

CANADA / JUDGMENT

Andersen Enterprises Ltd. v. Kerrisdale Plaza Projects Ltd.

2010 BCSC 624

COURT

Supreme Court of British Columbia

DECIDED

4 May 2010

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2010 BCSC 624 Andersen Enterprises Ltd. v. Kerrisdale Plaza Projects Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Andersen Enterprises Ltd. v. Kerrisdale Plaza Projects Ltd.,

2010 BCSC 624

Date: 20100504

Docket: S046799

Registry: Vancouver

Between:

Andersen Enterprises Ltd.

Plaintiff

And

Kerrisdale Plaza Projects Ltd., Ronald Frank

Fuller, Terrence William Johnson, Levelton

Engineering Ltd., and City of Vancouver

Defendant

Before: The Honourable Madam Justice Kloegman

Reasons for Judgment

Counsel for the Plaintiff:

W. E. Knutson, Q.C.

V. Reakes

Counsel for the Defendant

Levelton Engineering Ltd.:

G. A. Urquhart, Q.C.

S. W. Lesiuk

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 29, 2010

Place and Date of Judgment:

Vancouver, B.C.

May 4, 2010

- [1] There are two parallel lawsuits, ordered to be tried together, that have arisen from the alleged negligent design and supervision of construction of a building on the property located at 2031 West 41st Avenue in Vancouver. One lawsuit has been brought by the strata corporation that represents the owners of 2031 West 41st Avenue. The other lawsuit, which is before me, has been brought by the plaintiff company which purchased the property immediately adjacent to 2031 West 41st Avenue in 1999. This adjacent property bears the address 2035 West 41st Avenue (the "Property"). The Property has since been sold to a third party in 2008.
- [2] It is alleged by the plaintiff that the defendant, Levelton Engineering Ltd. ("Levelton") was negligent in the shoring, drainage, soil preparation and dewatering of the adjacent soil of the Property without taking reasonable steps to protect the Property from the risk of settlement resulting therefrom. The plaintiff's geotechnical engineering expert describes the primary cause of the settlement as:

The design and construction of the excavation shoring and the permanent below grade parkade structure, both of which allowed continuing and long term drainage of the original shallow, "perched" ground water level within the highly compressible peat and more general or regional ground water lowering within the underline, relatively permeable sands.

- [3] The defendant Levelton defends the substantive claim on a number of grounds that are not relevant for the purposes of this application. Presently, it applies before me for a summary dismissal of the entire claim on the ground that it is barred by the Limitation Act, R.S.B.C. 1996, c. 266.

Background

[4] The chronology of pertinent events, as I glean it from the affidavit evidence, is as follows:

1. Levelton worked on 2031 West 41st Avenue in the years 1997-1998. It had completed the work before November 16, 1998. Levelton had no contractual or other relationship with the owner of the Property.
2. The plaintiff purchased the Property in spring 1999 for a price \$52,000 less than the B.C. assessed value.
3. The contract for purchase and sale referred to the right of the plaintiff to obtain a building inspection report, which condition could be waived by the purchaser.
4. The plaintiff obtained a building inspection report prior to completion. The plaintiff has not produced the building inspection report in the litigation because both the files of the realtor and the lawyer involved in the transaction have been destroyed.
5. The plaintiff's contractor, who performed renovations to the interior of the Property, conducted an inspection of the Property at the time of purchase by the plaintiff. He recalls that there were spider or shrinkage cracks in the layer of leveling compound on the floor around that time.
6. A structural engineer inspected the premises in 1999. By letter dated July 6, 1999 he advised the plaintiff that a field review of the inside and outside of the building indicated no sign of distress, settlement nor damage.
7. The plaintiff experienced settlement problems with the property from 2000 - 2002. In 2001, the plaintiff's representative Ms. Andersen was aware of door shifting. By early 2002 she was aware of subsidence in the form of cracking and settling of the concrete floor. In June 2002, the plaintiff retained an engineer to review the subsidence.
8. The plaintiff decided to monitor the situation to see whether the subsidence was ongoing or had subsided.
9. In November 2002, the engineer returned to the property to take survey measurements. The plaintiff retained land surveyors to monitor and measure the ongoing subsidence.
10. By May 2003, the rate of subsidence had slowed, but not stopped.
11. The plaintiff retained a geotechnical engineer in August 2003 who raised the issue of ongoing dewatering on the adjacent property having impacted the status of the soil underneath the Property. The plaintiff consulted a lawyer who retained the geotechnical engineer to provide an expert report.
12. On December 7, 2004 the plaintiff issued a Writ of Summons against Levelton and the other defendants, the latter of whom have now been discontinued as parties.

