IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Petersen v. Proline Management Ltd.,***
2007 BCSC 790

Date: 20070605
Docket: 04-3820
Registry: Victoria

07 158 038

Between:

Irene Rose Petersen

Plaintiff

And:

Proline Management Ltd. and The Owners Strata Plan VIS 845

Defendants

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiff:	R. Margetts, Q.C.
Counsel for the Defendants:	N. Carfra
Date and Place of Trial:	20070410-20070411 Victoria, B.C.

[1] In early afternoon on August 4, 1998, the plaintiff fell over a 26-inch wall at the edge of the patio outside her condominium. The wall rose just 26 inches from the patio on one side, but fell some 13 feet into a concrete stairwell, on the other side. The plaintiff suffered serious injuries in the fall. This trial concerns liability only, with damages to be assessed later if the defendants are found liable.

[2] On September 10, 2004 the plaintiff sued a number of defendants for damages caused in her fall. She was unrepresented when the writ of summons and statement of claim were drafted and filed.

[3] On June 2, 2005 the plaintiff's claims for damages in respect of injury to her person, including economic loss arising from the injury, whether based on contract or tort, were dismissed by order of Melvin J. against all defendants because they were barred by s. 3(2)(a) of the ***Limitation Act***, R.S.B.C. 1996, c. 266. By the same order the plaintiff was granted leave to amend her statement of claim to plead, as against The Owners Strata Plan VIS 845 (hereinafter "Owners") and Proline Management Ltd. (hereinafter "Proline"), that their breach of fiduciary duty caused her the damage and loss of which she complained. Proline was and is a professional property management firm contracted to provide management services to the Owners. The amendment was allowed without prejudice to the ability of those defendants to plead and argue that the claims based on breach of fiduciary duty were also barred by operation of the ***Limitation Act***.

[4] Very shortly thereafter the plaintiff's action was either discontinued or dismissed by consent against the defendants, the Corporation of the District of

Saanich and a construction company. I gather that claims against two other corporate defendants will not proceed, although no documents formally discontinuing or dismissing those claims appear in the trial record. In any event, this trial proceeded on the basis that the only claims remaining are those against the Owners and its property manager, Proline, founded on breach of fiduciary duty.

[5] The issues to be decided are:

1. Did the defendants owe the plaintiff a fiduciary duty?

2. If they did, are claims for breach of that duty barred by the ***Limitation Act***?

3. If a fiduciary duty were owed, was it breached by the defendants?

4. If a fiduciary duty were owed and breached, did the breach cause or contribute to injuries and losses suffered by the plaintiff?

5. If a fiduciary duty were owed and breached and injuries were caused, are any losses suffered by the plaintiff subject to contribution by reason of her failure to take care for her own safety?

6. If contribution is appropriate, what is the proportionate responsibility of the plaintiff and the defendants for the plaintiff's damages?

BACKGROUND

[6] The relevant facts can be briefly stated. In late spring 1997 the plaintiff and her then husband, who were looking to buy a condominium, toured strata Unit 203 in

a building known as Cedar Shores, part of a strata complex owned by the defendant Owners. Unit 203 is a ground floor unit. On that occasion the plaintiff looked out onto the patio attached to Unit 203 but did not go out onto the patio to inspect it closely.

[7] After the plaintiff completed the purchase and moved into Unit 203, she went out onto the patio and noted that, immediately beyond a low (26 inch high) retaining wall, there was an open concrete stairwell and not the grassy area she expected. The bottom of the stairwell was some 13 feet below the top of the retaining wall which bordered her patio. The plaintiff was sufficiently concerned with the risks she perceived from this situation that she would not permit any guest visiting her strata unit to go out onto the patio, and she locked the patio door when she had company.

[8] The plaintiff says that very soon thereafter she began to telephone the defendant Proline to complain about the dangers she perceived from the combination of the low retaining wall and open stairwell. The plaintiff says she telephoned daily for two weeks and thereafter every second day or thereabouts. She says she never got beyond leaving a message with a receptionist and that no one from Proline ever responded to her.

[9] On November 6, 1997, the plaintiff wrote to Proline and drew its attention to the apparent risk created by the low wall and open stairwell. She also enclosed photographs illustrating those risks. Proline responded in writing on November 12, 1997, saying in part:

> If the height [of the retaining wall] is only 26" it seems possible that this may not meet current building code requirements. We will be contacting the Saanich Building Inspection Department to ascertain if the area meets building code requirements.

[10] Proline's letter ended with the promise that Proline would be in touch with the plaintiff once it had discussed the matter with Saanich and with the defendant Owners.

