

CANADA / JUDGMENT

Globalnet Management Solutions Inc. v. Cornerstone CBS Building Solutions Ltd.

2018 BCCA 303

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 303 Globalnet Management Solutions Inc. v. Cornerstone CBS Building Solutions Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Globalnet Management Solutions Inc. v. Cornerstone CBS Building Solutions Ltd.,

2018 BCCA 303

Date: 20180723

Docket: CA44801

Between:

Globalnet Management Solutions Inc., Shirley Neumann and Betty Dahl in their capacities as Trustees of the Pleasantville Trust and Ross Brennan and Leona Brennan in their capacities as Trustees of the Pacific Blue Global Trust

Appellants

(Plaintiffs)

And

Cornerstone CBS Building Solutions Ltd. and Linwood Homes Ltd.

Respondents

(Defendants)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated September 6, 2017 (Globalnet Management Solutions Inc. v. Aviva Insurance Company, 2017 BCSC 1580, Vancouver Registry Docket S097300).

Counsel for the Appellants:

M.B. Morgan

L.L. Bevan

Counsel for the Respondents:

D.R. McGowan

L. von Bloedau

Place and Date of Hearing:

Vancouver, British Columbia

June 8, 2018

Place and Date of Judgment:

Vancouver, British Columbia

July 23, 2018

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fisher

Summary:

Corporate plaintiff ("G") caused a house to be built for use by its two principals and their families. A year later, water egress problems surfaced, and minor cracks in retaining wall were noted. G retained professional advice to monitor these and eventually to remedy the leakage defect. In November 2008, G transferred the property to two trusts established for the benefit of the families of the principals. This was done on a 'roll-over' basis for "fair market value", said to be \$1,385,000. G then continued on with overseeing the remediation of the defects (which ultimately involved replacing the failed retaining wall) and paid for such remediation. The trusts authorized one of G's principals to undertake this process.

This proceeding was brought by G and the trusts in October 2009 against the defendant builder ("Cornerstone") for breach of contract and negligence, and the designer ("Linwood") for negligence.

Trial judge found breach of contract and negligence were proven and indeed that defects in retaining wall had constituted a danger to occupants of the house. Remedial steps taken by G had been reasonable, and damages (measured by the cost of remediation) were fixed at some \$519,000.

However, trial judge denied recovery as against the defendants because G had been under no obligation to pay the remediation expenses; it had not owned the property when the costs were incurred, and it had received "market value" on the sale to the trusts. The trusts were found to have suffered no loss because they had received a property that was (now) defect-free. Trial judge also declined to lift the corporate veil or to treat the plaintiffs as one economic unit for purposes of recovery.

Appeal allowed. Trial judge had erred in finding no loss had been proven. It was unclear whether the "fair market value" referred to in the 'roll-over' agreement described the property with defects as it stood in November 2008, or the property without regard for the defects. In either event, either vendor or purchaser would have suffered a loss. Since counsel agreed that the phrase "fair market value" in the agreement referred to the building without defects, Court of Appeal would assume G had received \$1,385,000 for a house that was worth considerably less on the market. This left G open to allegations of misrepresentation, unjust enrichment and G's directors to allegations of conflict of interest. At the least, G had had a moral duty to remedy the defects. Discussion of *Sedco v. William Kelly Holdings* (1990, Sask. C.A.)

Defendants argued that a "voluntary" payment is not recoverable, but in the tort context, damages payable by a negligent defendant are generally not reduced by "voluntary" payments by third parties. Here, a legal relationship existed between G and the defendants; G was not an officious intermeddler. G's causes of action had not been assigned to anyone; the repairs were required to be done and had been done; and the "floodgates" argument advanced by the defendants was attenuated.

This unusual case should and could be decided on the principle that tortfeasors should be responsible for their carelessness. Court of Appeal allowed recovery by G in the amount of damages fixed by trial judge.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This appeal requires us to consider some basic principles of the law relating to tort liability in connection with the negligent design and construction of a residential building. The trial judge below, in long and detailed reasons, made various findings in favour of the plaintiff owners of the building in this case, including a finding that "generally speaking", the plaintiffs had suffered a loss by reason of contractual breaches by the builder (at para. 274) and that the appropriate measure of damages was the cost of "remediation or

reinstatement" (at para. 278.) Under the rubric of negligence, the judge also found that the retaining walls of the building had posed a danger to the health and safety of its occupants (at para. 297) and that the "appropriate response" had been to replace the walls (at para. 298). The judge assessed damages at some \$435,000 in relation to the retaining wall and some \$84,000 in relation to defects in the roof.

