is clear that the limitations period for a claim based on a specific deficiency does not arise until that deficiency is known or ought to be known by the plaintiff.

[23] The trial judge then made two significant findings of fact, which have not been challenged on appeal.

[24] First, based on the significant amount of evidence concerning discoverability, including expert evidence, the trial judge found that the October 1993 letter alerted Grey Condo only of the need to check the exterior walls. The plaintiff had no reason to investigate other construction deficiencies. As well, the trial judge found that there was no reason why a consultant engaged to review the fire safety qualities of the exterior walls would have investigated or found the interior deficiencies. Accordingly, while these deficiencies were readily discoverable through a review of the building plans (in fact, they were discovered in this manner) and no destructive investigation would have been necessary, they would not have been discoverable upon the use of reasonable diligence. The trial judge therefore found as a fact that a reasonable and competent investigation of the concerns raised in the October 1993 letter would not have uncovered the internal fire separation and the structural beams problems.

[25] Second, the trial judge found that the Town only conducted one review of the plans, and that this review missed all the defects. He made this finding after reasoning that a tort action against a builder is different than one brought against an inspector. In the former, the negligent conduct may be multi-faceted and occur on different occasions over a period of time. However, the same could not necessarily be said about a municipality fulfilling its obligations to review building plans and construction.

[26] Having made this second finding of fact, the trial judge stated that the focus should not be on the tortfeasor's conduct but on the nature of the deficiency. Flowing from his synthesis of the law, he held that where the deficiencies are truly distinct, such that one is not going to be uncovered at the same time as the other, then the limitations

period will be separate – regardless of whether the deficiencies arose from one act of negligence or factually separate incidents.

[27] In this regard, he found that while the problems all related to fire safety, they were distinct deficiencies and the limitations period ran separately on the interior defects.

[28] The Town appealed the trial judge's decision.

ISSUES ON APPEAL

[29] The basic issue on this appeal is whether there are separate causes of action for distinct construction deficiencies with the result that there are separate limitation periods for each deficiency.

THE APPEAL

(i) The Town's Position

[30] As stated above, the Town's argument on appeal is the same as its argument at trial. It submits that a cause of action has only one limitation period, and that the trial judge erred when he effectively split the claim arising out of one act of negligence by identifying two separate limitations periods.

[31] Since there can only be one claim and since the EIFS claim is statute barred, the claim in relation to the interior deficiencies must also be barred.

(ii) Grey Condo's Position

[32] The essence of Grey Condo's argument lies in the discoverability principle as applied in construction cases. According to Grey Condo, negligent conduct that causes different defects to different parts of a building may give rise to multiple claims – as this court accepted in *Carleton Condominium*.

[33] Against this background, Grey Condo submits it was open to the trial judge to find that the interior and exterior defects could be the subject of separate claims.

[34] Given the trial judge's unchallenged finding of fact that Grey Condo could not have reasonably discovered the interior defects before August of 1995, the claim in relation to those defects was not statute barred.

ANALYSIS

[35] The central issue is whether the plaintiff can advance more than one claim in relation to the Town's negligence in not identifying the design and construction deficiencies in the Grey Condo buildings. If that question is answered affirmatively, then, based on the trial judge's finding that Grey Condo could not, with reasonable diligence, have discovered the existence of the interior defects before 1996, the appeal ought to be dismissed.

[36] I return to the trial judge's analysis of this issue. His reasoning centres on two propositions. First, the focus should not be on the conduct of the tortfeasor but on the nature of the deficiencies. Second, deficiencies are distinct where the discovery of one would not reasonably give rise to the discovery of the other.

[37] I have concerns with the trial judge's reasoning that the focus should be on the nature of the deficiencies rather than on the conduct of the tortfeasor. If his intention was to advance this as a general proposition of law, this perspective runs the risk of eroding the important principles of repose and finality. However, based on the analysis below, I agree with his ultimate conclusion that, in cases involving construction defects, emphasizing the nature of the deficiencies is appropriate in recognizing distinct causes of action, arising out of one act of negligence.

