Case Name:

# Strata Plan NW 3341 v. Delta (Corp.)

Between
The Owners, Strata Plan NW 3341, Leslie Evans, Gerald O'Neil, Fiona Smith, John Robert McNab, Colleen Harnett, George Temperton, Nancy Stewart, Tawnia Gale Scott, Noreen Sydell Anne Gunn and Lavona Sybil Marie Dayle, Executrices of the Estate of Doris Wright, plaintiffs (respondents), and
The Corporation of Delta, defendant (appellant), and
Elbe, Lock Walls & Associates Inc., Van Maren Construction Co. Ltd. and Van Maren Construction (#8701) Ltd., defendants/third parties, respondents

[2002] B.C.J. No. 2142
2002 BCCA 526
Vancouver Registry No. CA028972

**British Columbia Court of Appeal**
**Vancouver, British Columbia**
**Esson, Donald and Newbury JJ.A.**

Oral judgment: September 17, 2002.
Released: September 20, 2002.
(25 paras.)

**Counsel:**

J.E. Gouge, Q.C., and J.G. Yardley, for the appellants.
D.W. Roberts, Q.C., and B. Curran, for the respondents.

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The judgment of the Court was delivered by

¶ 1 **ESSON J.A.** (orally):— The defendant Corporation of Delta appeals certain aspects of a judgment of Mr. Justice Grist holding Delta liable for damages in excess of $3,000,000 which arose out of defective design and construction of a condominium development.

¶ 2 The action was launched in October 1996 by the strata corporation on behalf of the owners of the units situate in three separate buildings which formed the overall project. The claim was for repair and remediation of the three buildings which was made necessary because of wood rot in the exterior wall, the studs, and the beams. The other defendants to the action were the developer, a firm of architects, a firm of building designers and the contractor. The firm of architects was dropped from the action because there was no basis for any liability against it. The trial involved only the liability of Delta. Prior to the trial the developer Canlan was dismissed from the action by consent following upon a settlement. The building design firm and the contractor remained as parties but took no part in the trial.

¶ 3 The trial judge found the developer, the building designer, and the contractor jointly and severally liable along with Delta for the damages and, after delivering judgment, made an order under s. 4 of the Negligence Act allocating the degrees of liability as required by that section. There is a cross appeal by the plaintiffs with respect to that aspect of the judgment.

¶ 4 The basis of liability against Delta was essentially that it breached its duty to inspect and supervise the construction and particularly to enforce the provisions of the Building Code. Delta has not appealed against the findings of liability and quantum. The basis for the appeal is firstly, that the action was commenced out of time and secondly, that the learned trial

judge erred in failing to find contributory negligence on the part of the plaintiffs.

¶ 5 The limitation argument rests on two statutory provisions. The one which was relied on at trial is s. 285 of the Local Government Act which reads as follows:

> 285 All actions against a municipality for the unlawful doing of anything that
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> (a) is purported to have been done by the municipality under the powers conferred by an Act, and
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> (b) might have been lawfully done by the municipality if acting in the manner established by law,
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> must be commenced within 6 months after the cause of action first arose, or within a further period designated by the council in a particular case, but not afterwards.

¶ 6 The trial judge held that that section did not apply. At the time the appeal was launched, there were a number of conflicting decisions of trial judges on the applicability of s. 285 to actions such as this. That issue was resolved by a decision of this Court delivered while this appeal was proceeding. That decision, holding that s. 285 does not apply, is Gringmuth v. North Vancouver (District) 98 B.C.L.R. (3d) 116, 26 M.P.L.R. (3d) 54, [2002] 3 W.W.R. 612.

¶ 7 Faced with the reality that the Gringmuth decision would be binding on this Court on the hearing of this appeal, counsel for Delta applied some time ago to the Chief Justice requesting that he direct that five judges sit who would then be in a position to overrule that decision. In rejecting that application, the Chief Justice left open the possibility that the panel hearing the appeal would see fit to determine that the Gringmuth decision should be reconsidered.