[11] The matter was taken by Proline to the strata council at its next meeting on November 17, 1997 and the minutes show that Proline was instructed:

> ... to deal with the issue and to agree with whatever terms are necessary to remedy the problem.

[12] At the same time the plaintiff was also complaining to the strata council about an unacceptable level of noise coming from the unit immediately above hers. The plaintiff hired a solicitor to assist her with that complaint, and the solicitor wrote to the strata council on her behalf. This complaint was the subject of discussion at strata council meetings and Proline communicated with the lawyer on behalf of the strata council.

[13] On December 3, 1997 the plaintiff wrote to Proline complaining again about the noise from the suite above and enclosing a log of occasions where she said the sound was unacceptable. On December 15, 1997 Proline responded to the plaintiff directly in a letter saying that fines had been levied against the offending unit owner. Proline's letter goes on to say:

> On the subject of your patio, I have not yet had the building inspector there – I will let you know once he has been.

[14] The matter relating to the safety of the plaintiff's patio was raised, discussed and deferred at meetings of the strata council on January 6, 1998, February 24, 1998, and April 16, 1998. Minutes from each meeting noted that the issue was carried forward.

[15] During that time nothing was done by either defendant to further investigate or correct any defect in the plaintiff's patio railing.

[16] On April 27, 1998 the plaintiff wrote to Proline and complained about inaction with respect to her patio railing. On May 19th Mr. Spurling, on behalf of Proline, replied in writing to the plaintiff, and informed her that he had called the building inspector and hoped that the matter could be resolved shortly. He apologised for the delay.

[17] Mr. Spurling had telephoned the Saanich Municipal Building Inspection department after the plaintiff's April 27, 1998 letter, and was told that a 42 inch railing was required by the Building Code. Mr. Spurling took that information to the strata council at its meeting of May 27, 1998, and the minutes from the meeting recorded that Proline would arrange to have a 42 inch railing installed. The plaintiff was informed of that decision by letter from Proline dated May 28, 1998.

[18] Proline attempted to have a contractor, who was already on site working on balcony railings, deal with this problem, but that contractor declined to become involved. Proline then delegated the matter to the on-site caretaker. Proline instructed the caretaker to find a handyman or someone else willing and able to correct the safety defect with respect to the plaintiff's balcony.

[19] That work had not been done by August 4, 1998, when the plaintiff fell off her patio into the stairwell suffering the injuries briefly described above.

[20] The work was done after the plaintiff fell and an invoice in the amount of $552.76, dated September 10, 1998, was received by Proline on September 17, 1998 and duly paid.

[21] Facts upon which the parties agreed for the purpose of trial include:

- that for some 25 years prior to her accident, the plaintiff had been a binge drinker of alcohol;
- this fact was not known to either of the defendants before the plaintiff fell;
- the plaintiff recalls nothing in the events of August 4, 1998 other than that she was alone and binge drinking;
- the plaintiff does not know what she drank that day or in what quantity;
- an analysis of a sample of the plaintiff's blood, drawn at hospital shortly after she was admitted, showed an equivalent of 292 mg. of alcohol in 100 ml. of blood at 2:45 p.m., on August 4th, which is when the plaintiff was found unconscious in the stairwell.

[22] Caroline Kirkwood, qualified as an expert in the effects of alcohol on driving skills and behaviour, as well as the calculation of blood alcohol level, gave an uncontested opinion that at 292 mg. of alcohol in 100 ml. of blood, virtually all of the

general population would exhibit symptoms of impairment that would be apparent to a casual observer. Ms. Kirkwood also described effects of that proportion of alcohol on vision, including reduced distance judgement, reduced speed judgement and reduced depth perception. Double vision is also a possibility at that level of alcohol. Ms. Kirkwood said that reduced inhibitions can be expected as could a reduced ability to perceive danger from the surrounding environment. In general, and as conceded by plaintiff's counsel, a blood alcohol content of 292 mg. of alcohol in 100 ml. of blood would make an ordinary person significantly impaired by alcohol and, regardless of an individual's tolerance to alcohol, would impair vision, reaction time, fine motor control, coordination and judgement.

1. Did the defendants owe the plaintiff a fiduciary duty?

[23] Mr. Carfra, acting for both defendants, agreed that for all purposes relating to this action the defendants could be treated as one.

[24] Whether fiduciary obligations arise between parties is determined by the relationship between them rather than the status or occupation of the one against whom fiduciary obligations are alleged: see ***Hodgkinson v. Simms***, [1994] 3 S.C.R. 377.