- [2] In the unusual circumstances of this case, however, the Court denied recovery for breach of contract and negligence to all the plaintiffs because the first owner of the building, the plaintiff "Globalnet", had transferred it to the trustees of two trusts (who are also plaintiffs herein) after the defects in the building had been discovered, but before all repairs had been carried out and the action had been commenced. The Court agreed with the defendants that although Globalnet had arranged for and paid for all the remedial work, it had not been under any obligation to do so after the transfer. Further, because it had sold the property to the trustees (who were obviously not at arm's length and were aware of the defects) for "fair market value", Globalnet was found to have suffered no loss. By the same token, since Globalnet had carried out the repairs at its own expense, the trusts had suffered no loss. The Court dismissed the action in its entirety.
- [3] This is a result that most reasonable people would, in my opinion, find unsatisfactory, if not unjust. It denies compensation to a plaintiff that has laid out more than \$500,000 to remediate serious (and in large part dangerous) defects, and permits the tortfeasors to avoid responsibility for their carelessness. This is contrary to the central aim of the law of negligence - to protect against unreasonable risks to the safety of people and property. This objective is why Canadian courts some years ago ruled that pure economic loss is recoverable in tort; that contractual and tortious duties may arise concurrently; and that where the defects in a building are in fact dangerous to its occupants, a 'subsequent purchaser' of a building may hold the wrongdoer liable in negligence to the extent necessary to remove the danger. All these principles are engaged in this case.
- [4] As against them, the defendants rely on other considerations - the law's distaste for officious intermeddling; the fear of opening 'floodgates' to claims of negligence against builders by successive purchasers of real property; and the desirability of encouraging parties to provide by agreement for situations such as this. Indeed, the defendants contend that the plaintiffs should not be permitted to "benefit" (i.e., to recover expenditures made to repair the building) from their failure to structure their affairs properly. As will be seen below, it is my view that these considerations have only limited relevance to this case and are clearly outweighed by the more fundamental principles of tort law mentioned above.

Factual Background

- [5] I intend to describe the factual background only briefly, since it is not necessary to provide details for purposes of the issues raised on the appeal. Globalnet is a British Columbia corporation the principals of which are Messrs. Kirkpatrick and Dahl. At the material time, they were also the trustees of the "Pacific Blue Global Trust" and the "Pleasantville Trust"

respectively, which trusts were established for the benefit of their respective families. The defendant Cornerstone CBS Building Solutions Ltd. ("Cornerstone") is also a British Columbia corporation and is a subsidiary of the defendant Linwood Homes Ltd. ("Linwood").

[6] Drawing largely on the chronology provided in the plaintiffs' factum, I summarize the relevant events as follows:

January 21, 2005

- Globalnet purchased property in Barriere, British Columbia.

March 30, 2005

- Globalnet entered into a contract with Cornerstone for the construction of a house for the use of the Kirkpatrick and Dahl families, using a design supplied by Linwood. In due course, the contract was amended to include the design and construction of retaining walls on the property.

Spring 2006

- Construction of the house was completed.

December 2007

- Mr. Kirkpatrick discovered water damage inside the house and soon thereafter contacted Cornerstone.

Spring 2008

- Mr. Kirkpatrick discovered cracks in the retaining walls of the building.

April-May 2008

- National Home Warranty issued an assessment of the water damage inside the home and structural issues regarding the retaining walls.

July 2008

- Globalnet retained an architectural firm to review the damage from water ingress and the retaining wall damage and make recommendations for repairs to the roof. The architect's recommendation at this time was to monitor the retaining walls for further movement.

September 2008

- Globalnet retained the architectural firm to design a plan for repairing and remediating the water ingress damage.

October 2008

- Globalnet retained a construction firm to carry out the repairs specified by the architect.

November 25, 2008

- Globalnet transferred the subject property and certain personal property appurtenant thereto, to the Trusts for \$1,500,000, of which \$1,385,000 was attributed to the real property.