¶ 8 Having heard the full submissions of the appellant, I am of the view that there are no grounds which would justify reconsideration, certainly at this time, of the fully considered and very recent decision of this Court in Grinmuth. It follows that, in my view, we are bound by that decision and that the first ground of appeal must fail.

¶ 9 The second limitation provision relied on by Delta is s. 3(2)(a) of the Limitation Act which reads as follows:

> 3(1) In subsections (4) and (6), "debtor" means a person who owes payment or other performance of an obligation secured, whether or not the person owns or has rights in the collateral.
>
> (2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
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> (a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

¶ 10 At the opening of this appeal, Mr. Roberts made a preliminary objection to that ground of appeal being heard. His objection was based on the fact that the section was not raised at trial. In its statement of defence, Delta had pleaded that the action was barred by efluxion of time and had made specific reference to the Limitation Act although without referring to a particular section. No particulars were requested and it would appear that, from that point on, no further reference was made to the Limitation Act. Certainly, it was not raised at trial.

¶ 11 We declined to deal with Mr. Robert's objection as a preliminary one. Having heard the appellant's submission, it is unnecessary to decide the question because the appellant's submission fails on the merits.

¶ 12 The only case which, in my view, need be referred to in support of that conclusion is Workers' Compensation Board of British Columbia v. Genstar Corporation (1986), 24 B.C.L.R. (2d) 157, [1988] 4 W.W.R. 184. The issue arose in that case on an application to add a defendant. It was contended by the proposed defendant that the action was barred by efluxion of time and that it should therefore not be added to the case. The chambers judge, [1985] B.C.J. No. 2826, rejected the submission that the applicable limitation period was the two year period provided by s. 3(1)(a) of the Limitation Act and held

that the applicable period was the six years provided by what is now s. 3(5) of the Act which reads:

> (5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

¶ 13 On appeal to this Court, a bench of five sat. The appeal was dismissed for the reasons of Madam Justice McLachlin. The relevant passages in the reasons are these:

> I cannot accept Genstar's contention that the action against it is for damages for "injury to property". I am persuaded by the authorities that "injury to property" refers to the situation where property is damaged by an extrinsic act, and not to the situation where a claim is made for damage occasioned by defects in the property itself. In Alberni District Credit Union and ADCU Development Ltd. v. Cambridge Properties Ltd. et al. (1985), 65 B.C.L.R. 297 (B.C.C.A.), the issue, as in the case at bar, was whether the limitation period applicable to a claim for defects in the building was the two-year limitation period provided by s. 3(1)(a) of the Limitation Act, or the six-year limitation period provided by s. 3(4). Esson J.A., speaking for the Court, held that the action was not one in respect of "injury to property", as the "building simply has not, in plain language, been injured". Accordingly, the six-year limitation period was held to apply. Counsel for Genstar seeks to distinguish the Alberni case on the grounds that the claim there was for breach of contract rather than in tort. In my opinion, that distinction cannot be sustained. Whether the action is brought in contract or tort, damage is an essential element of it. The question in each case is whether that damage comes within the phrase "injury to property".
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> Other authorities support the same view. In British Columbia Hydro & Power Authority v. Homco International Ltd. (1980), 25 B.C.L.R. 181 (C.A.), this Court held that the phrase "injury to property" did not apply to a claim for damages arising from defective gas fitting tees that fractured during testing procedures. The court stated that to fall within the ambit of the phrase "injury to property", an action must be one for physical injury or for direct damage to property.

¶ 14 After referring to a number of authorities Madam Justice McLachlin went on to say:

> Policy considerations support the conclusion that "injury to property" refers to damage caused by an identifiable external event. A short limitation period of two years is appropriate where the claim is based on an event which causes direct injury to property. Such a short limitation period may not be appropriate for a claim based on defects in the property which may not manifest themselves clearly for some time, even though with the benefit of hindsight one may be able to say that their onset was revealed at an earlier date.

It is that paragraph which, in my view, has particular application to the facts of this case. This was very much an instance of a case where the claim was based on defects which to some extend manifested themselves very early in the day but where the true magnitude only became clear with the passage of time and increased damage. I should say that, in this case, the appellant concedes that the action was commenced within the six year limitation period in s. 3(5).