[38] I say this for two reasons. First, the discoverability principle is a tool of general application to ensure individuals are not unjustly denied their right to bring claims. Second, to ensure public safety, in circumstances involving construction defects, courts have been prepared to use this tool to allow multiple claims arising out of one act of negligence.

(i) The Discoverability Principle

[39] For a plaintiff to establish a defendant's liability in negligence, the plaintiff must show: (i) that he was owed a duty of care by the defendant; (ii) that the defendant should have observed a particular standard of care when performing or fulfilling that duty; (iii) that the defendant failed to observe that standard of care (i.e. negligence); (iv) that such failure caused damage to the plaintiff; and (v) that such damage was not too remote a consequence of the breach: see G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell Thomson, 2002) at 317.

[40] A cause of action in negligence accrues when these elements come into existence. At that point the limitation period begins to run.

[41] While in most cases, these elements come into existence simultaneously, in some, damages do not manifest themselves until long after the tortious conduct. It was in light of this reality that the courts developed the discoverability rule.

[42] According to Lord Denning, in *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*, [1976] Q.B. 858 at 866-867, if a cause of action for negligence accrues on the date when damage is sustained (rather than discovered), then a plaintiff could be deprived of the right to bring a claim despite not knowing of his or her claim. He then held, "[t]ime should not begin to run against [a plaintiff] until he [knows] of the [defect] or could, with reasonable diligence, have discovered it." In other words, for a person to

have an *actionable* injury he must be aware of it or must reasonably be taken to be aware of it, and the limitation period will not start to run until such time.

[43] This reasoning was adopted by the Supreme Court of Canada in *Nielsen v. Kamloops (City),* [1984] 2 S.C.R. 2, where one of the issues that arose was whether the plaintiff's action was barred by the *British Columbia Municipal Act,* R.S.B.C. 1960, c. 255. In adopting the discoverability rule, the Court expressed the view that the injustice of statute barring a claim before a plaintiff is aware of its existence takes precedence over any difficulty encountered in investigating historical facts.

[44] Similarly, in *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, the Supreme Court held that the discoverability rule was as applicable to cases involving professional negligence as it was to actions involving injury to property. In fact, the Supreme Court held at p. 224 that *Kamloops* established "a general rule that 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".

[45] The development of the discoverability rule continued in *Peixeiro*, *supra.* In that case the plaintiff, following a car accident in 1990, was advised by his doctor that he had suffered mild soft-tissue injuries. In 1993, the plaintiff was diagnosed with a disc protrusion in his spine. He sued in 1994 for damages arising from the 1990 accident. The defendants argued that the claim was statute barred by virtue of s. 206 of Ontario's *Highway Traffic Act*, R.S.O. 1990, c. H.8, which provided for a limitation period of two years from the time "when the damages were sustained".

[46] The defendant's submissions seemed well reasoned since the plaintiff had discovered the mild soft-tissue injuries in 1990. However, in deciding in favour of the plaintiff, Major J. held that despite the plaintiff's knowledge of some injury, he did not know, prior to June 1993, that his injuries were serious enough to satisfy the "permanent serious impairment" threshold within the meaning of s. 266(1) of the *Insurance Act*, R.S.O. 1990, c. I.8. In other words, since a component of the cause of action was the seriousness of the plaintiff's injuries, the cause of action did not accrue until this level of damages was discovered. Justice Major therefore held that the claim should be allowed to proceed.

[47] More important, however, the Supreme Court in *Peixeiro* took the discoverability principle one step further by specifically identifying it as an interpretive tool to construe limitations provisions.

[48] Accordingly, the discoverability rule is now available to respond to the competing issues involved in limitation period disputes – namely, access to justice on the one hand

and repose, finality and evidentiary staleness, on the other: see *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 for a discussion of these principles.

(ii) Application of the Discoverability Rule in Construction Defect Cases – Multiple Claims arising out of One act of Negligence

[49] In construction deficiency cases allowing multiple claims that arise out of one act of negligence is not without precedent.

[50] In *Carleton Condominium*, due to obvious problems with the brick cladding discovered in 1986, on a building constructed in 1972, the owners sued the builder/developer for negligent design and construction. The matter was settled in 1987. Subsequently, the plaintiff determined that there was a deficiency in the block wall. The defendants claimed that the claim was *res judicata* and statute barred.