September 2009

- Mr. Kirkpatrick observed that the retaining walls had moved further inwards towards the driveway of the house and contacted the design engineer to discuss repair options.

Fall 2009

- Globalnet retained a construction firm to excavate some backfill behind the retaining walls and retained a geotechnical consulting firm to assess damage to the retaining walls.

October 6, 2009

- Globalnet and the trustees commenced this proceeding, advancing claims both for damages for breach of contract and negligence against, inter alia, Cornerstone and Linwood.

Spring 2010

- Completion of repairs to roof and remediation of water ingress damage problem.

Summer 2010

- Structural engineers concluded that the retaining walls had "failed" entirely and recommended that they be demolished and replaced.

August 2010

- Globalnet obtained a second opinion from a second engineering firm, which agreed it was necessary to construct new retaining walls.

September 2010

- Globalnet instructed the construction company to carry out the work recommended for the retaining walls.

August 2011

- Construction of new retaining walls completed.

[7] As noted by the trial judge at paras. 15-6 of his reasons, the defendants brought third party proceedings in July 2010 against various other parties. Those were ultimately settled, and in 2011 the plaintiffs also settled their claims against the "Home Warranty defendants" (Aviva Insurance and National Home Warranty Group Inc.) for \$200,000. The plaintiffs discontinued the action against those defendants in September of 2011 and amended their pleadings to waive their claims against the remaining defendants, Cornerstone and Linwood, to the extent of the settlement amounts.

- [8] The trial of the main claims was postponed at least once, but following a number of judicial management conferences, counsel agreed that the matter could be resolved by way of summary trial. In their Application Response filed in June 2015, Cornerstone and Linwood first characterized Globalnet's payment of the repair costs as "voluntary".
- [9] Ultimately, the summary trial took 10 days over a six-month period - doing, as the trial judge noted, "considerable violence to the term 'summary'." He issued his reasons, which are indexed as 2017 BCSC 1580, on September 6, 2017.

The Summary Trial Judge's Reasons

- [10] At paras.161-298, the trial judge examined the various factual and legal questions raised by the parties, including the qualification of expert witnesses, the consideration of expert opinions, the applicable standard of care, causation, whether the defects in the retaining walls had constituted a danger to occupants of the home, mitigation, and the reasonableness of the remedial steps taken by Globalnet. As mentioned, the judge resolved all these issues generally in the plaintiffs' favour.
- [11] Beginning at para. 267, the Court considered the appropriate measure of assessing damages in this case. The plaintiffs acknowledged that in some instances, the diminution in the value of the building is used as the measure of damages, but argued that the appropriate measure of damages here was the amount of money required to remedy the defects. For their part, the defendants submitted that the cost of remediation was not the "default position" for the assessment of damages for breach of contract and that where that cost is "unreasonable or oppressive", the preferable measure is the diminution in value of the building. As well, the defendants argued that the plaintiffs' decisions to reconstruct the roof and retaining walls had been unreasonable and unnecessary. Since the plaintiffs had led no evidence of diminution in value, they contended, no damages could be awarded. (At para. 268.)
- [12] The trial judge cited this court's decision in 514953 B.C. Ltd. dba Gold Key Construction and Chiu v. Leung 2007 BCCA 114, which in turn had quoted extensively from two English cases, Radford v. de Froberville [1978] 1 All E.R. 33 (Ch.D.) and Ruxley Electronics and Construction Ltd. v. Forsyth [1996] A.C. 344 (H.L.). From these, the judge drew certain principles set out in his reasons at para. 272. Applying them to the facts, he found that the remedial work undertaken by Globalnet had been necessary because the roof and retaining walls had failed in their essential purposes. In his analysis:

These were important functional failures, not merely esthetic failures.

From my earlier discussion I conclude that the remedial work undertaken was reasonable to adopt. The remedial work was expensive, but following a close examination of the experts' evidence I am satisfied that, on the evidence, no reasonable alternatives were shown to be available.

I am not persuaded by the defendants' submission that the expenditure is out of all proportion to the benefit obtained. The evidence has satisfied me that the expenditure on the roof was necessary to achieve a properly-functioning roof. The expenditure on the retaining walls was necessary to achieve retaining walls that worked as they were supposed to work, without the threat of complete failure into the driveway area or potential damage to the rear area of the house through the loss of support from the retaining walls.