¶ 15 In this Court it was submitted that the frequent rainfalls which are a fact of life in the Lower Mainland qualify as an identifiable external event within the meaning of the passage which I have quoted from the W.C.B. case. With respect, I cannot accept that submission.

¶ 16 I turn then to the alternative submission, i.e., that the trial judge erred in failing to attribute a degree of responsibility to the plaintiffs for the loss and damage which they suffered. The submission is that the plaintiffs failed to exercise due care and diligence in protection of their own interests because they failed to follow certain advice given to them at a relatively early stage by an engineer whom they had retained to advise them with respect to warranty claims. In particular, they did not implement certain remedial measures which, had they been taken then would, as the trial judge found, have prevented some of the damage. The appellant puts the matter this way in its factum, the reference to "Frank" being to the engineer in question:

> 33. The conclusion of the learned trial Judge (that the Plaintiff's were not contributorily negligent) simply cannot be reconciled with his findings of fact (that the Plaintiffs failed to follow Frank's

advice and that the damage was caused, at least in part, by that failure). We refer to paragraph 6, above:

a. Frank warned the Plaintiffs that the proposal to fix the deck-slope problem by building new decks on top of the old would not work. The learned trial Judge found that, "...despite Frank's advice...", the Plaintiffs persisted in attempting to fix the problem in that way. The learned trial Judge also found that that choice "...contributed to ... the greater problem of moisture entering the walls."

b. Frank warned the Plaintiffs that the attempt to solve the flashing problems by caulking the joints with sealant would never be effective. The learned trial Judge found that the Plaintiff attempted no other method of repair. At paragraph 73 of his reasons for judgment, the learned trial Judge found the flashing problem to be the most important cause of the structural damage at Riverwest.

c. Frank recommended that the fascias at the metal reveal band be replaced: Appeal Book, Vol 2, page 218. The Plaintiffs did not follow that advice. The learned trial Judge found that the failure to replace the fascias was fourth in order of importance among the causes of the leaks at Riverwest: Appeal Book, Vol. 1, page 162; Vol 4, page 652.

¶ 17 Based on those assertions, the submission is that, in light of the findings that the plaintiffs failed to follow the advice of their own expert and that that failure was a significant cause of the loss, it "necessarily follows as a matter of law" that some fault must be attributed to the plaintiff under the Negligence Act. The trial judge dealt with those submissions in this way:

CONTRIBUTORY NEGLIGENCE:

[87] Delta argues that the Strata Council contributed by negligence in failing to properly maintain the buildings that comprise Riverwest. Contributory negligence would have the effect of restricting damages against the Municipality to the proportion corresponding to its fault. The fact is, however, that this Strata Corporation acted with a high degree of diligence in pursuing problems with these three buildings.

[88] The degree of organization exhibited by the Strata Council would, in my view, be difficult to sustain with most residential Strata Councils. Their initial efforts were to have the developer correct deficiencies. These were maintained with diligence for so long as the developer was responsive. They continued with efforts to deal with leaks into the various suites and to correct the decks in accordance with advice given them. Ultimately they took the appropriate action in receiving expert advice and undertaking the remediation. I find no substance in this claim that the Strata Council was negligent.

¶ 18 The essence of the trial judge's decision on this issue is that he had regard to the context in which the plaintiffs had to decide, at an early stage, how to respond to the very difficult problems which were created for them by the defective state of the buildings in which they lived. The trial judge, after hearing many days of evidence and in delivering a very careful and extensive set of reasons for judgment, concluded that it was reasonable for the plaintiffs, having received the advice they did from Mr. Frank, which as I have said was given at a stage when the issue was what was going to be done under warranty, to continue for a time to rely on the developer to remedy the situation. In retrospect and with the wisdom of hindsight, that was not the best course. But I cannot say that the trial judge's assessment of the issue was an error which would permit this Court to interfere with his decision.