[25] In circumstances such as are present here, where the alleged fiduciary duties do not spring from a relationship of the kind normally giving rise to such obligations, the nature of the relationship is often evaluated against these three general characteristics set out by Wilson J. in ***Frame v. Smith***, [1987] 2 S.C.R. 99, at 136:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[26] Here, the plaintiff argues that she could not modify the retaining wall separating her patio from the stairwell because it was common property and thus under the exclusive jurisdiction and control of the defendant Owners. The evidence was not clear, and counsel were unsure, whether the retaining wall and the railing were common property as opposed to part of the plaintiff's strata lot. I note that when the plaintiff complained of the risk, the defendants both appeared to have accepted that the obligation to investigate the safety of the retaining wall, and to effect whatever modifications or repairs were necessary to comply with the Building Code, lay with the defendant Owners. As well, Bylaw 1(3)(b) of the defendant Owners, which the plaintiff was bound to observe, placed the obligation for repair and maintenance of balcony railings on the defendant Owners. I find that, as between the plaintiff and the defendants, the defendants were responsible for the maintenance and safety of the retaining wall and the railing.

[27] That does not make the responsibility exclusive. It is not clear from the bylaws that the plaintiff was directly prohibited from herself installing a railing on the retaining wall in order to bring it up to a height that would satisfy the Building Code. Bylaw 1(8) would appear to require written permission of the strata council before undertaking structural alterations to the exterior or structure of the plaintiff's strata

lot, and provides that permission would not be unreasonably withheld. Other bylaws imposed on the Owners obligations such as: to control, manage and administer common property for the benefit of all owners; to keep in a state of good and serviceable repair, assets of the corporation; and to maintain and repair the exterior of the buildings (excluding patios). There was also a written policy permitting owners of strata units to enclose balconies on written request to the property manager.

[28] It is unclear from this whether the defendants or either of them had exclusive discretion or power to effect modifications to the plaintiff's patio or, conversely, that the plaintiff was entirely powerless to make her own arrangements to have the work done.

[29] In any event, both plaintiff and defendants proceeded as if the obligation to modify the plaintiff's patio fell to the defendants.

[30] With respect to the criteria taken from ***Frame v. Smith***, I note that Wilson J., by way of elaboration on the third point, said, at 137:

> The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. ...

[31] As I have said it is not clear to me the plaintiff was prevented by the bylaws from doing the necessary work herself. Even if she were, the plaintiff could have

sought compliance from the defendants, to effect the work, by action or threat of action. I note in this context that, concurrently with the plaintiff's complaint to the defendants over the state of her patio retaining wall which the plaintiff conducted on her own, the plaintiff retained counsel to make representations on her behalf over noise coming from the strata unit immediately above her, indicating that the plaintiff was willing and able to enlist competent professional assistance to assert her rights as an owner. I do not conclude that the plaintiff here was in such a vulnerable position as is suggested by the passage from ***Frame v. Smith*** quoted above.

[32] The plaintiff argues that there were in this case elements of trust, loyalty and confidence existing in the relationship between the plaintiff and the defendant Owners sufficient to bring the relationship into the category of fiduciary relationships and distinguish it from a relationship solely giving rise to duties of care in tort or contract. The plaintiff argues that trust, loyalty and confidence arise out of a power-dependency relationship such as discussed by La Forest J. in ***Hodgkinson v. Simms***. Based on my review of the respective obligations set out in the bylaws, it is not clear to me that, at least insofar as the plaintiff's retaining wall is concerned, there was a significant imbalance in the power of each of the parties.

[33] Another feature of fiduciary relationship has been that the party on whom another has relied for guidance or advice has obtained some benefit or advantage from the use or abuse of the reliance or position of advantage in his or her own interests.

[34] That is not a concept into which the facts of this case easily fit. While it might be alleged that the defendants gained some advantage by deferring the small expenditure needed to modify the plaintiff's balcony, such advantage, if indeed it were an advantage, accrued to all of the owners of which the plaintiff was one.

[35] In ***Hodgkinson v. Simms***, for example, the defendant accountant had derived some arguable advantage from representing or advising developers of projects in which the plaintiff invested. In ***K.L.B. v. British Columbia,*** 2003 SCC 51, it could be argued that an abuser took advantage of a fiduciary position for his own sexual gratification. A similar allegation could be made in ***E.D.G. v. Hammer,*** 2003 SCC 52.