For these reasons I am satisfied that, on the facts of this case, the proper measure of damages for Cornerstone's breaches of contract is the cost of remediation or reinstatement, which in the case of the roof is \$84,287.05 and in the case of the retaining walls is \$435,887.00. [At paras. 275-78; emphasis added.]

[13] Turning then to damages in negligence, the trial judge noted the defendants' argument that the trustees were "subsequent purchasers" of the building, and could not recover unless it was shown that the defects in design and construction had posed a "substantial danger to the health and safety of the occupants". (Citing *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* [1995] 1 S.C.R. 85 at para. 43.) The plaintiffs argued that the trustees were not "subsequent purchasers", so that the *Winnipeg Condominium* limitation on recovery did not apply; or in the alternative, that the retaining walls met the "substantial danger" criterion because the walls "posed a significant risk of danger to the occupants of the house." (At para. 281.) After reviewing the evidence, the trial judge concluded that the retaining walls had posed a substantial danger to the occupants of the building and that it had been appropriate to replace the walls. In his words, "No lesser measures were shown to be effective. Other methods were postulated but those methods were not shown to be viable or more economical alternatives." (At para. 298.)

[14] The judge turned next to the issue of whether the plaintiffs had proven a recoverable loss - the fundamental issue on appeal. He summarized the facts relating to this issue as follows:

- a) on November 25, 2008 Globalnet entered into a contract for the sale of the subject property to the Trustees of the two Trusts. The purchase price was \$1,500,000. The sale contract contained a purchase price adjustment clause to ensure that the purchase price was equal to the fair market value of the property;
- b) title to the property was conveyed to the Trustees on December 12, 2008;
- c) the respective Trustees of the two Trusts acquired equal shares in the property as tenants in common;
- d) at the time of sale Mr. Kirkpatrick and Mr. Dahl were the principals of Globalnet;
- e) the two Trusts are the family trusts of Mr. Kirkpatrick and Mr. Dahl;

f) at the time of sale Mr. Kirkpatrick was a trustee and beneficiary of the Pacific Blue Global Trust (Mr. Kirkpatrick's family trust) and was a trustee of the Pleasantville Trust (Mr. Dahl's family trust). In May 2009 Mr. Kirkpatrick resigned as a trustee of each trust and at the same time he was removed as a beneficiary of the Pacific Blue Global Trust;

g) Mr. Kirkpatrick said:

At all material times I was authorized by the Trustees of the Pleasantville Trust and the Pacific Blue Global Trust to act on their behalf. Specifically, I was authorized by them to organize and oversee all aspects of the investigation into and remediation of the defects in the Property.

h) Globalnet (through Mr. Kirkpatrick) assumed responsibility for retaining and instructing contractors, and Globalnet paid the repair bills; and

i) the property was transferred to the Trustees after the water ingress and retaining wall damage were first noticed, but before the full extent of the loss was discovered. The repair invoices all post-date the transfer of title. [At para. 301; emphasis added.]

[15] It is notable that there was very little evidence about the sale and purchase of the property that occurred in late 2008. As far as I am aware, Mr. Kirkpatrick was not asked why it had happened or happened when it did. Obviously it was structured as a 'roll-over' for tax purposes, but what consideration did the parties give to the defects in the building? When asked how the price had been arrived at, Mr. Kirkpatrick said he had spoken to "one or more" real estate agents about the value of the property. However, he was not asked whether the "fair market value" reflected the defects in the building and possible remediation costs or whether these were set aside (perhaps on the assumption that the defects would ultimately be fixed) in reaching the figure of \$1,385,000.