[51] In addressing these defences, the trial judge's decision was based primarily on issues pertaining to *estoppel*. In particular, the trial judge cited the rule in *Henderson v. Henderson* (1843), 3 Hare 100 aff'd in *Doering v. Grandview (Town)*, [1976] 2 S.C.R. 621: the plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. She then found that the defects in the block wall could not reasonably have been discovered with due diligence and hence the plaintiff was not estopped from raising the claim.

[52] However, the trial judge still had to consider whether the claim was statute barred. In this regard she re-emphasized that the claim could not have been discovered before 1993, and, since the second action was commenced in 1995, it was brought in time. She held that it would be impractical, when dealing with a matter as complex as the construction of an apartment building, to expect the owner to be able to identify all latent deficiencies at any given point in time just because one patent deficiency had been identified.

[53] In a brief judgment, this court affirmed the trial judge's reasons, thereby sanctioning multiple causes of action arising out of one act of negligence.

[54] The Town, relying on *Cahoon*, *supra* and *Peixeiro*, *supra*, submits that *Carleton Condominium* was wrongly decided. While this panel is not in a position to consider this issue, it is important to address the Town's concerns about the principles established in *Cahoon* and *Peixeiro*.

[55] In *Cahoon* at p. 459, the Supreme Court accepted that a "single cause of action cannot be split to be made the subject of several causes of action". While this decision

addressed whether a party could amend a pleading and remains accepted law, it was decided well before the discovery principle became part of Canadian jurisprudence.

[56] In *Peixeiro*, the Supreme Court held at para. 18, "[o]nce the plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period." [Citations omitted.]

[57] The Town's position is that this statement is unequivocal – once damage, any damage, is discovered or reasonably could have been discovered, the cause of action has accrued.

[58] I disagree for two reasons.

[59] First, the Supreme Court has flexibly defined causes of action to respond, in certain circumstances, to access to justice concerns. Second, allowing a second claim is consistent with the principles the Supreme Court has identified in addressing claims for pure economic loss in the construction industry.

[60] I start with an example of the first, *M.(K.) v. M.(H.)*, *supra* where the Supreme Court altered the contours of the cause of action in battery for reasons relating to access to justice.

[61] In *M.(K.) v. M.(H.)*, the discoverability principle was, arguably, extended to define the elements of the cause of action in a way that allowed an incest victim to bring her claim. The issue arose after the plaintiff advanced a claim of assault, battery and breach of fiduciary duty on the basis of having been a childhood victim of incest by her father. The plaintiff did not commence her action until after entering therapy late in her twenties. At trial, the jury awarded the plaintiff $50,000 in damages, but the judge held that the claim was statute barred. According to the trial judge, the plaintiff had discovered that she had been wronged and suffered adverse effects when she was sixteen.

[62] The Supreme Court, however, took a functional approach and identified a presumption that it is only through therapy that certain incest victims discover the necessary connection between their injuries and the wrong done to them. According to the court at pp. 45-47:

> Battery consists of wrongful touching, and it is the wrongfulness of the contact and its consequential effects that are the material facts the plaintiff must discover before her cause of action accrues....

> ...
>
> It is clear from the evidence and the scientific literature that a misapplied sense of responsibility is instrumental in conditioning the child victim to submit silently to the abuse, while at the same time serving as the catalyst for much of the consequential psychological and emotional damages that emerge over time. More importantly, though, it is the redirection of responsibility for the abuse to whom it properly belongs that initiates the therapeutic process, such that the victim becomes aware of the causal connection between her childhood history and resulting injuries.
>
> ...
>
> The close connection between therapy and the shifting of responsibility is typical in incest cases. In my view, this observed phenomenon is sufficient to create a presumption that certain incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy.

[63] The Supreme Court held that even if the plaintiff was generally aware, while a teenager, that she wanted the abuse to stop, it was only once she had a "substantial awareness" of the wrong committed that her cause of action had accrued, and that this level of awareness presumptively arose during therapy. The Supreme Court adopted this approach even after considering the purposes of statutes of limitations: repose, finality and freshness of evidence.