[36] A theme running through many, if not all of the fiduciary cases, beginning with ***Nocton v. Lord Ashburton***, [1914] A.C. 932 (H.L.), is that the defendant stood to gain something at the expense of someone to whom an obligation was owed or, at least in equity, ought to be owed. That feature I find is missing here.

[37] I find, on the facts of this case, and with respect to the safety of the plaintiff's balcony, that the relationship between the plaintiff and the defendants was not fiduciary, and that the defendants did not owe the plaintiff a fiduciary obligation to see that the safety of her balcony railing was investigated and dealt with.

2. If a fiduciary duty were owed, is it subject to a two year limitation?

[38] The plaintiff commenced her action a little over six years and one month after she suffered her injury. The defendants concede that, if a six year limitation applies

to the claim for breach of fiduciary obligation, the plaintiff was in time, presumably because the extent of her injuries postponed the commencement of the running of limitations for at least 37 days.

[39] Section 3(2)(a) of the ***Limitation Act*** , R.S.B.C. 1996, c. 266, reads:

> **3** (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:
>
> (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;
>
> ...

[40] Questions arising are whether the plaintiff's claims for breach of fiduciary duty are for " ... damages in respect of injury to person ..." and, if they are, whether they are caught by s. 3(2)(a), which raises a secondary question, whether claims for breach of fiduciary duty are "... based on contract, tort or statutory duty ...".

[41] The amended statement of claim in para. 10 pleads several sections of the ***Condominium Act***, R.S.B.C. 1996, c. 64, as well as the bylaws of the defendant Owners. It is alleged that the Owners assumed responsibility for repair, completion and maintenance of balconies and railings by the bylaws and by reason of that as well as the course of conduct between the plaintiff and the defendant Proline, these defendants owed to the plaintiff a fiduciary duty "... to undertake the completion and maintenance of the balcony and railing immediately adjacent to the strata unit owned and occupied by the Plaintiff (the "Balcony")."

[42] Paragraph 10 goes on to allege that these defendants "... in breach of their aforementioned fiduciary duty owed to the Plaintiff, failed to properly complete and maintain the Balcony" and that failure "... caused damage and loss to the Plaintiff as hereinbefore alleged".

[43] In para. 81 of the statement of claim the plaintiff alleges that she has suffered various losses including loss of enjoyment, pain and suffering, loss of future income, loss of property and psychological trauma. In para. 82 the plaintiff claims damages for, *inter alia*, breach of duty of care owed to her, breach of trust, breach of contract and many others. I should note that the statement of claim, with the exception of para. 10, was drafted by the plaintiff herself as she was unrepresented at the time the action was commenced. Paragraph 10 was drafted by Mr. Margetts who had acted for the plaintiff in the application before Melvin J. on June 2, 2005, at which time the amendment was granted.

[44] Although breach of fiduciary duty is a claim in equity, damages may be the appropriate remedy where breach is found: see ***Nocton*** at para. 17. See also ***Hodgkinson v. Simms*** where La Forest says at 440:

> ... It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred. ...

[45] ***Hodgkinson*** goes on to illustrate the confluence or overlap between equity and the common law in considering damages as a remedy at 443:

> ... *Canson* (*Canson Enterprises v. Boughton & Co.*, [1991] 3 S.C.R. 534) held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of a fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate ...

And, at 444:

> Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. ... Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. ... In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy.

[46] On the basis of her pleadings and the passages quoted above, I conclude that the plaintiff's claims are, in this case, for damages for injury to person.

[47] The next question arising is whether these claims are based on contract, tort or statutory duty, and thus subject to the two year limitation in s. 3.2(a) of the ***Limitation Act***.

[48] Although the ***Condominium Act*** and bylaws are invoked in the pleadings, I do not consider this claim to be based on a breach of statutory duty.

[49] Although the claims for damages for injuries were also brought in negligence and breach of contract, those claims were dismissed by Melvin J. on application of the ***Limitation Act***. The possibility that the claims might co-exist in negligence,

breach of contract and breach of fiduciary duty, has been recognized since at least the decision in ***Nocton***. That does not mean that a claim for damages for injuries for breach of fiduciary duty is based on tort simply because the same actions – or lack of action – are alleged to have brought about the injuries complained of.

[50] As I interpret para. 3(2)(a) of the ***Limitation Act***, it is only claims for damages for injury based on tort, contract or breach of statutory duty that are subject to the two year limitation period. This claim is for damages for personal injury founded in breach of fiduciary obligation, and is not caught by s. 3(2)(a). In my view, the Legislature intended, by including the phrase, "whether based on contract, tort or statutory duty", to confine the operation of the two year limitation to claims of personal injury based on those and those alone. This claim, for damages for breach of fiduciary duty, although founded in the same personal injuries as were barred by the ***Limitation Act***, falls under s. 3(5):

> (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.