[16] The Agreement of Purchase and Sale is in evidence but it is silent on the point. Paragraph 5 thereof states, however, that:

If the Minister of National Revenue, the Minister of Finance for the Province of British Columbia, their authorized representative or any similar authority proposes to issue or issues any assessment or reassessment on any of the parties on the basis of a determination or assumption that, or if it should be brought to the attention of the parties that, the fair market value of the Property at the Effective Date is a greater or lesser amount than the Purchase Price, then upon the fair market value of the Property at the Effective Date being finally determined by the agreement of the Vendor and the Purchasers or by final determination by a court of competent jurisdiction:

- (a) the Purchase Price hereunder will be adjusted retroactively to the Effective Date so that the Purchase Price is equal to the fair market value of the Property;
- (b) if the adjusted Purchase Price is greater than the original Purchase Price, the Purchasers will pay the difference to the Vendor, each as to a one-half share;

- (c) if the adjusted Purchase Price is less than the original Purchase Price, the Vendor will pay the difference to each of the Purchasers, in equal shares; and
- (d) the Vendor and the Purchasers will do all other things and perform all such acts as may be necessary to revise the Purchase Price accordingly. [Emphasis added.]

There is no evidence that the price adjustment clause has been invoked; but it would appear to be available if it is the case that the \$1,385,000 figure did not take into account the defects that are the subject of this proceeding.

- [17] The defendants argued that as a consequence of the transaction it could not be said that the trustees had suffered loss or that Globalnet, which (the trial judge stated) had "sold the property for fair market value (that is, without a loss)", had been under any obligation to pay for the repairs after the property was transferred to the trusts. In the defendants' submission, Globalnet was a "volunteer" and its payment of the repair bills had been "gratuitous". The repair costs should therefore not be recoverable. For their part, the plaintiffs submitted that they were sufficiently related to be treated as a single economic unit for purposes of determining the losses resulting from the defendants' negligence and breach of contract, and that to decline to award damages to Globalnet would allow the defendants to take advantage of a "legal black hole"[1]. This would work an injustice on the plaintiffs and provide an unwarranted benefit to the negligent defendants. (At para. 302.)

Sedco

- [18] There are very few cases analogous to this one. The plaintiffs relied below, as they do in this court, on the decision of the Saskatchewan Court of Appeal in *Sedco v. William Kelly Holdings Ltd.* [1990] 4 W.W.R. 134 and on *Gentra Canada Investments Inc. v. Lipson* 2010 ONSC 1417, which was largely upheld for reasons indexed as 2011 ONCA 331. Since *Sedco* is of primary importance to the trial judge's analysis and to the plaintiffs' argument on appeal regarding the recoverability of damages by Globalnet, it deserves some close attention. Admittedly, the judgment is complicated and at times difficult to follow.
- [19] *Sedco* was a Crown corporation of the Province of Saskatchewan, formed for the purpose of encouraging economic development. It owned some property in Regina that would be appropriate for the construction of a laundry facility to be used by hospitals in the area, and reached an agreement with a non-profit company, Hospital Laundry Services ("Hospital Laundry"), under which *Sedco* agreed to build and equip a new facility and lease it to Hospital Laundry at cost.
- [20] *Sedco* retained an architect ("Kelly") to design the facility and supervise construction and post-construction. Kelly then contracted with a mechanical engineering firm, "Briggs", to design a central air-conditioning system for the proposed plant. Eventually, the building was constructed by a company ("PCL") in accordance with the design, plans and specifications prepared by Kelly, with Briggs' input. In early 1983, Hospital Laundry and *Sedco* entered into their lease and Hospital Laundry began moving in. Substantial completion of the building

was achieved in June.

- [21] As soon as it took possession, Hospital Laundry began to experience problems with the air-conditioning system that made it almost impossible for its employees to work in the building in the summer of 1984. Kelly and Briggs introduced a series of modifications that were made in the fall of that year, but these had little effect on the temperature or quality of air in the building. An outside mechanical engineering firm, "Yoneda", was consulted. It reported that the system had been seriously under-designed - an opinion shared by another engineering firm consulted by Kelly and Briggs. The parties were unable to agree on what ought to be done and the problem persisted through the summer of 1985.
- [22] In September 1985, Sedco received a directive from the provincial government to sell certain properties, including the subject land and building. It sold this property to Hospital Laundry on an "as is" basis for \$4,400,000. The Court noted at para. 32 that "To the extent it could do so without Kelly's consent, the Crown corporation assigned its contract with the architect to the laundry company. To the extent it could not do so, it undertook to pursue an action at the expense and for the benefit of the laundry company." (The contract contained a clause that prohibited the assignment of the contract without the consent of Kelly, which had not been obtained.) Some short-term remedial measures were undertaken by Hospital Laundry after the sale, but the following summer, it decided on more permanent modifications to the system that involved the installation of a number of rooftop air-conditioning units - a "major departure" from the central system originally intended. Evidently, these units were "sufficient for the time being but insufficient for the future."