[64] The Supreme Court used the discoverability rule to modify the tort of battery – specifically, the awareness component. This modification affected the time when the cause of action could be said to have accrued. In this fashion, the Supreme Court provided an incest victim the opportunity to redress damages that otherwise would have been statute barred because of her prior, though limited, awareness of wrongdoing and its negative effects.

[65] This takes me to *Winnipeg Condominium, supra,* where the owner/developer of an apartment building sold it to a purchaser who had no privity of contract with the contractor who built the building. Later, the purchaser had to incur substantial repair costs after a large slab fell from the building. The purchaser sued the contractor in negligence, claiming economic loss for the repairs. The Manitoba Court of Appeal struck the claim as disclosing no cause of action.

[66] The Supreme Court, in allowing the appeal, held that individuals who negligently design and construct buildings can be held liable for the costs of repairing dangerous defects. In reaching this conclusion, the Supreme Court reasoned that individuals should be liable for these costs because the defects in question could, if not repaired, harm persons or property, which would result in other causes of action (at paras. 35-43).

[67] It is clear that the analysis in *Winnipeg Condominium* was focused on the problems of recovery for pure economic loss and the various conceptual arguments that might take a case out of the pure economic loss category and put it into the direct physical injury category. However, it is equally clear that, in this decision, the Supreme Court expressed an intention to open up avenues of redress in construction cases involving defects that pose a substantial danger to the health and safety of occupants.

[68] I agree with the trial judge that the "single cause of action" theory upon which the Town relies in this appeal is contrary to the underlying principle established in *Winnipeg Condominium* as it would allow builders and other individuals involved in the construction industry to avoid liability for subsequently discovered dangerous defects.

[69] What makes the argument that the single cause of action paradigm should not be applied to construction deficiency cases particularly compelling is that it does not violate the important principles underlying statutes of limitation.

[70] While it is clear that repose is best served by accepting the Town's position, the evidentiary objective is different. Key issues to be litigated in latent deficiency cases are the existence of the deficiency, its proximate cause and the resultant damage. Evidence relating to these issues tends to develop, rather than disappear, over time. The diligence factor does not enter into the equation at all since diligence obligations cannot reasonably be imposed on a plaintiff who is blamelessly ignorant due to the inherently undiscoverable nature of the injury.

[71] In my view therefore, given the inherently latent nature of construction defects, and given that they will often be discovered over a period of time, it is neither logical nor fair to deny innocent victims an opportunity to seek redress for the wrongs done to them, based solely on the single cause of action paradigm.

[72] That said, trial judges must be careful to ensure that the deficiencies in question are clearly independently discoverable. Failure to do so could undermine the need for finality in litigation. As Doherty J.A. expressed it in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.) at para. 14:

> Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties,

> it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation."

[73] A party should not be allowed to pursue a claim, in a separate action, for damages based on a construction defect arising from the same act of negligence, where the damages sought are simply an attempt to litigate an issue that could have been previously pursued.

CONCLUSION

[74] The Town's position would deny Grey Condo any access to justice in relation to its claim for reimbursement for the costs of addressing the interior defects, defects that were serious and for which the Town admitted liability. In light of the trial judge's findings of fact and the foregoing reasoning, there are no circumstances in this case that would support a conclusion to this effect. Nor is there any basis to depart from the reasoning in *Carleton Condominium, supra.*

[75] I hold, therefore, that Grey Condo's claim for reimbursement for the costs it incurred to remedy the interior defects is separate from its claim in relation to the EIFS defect. The interior deficiency claim was commenced within time and Grey Condo is therefore entitled to judgment against the Town.

DISPOSITION

[76] For these reasons, I would dismiss the appeal.

COSTS

[77] The parties are agreed that the appropriate award for the costs of this appeal is $10,000 inclusive of GST and disbursements. I would make that order in favour of the respondent.

RELEASED:

"MAY 14 2008"
"JCM"

"Epstein J.A."
"I agree J.C. MacPherson J.A."
"I agree Robert P. Armstrong J.A."