- [5] Levelton argues, very simply, that if its work on the adjacent property caused damage to the Property, the damage was direct and of a physical nature. The damage occurred in 1997 or 1998 and therefore the time within which the plaintiff could have brought an action expired in November 2000. The damage was observable by the plaintiff's contractor, Mr. Strand in 1999 and the plaintiff's representatives Ms. Andersen and Mr. Gilmore were aware of subsidence in 2000 and 2001. There were further and more obvious signs of deterioration of the Property in early 2002. Even using this latest period of discovery of damage, the plaintiff's action was time barred long before December 2004 when it started this action.
- [6] The plaintiff agrees that the correct characterization of its claim is for physical damage to the Property and that the limitation period is two years from when the damage occurred. However, the plaintiff submits that the limitation period of two years should be postponed because it did not have the facts within its means of knowledge such that a reasonable person, having taken appropriate advice on those facts, would regard as showing that a cause of action against Levelton would have a reasonable prospect of success.
- [7] Unfortunately, the plaintiff has never pleaded postponement under section 6 of the Limitation Act. The plaintiff applied at the hearing before me for leave to file a Reply raising the issue of postponement and I have allowed it. Levelton has been well aware of the plaintiff's position regarding postponement since the examinations for discovery a year ago and is not prejudiced by the filing of the Reply at this stage.
- [8] The Reply pleads that the plaintiff did not acquire the requisite knowledge to start the limitation period running until 2003, after taking advice from a geotechnical engineer. Prior to that time, the plaintiff says it was aware that the Property was subsiding but it did not have the knowledge that this was caused by the engineers who designed and supervised the construction of the neighbouring excavation, shoring and below grade dewatering system.
- [9] It is trite law that the limitation period under section 3(2) of the Limitation Act starts to run at the date upon which the cause of action accrues: *Armstrong v. West Vancouver (District)*, 2003 BCCA 73. In a case of negligence the cause of action accrues when a duty of care comes into existence, is breached, and damage results therefrom. In the case before me, the damage had likely resulted at the latest by the time the purchasers bought the property in April 1999. Levelton's work had completed in November 1998 and by April 1999 the plaintiff's contractor observed cracks and leveling compound in the floor of the property. Therefore, under section 3(2) the limitation period would have expired two years later, by April 2001.
- [10] However, I am of the view that the limitation period under section 3(2) should be postponed under section 6(3) because the information provided to the plaintiff in July 1999 was that there was no sign of distress, settlement or damage to the structure of the building. A reasonable person, armed with that information, would not necessarily have pursued the issue of settlement despite a few cracks in the floor.

- [11] The key issue is at what point were there facts within the plaintiff's means of knowledge (not the actual knowledge of the plaintiff) such that a reasonable person knowing those facts etc. would have brought an action.
- [12] In my view, on the evidence before me, a reasonable postponement period cannot extend beyond June 2002. By this time, representatives of the plaintiff were well aware that they had a serious subsidence problem. I infer from the affidavit material and the examination for discovery of Ms. Andersen, that the plaintiff was concerned about the expense of a geotechnical inspection and that if the subsidence had stabilized, the plaintiff likely would have made some repairs but not tried to determine the cause.
- [13] The plaintiff chose to monitor and measure for over a whole year more before retaining a geotechnical engineer to determine the cause of the problem. When it learned of the work of Levelton possibly being responsible for causing the subsidence, it sought legal advice. The plaintiff then waited for another whole year before issuing the Writ of Summons. I do not find this conduct to have been that of a reasonable person in the circumstances.
- [14] In *Emms v. Prince George (City)*, [1999] B.C.J. No. 1627 (B.C.S.C.), aff'd 2001 BCCA 120, Madam Justice Loo found that the plaintiffs, who only performed a visual inspection upon purchase of a property and later noticed a crack in the foundation, could not rely on their own ignorance of the facts, or their failure to take any steps other than a visual inspection of a building before purchasing it, to succeed in a postponement argument. In *Emms*, Loo J. attributed the knowledge of the former owner to the plaintiffs. I do not find it necessary to do that here, because even allowing as much postponement in favour of the plaintiff as the evidence reasonably provides, this action was time barred, at the latest, by June 2004. The plaintiff cannot rely on its own decision to "wait and see" until it determined that the damage was so serious that the cause had to be ascertained.
- [15] Therefore I am dismissing the claim against Levelton as being statute barred under the Limitations Act.

"Kloegman J."

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Prepared on 29 October 2026 · Esheria