- [23] A total of five proceedings were launched. The Court described them:

Four were in negligence, with SEDCO and Hospital Laundry claiming, each in its own right, against Kelly and Briggs respectively. The other, against Kelly alone, was in contract and was founded solely upon an alleged breach by Kelly of his contract with SEDCO.

The purported assignment of the contract to Hospital Laundry was pleaded, as was SEDCO's undertaking to pursue an action for the benefit of the laundry company should the assignment prove ineffective as against Kelly, though the relevance of this, if any, was not made clear. And the matter tended, throughout, to give rise to confusion, especially in relation to matters having to do with damage.

Damages were pleaded in general terms only, and the case therefor, including the nature of the losses, the footings upon which they were being claimed, and the basis for their valuation, tended to be obscured by the multiplicity of the causes of action and especially by the fact of the sale. Indeed the sale, and its financial and legal implications, gave rise to much uncertainty in these respects. [At paras. 36-8; emphasis added.]

- [24] There was evidence that Sedco had incurred costs and losses totalling \$126,672 and that Hospital Laundry had spent a total of \$581,038 in making modifications following its purchase of the building, including the installation of the rooftop units. (At para. 42.) In

addition, it had spent about \$12,210.82 in providing "heat breaks" to its employees from time to time before the system was modified. Importantly for our purposes, there was evidence suggesting that another \$657,877 would be required to be spent on future modifications and on the replacement of the rooftop units earlier than would have been the case with a central system. (Para. 44.) The Court observed that aside from the "heat break" costs, the case in relation to the remainder of the losses "lacked clarity, it not being clear just what was being sought by whom and on what basis." In the words of Cameron J.A. for the Court:

On one view of the matter it appears as though SEDCO and Hospital Laundry were seeking, in effect, to recover their respective expenditures, each in its own right, on the footing Kelly was liable to both in contract as well as in tort, while Briggs was liable to both in negligence.

On another view of the matter, it appears as though SEDCO was seeking, in effect, to recover first, its out-of-pocket expenditures -- this in its own right and for its own benefit -- and second, the estimated costs of bringing the plant up to standard, this in its own right but for the benefit of Hospital Laundry.

It became evident during the course of the trial that the parties had some difficulty understanding one another's positions in these respects, and it appears the trial judge proceeded for the most part, on the first view of the matter. [At paras. 46-8; emphasis added.]

[25] The Court analyzed Sedco's claims against Kelly both in terms of contract and tort. The former involved brief consideration of the assignment given by Sedco to Hospital Laundry in respect of all of Sedco's "rights, title and interest" in and to various agreements, including Sedco's rights under its contract with Kelly and under the construction agreement with PCL. As earlier noted, the agreement with Kelly expressly prohibited assignment without Kelly's consent. The defendants relied on this fact, but the Court agreed with the plaintiffs that since both the assignor and the assignee were before the Court and since the cause of action was clearly vested in one or the other, "the nature and validity of the assignment is of no matter." (At para. 64.) Emphasizing that he was dealing here with the contractual claim, Cameron J.A. continued:

As for the cause of action on the contract, it must be understood that there was but one such cause. It lay entirely in the alleged breach by Kelly of his contract with SEDCO, and extended only to SEDCO's loss, to so much thereof as flowed from the breach and was compensable in law. It is not as though Hospital Laundry, through the medium of the action on the contract -- assuming an effective assignment in its favour of the cause of action -- could recover in relation to its own losses, yet that is the position which the two companies appeared to be taking. Whatever their positions respecting their claims in tort, in relation to which they set up independent causes of action, it was not possible for them to take that position in the context of the action on the contract.

The point I want to emphasize is this: whichever of them had the right of action, and whichever of them might have been entitled to the fruits of the action, the losses in issue with respect to the cause of action on the contract were those of SEDCO. On one basis or another the damages, if

any, in relation to those losses were to go to Hospital Laundry -- to the extent that is the two companies had agreed that would be so. It is, of course, entirely up to them, as between themselves, to determine the extent of their agreement, and I do not propose to comment on that. And so the only relevance of the matter in the context in which it was raised lies in understanding that whatever the effect of the assignment, Hospital Laundry was in no position to graft its own losses onto the claim against the architect in contract. [At paras. 67-8; emphasis by underlining added.]