[51] Had I found that the defendants owed the plaintiff a fiduciary duty, the plaintiff's claims for breach of that duty would not be barred by operation of the ***Limitation Act.***

3. If a fiduciary duty were owed, did the defendants breach it?

[52] Having concluded that no fiduciary obligation arose on the facts of this case, I need not decide whether there was a breach. I go no further than to comment that

the duties of loyalty, trust and confidence, which together make up the fiduciary obligation, have no ready application to the allegations in this case.

4. Was breach of a fiduciary duty a contributing cause of the plaintiff's injuries?

[53] For the purposes of this question, I find that the plaintiff fell over the retaining wall from her patio into the stairwell. The retaining wall over which the plaintiff fell was 26 inches high measured from the patio level. The Building Code at the time required a 42 inch wall or railing. I further find that, had a 42 inch wall or railing been in place, the plaintiff would not have fallen into the stairwell. I make that finding based on my conclusion that the Building Code mandated a 42 inch railing in order to eliminate, or at least substantially reduce, the risk that a person coming too close to the edge might topple over a barrier erected for their safety.

[54] I have already concluded that it was within the jurisdiction and control of the defendants to effect whatever modifications were necessary to the railing to raise it to 42 inches. The failure of the defendants to do so, after it had been brought to their attention by the plaintiff, might well have been a breach by them of a common law duty which they owed to the plaintiff, based in tort or in contract, to take reasonable steps to make the patio railing reasonably safe for the plaintiff. Such questions have been removed from consideration in this trial by the order of Melvin J., and I need not decide them.

[55] I conclude that if there had been a fiduciary duty owed to the plaintiff, and if it had been breached, the breach was a contributing cause of the injuries suffered by

the plaintiff in her fall into the stairwell. The plaintiff fell in part because the railing was not high enough to impede her fall. The plaintiff's injuries were as serious as they were because she fell into an open concrete stairwell some 13 feet below, rather than onto ground some 26 inches below.

5. Can liability for any damages caused by breach of fiduciary duty in this case be apportioned?

[56] In written submissions the defendant phrases this issue as contributory negligence, illustrating one of the difficulties in dealing with a claim for damages for injury in the context of fiduciary obligations.

[57] The ***Negligence Act***, R.S.B.C. 1996, c. 333, says in s. 1:

> 1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

[58] This does not restrict itself to causes of action in negligence and, if there is a finding that the fault (by way of breach of fiduciary obligation) of the defendants caused damage to the plaintiff, it is appropriate under s. 1 of the ***Negligence Act*** to consider whether the fault of the plaintiff also caused or contributed to the damages or loss.

[59] I conclude that the plaintiff's claims here are for damage or loss caused by the fault of the defendants, and it would be open to the court to consider whether the fault of the plaintiff also caused or contributed to her damage or loss.

6. Apportionment

[60] In my view, the plaintiff's fault did contribute to her damage or loss.

[61] The plaintiff was significantly impaired at the time she fell according to the opinion of Ms. Kirkwood. Additionally, the plaintiff had, for 25 years, been a binge drinker of alcohol, a fact known to the plaintiff but not to the defendants. The plaintiff had demonstrated her awareness of the risk posed by the low retaining wall in her correspondence complaining to the defendants of the situation and in her assertion that she had prevented visitors from going onto the patio at all out of concern for their safety.

[62] Knowing, as the plaintiff did, that she was susceptible to binge drinking and that she lived in a unit with an unsafe patio, for her to embark on the consumption of alcohol showed a want of care for her own safety that I find was a fault on her part under s. 1(1) of the ***Negligence Act***.

[63] The defendants had a long time to take what turned out to be relatively inexpensive and simple steps to make the patio safe and failed to do so. The defendants did not know that the plaintiff was a binge drinker. The plaintiff did know she was a binge drinker and that the patio was unsafe. The effects of alcohol outlined by Ms. Kirkwood would not have been as dangerous had the patio been made safe in a reasonable time. I conclude that binge drinker or not, the plaintiff would not have fallen had the patio been properly constructed or remediated in a reasonably prompt fashion.

[64] Had I found there to be a fiduciary obligation, and that it was breached by the defendants who remain, I would, in all of the circumstances of this case, have apportioned fault for the plaintiff's injuries equally divided between the plaintiff and the defendants.

"R.T.C. Johnston, J."
The Honourable Mr. Justice Johnston