¶ 19 The case principally relied on by counsel for Delta is the very recent decision of the Supreme Court of Canada Housen v. Nikolaisen (2002), 211 D.L.R. (4th) 577 in which judgment was pronounced on March 28, 2002. The Court, by a 5-4 majority, allowed an appeal from the Saskatchewan Court of Appeal which had reversed a finding of the trial judge imposing a degree of negligence upon, as it happens, a municipal corporation. The facts were not similar to those in the case at bar but the case is helpful for the principles emphasised in it. For my purposes, they are adequately set out in this passage in the headnote at p. 578 in summarizing the majority judgment given by Mr. Justice Iacobucci and Mr. Justice Major, with three other members of the Court concurring:

The standard of review on pure questions of law was one of correctness, but appellate courts should not reverse findings of fact unless the trial judge had made a "palpable and overriding error". The same

> degree of deference should be paid to inferences of fact. If there was no palpable and overriding error with respect to the underlying facts that the trial judge relied upon to draw the inference, then it was only where the inference-drawing process itself was palpably in error that an appellate court should interfere. Questions of mixed fact and law involved the application of a legal standard to a set of facts. Appellate courts should defer the findings of negligence in the absence of a legal or palpable and overriding error. A determination regarding the standard of care was a question of mixed fact and law, and was subject to a standard of palpable and overriding error, unless the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case this might amount to an error of law, subject to a standard of correctness.

¶ 20 In my view, the decision in this case did not demonstrate error of the kind and degree which would be necessary. I do not intend to imply that there was any error in the conclusion. It clearly was one based on the whole of the evidence which involved a long and tortuous history of events.

¶ 21 I would, therefore, dismiss the appeal. I turn then to the cross appeal with respect to the allocation of fault amongst the four defendants pursuant to s. 4 of the Negligence Act. The trial judge determined that allocation to be 30% against the developer, 25% against each of the design firm and the contractor and 20% against Delta. The matter is of significance to the plaintiffs at this stage, notwithstanding that the defendants are jointly and severally liable, because the settlement with Canlan renders it in the interests of the plaintiffs to increase the percentage allocated to Delta and reduce that of the developer.

¶ 22 The principles which apply to this issue are essentially the same as those which apply to the contributory negligence issue. The distinction if any is that, with all respect to Mr. Roberts' submissions, the grounds for interfering are even weaker than with the contributory negligence. Accordingly, I would dismiss the cross appeal.

ESSON J.A.

¶ 23 **DONALD J.A.**:— I agree.

¶ 24 **NEWBURY J.A.**:— I agree.

¶ 25 **ESSON J.A.**: The appeal is dismissed. The cross appeal is dismissed.

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# Strata Plan NW 3341 v. Delta (Corp.)

[2002] C.C.S. No. 19815
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2002 BCCA 526
Vancouver Registry No. CA028972

**British Columbia Court of Appeal**
**Esson, Donald and Newbury JJ.A.**

Oral judgment: September 17, 2002
(25 paras.)

*Building contracts — Liability of builder — Defective workmanship or design — Defective construction — Duty to owner.*

Delta appealed a decision finding it liable to the plaintiff condominium owners for damages resulting from wood rot. The developer, building designer, and contractor were found jointly and severally liable for defective design and construction of the development. Delta was found liable on the basis that it breached its duty to inspect and supervise the construction. Delta argued on appeal that the action had been commenced out of time under the Local Government Act, which the trial judge found did not apply, and that the trial judge erred in not finding the owners contributorily negligent.

**HELD:** Appeal dismissed. The trial judge did not err in finding that s. 285 of the Local Government Act did not apply. This was a case where the magnitude of the damages was not clear until time had passed. There was also no error in finding no contributory negligence on the part of the owners. The trial judge had assessed the evidence as to the remedial measures the owners could have taken and determined that, in the context, they were not unreasonable in their actions.

**Statutes, Regulations and Rules Cited:**

Limitation Act, s. 3(1), 3(2)(a), 3(5).

Local Government Act, s. 285, 285(a), 285(b).

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