[26] The Court turned next to the claim in negligence, which the trial judge had dismissed on the basis that Sedco had "failed to prove loss". He had also dismissed Hospital Laundry's claim on the basis that its voluntary purchase of the building, knowing of its defects, served to negative a duty of care and to preclude recovery. Hospital Laundry had, the trial judge stated, "voluntarily assumed the risk of loss". The Court of Appeal disagreed, finding that:

the purchase did not serve to vitiate the duty which descended upon Kelly at the outset of the project and continued to bind him throughout its three-year duration. In light of the conclusion I have come to on this branch of the case, it is unnecessary for me to elaborate upon this, but I believe there is nothing in the second of the tests [in *Anns v. Merton London Borough Council* [1978] 1 A.C. 728 (H.L.)] to relieve the architect of liability should the other elements of the tort be satisfied. [At para. 79; emphasis added.]

On the evidence, however, the trial judge had found no breach of the duty of care had been proven, since the architect had retained and relied on Briggs to design the mechanical system and could not have been expected to have discovered the problem. The Court of Appeal agreed, or at least found no palpable and overriding error of fact in the trial judge's findings in this regard. (At para. 92.)

[27] Next to be considered were the claims of Sedco and Hospital Laundry in negligence against Briggs. (Kelly had advanced a 'claim over' against Briggs and it had not been defended, with the result that "to the extent Kelly might be liable in damages for breach of contract, the architect will be taken as entitled to succeed in full as against Briggs." (At para. 96.)) Under the heading "Damages", the Court noted at the outset that:

Though this is not entirely clear, the trial judge appears for the most part to have approached the case for damages on the footings: (i) that the loss, overall, consisted of the sum of the expenditures made or to be made by each of the appellants in consequence of the faulty design of the system;

(ii) that SEDCO's case against Kelly and Briggs was confined to the Crown Corporations' proportionate share of the loss, being the amounts actually expended by the Corporation in relation to the system prior to sale; and that Hospital Laundry's case consisted of a claim in its own right to damages

(iii) that Hospital Laundry's case consisted of a claim in its own right to damages with respect to the remainder of the loss, the remainder being made up of the amounts spent by the laundry company modifying the system following the sale, coupled with the amounts it would have to spend in the future by reason of such things as increased maintenance costs, lower life expectancy, and future expansion. [At para. 98.]

[28] The trial judge had dismissed Sedco's claim against Briggs on the ground that on the sale to Hospital Laundry, Sedco had recovered its out-of-pocket costs "either as costs of construction or as [a] contingency allowance." The trial judge's words are reminiscent of those of the trial judge in the case at bar:

Sedco recovered its costs of construction just as it had planned to do in the very beginning. There was no diminution in value or loss to Sedco because of the deficiencies; therefore, Sedco had not demonstrated any loss. If Sedco was to recover the damage it claims, it would be in a better position than it would have been if the breach had not occurred - it would recover twice for the amount it had expended, once from Hospital [Laundry] and once from Kelly. Sedco cannot recover for a loss it has not suffered. [Quoted at para. 99; emphasis added.]

[29] As for Hospital Laundry, the trial judge had found that its claim for damages relating to expenditures made or to be made correcting the defects in the building and caused by the faulty design were not recoverable "because the courts will not impose a duty of care owed by the designers of a building in favour of a person who voluntarily purchases that building with full knowledge of its defects. That person can and should protect itself through contract with the previous owner of the building." (At para. 101.) Hospital Laundry could claim, however, its costs relating to heat breaks since it had advanced that claim in its capacity as tenant of the building and not as an owner who had purchased the building with full knowledge of its defects.

[30] The Court of Appeal again disagreed, not only with the trial judge's conclusion that Sedco had made up its pre-sale out-of-pocket expenditures associated with the failings of the air-conditioning system, but also with the trial judge's fundamental approach to determining Sedco's loss. Cameron J.A. noted that Sedco's causes of action against Kelly in contract and Briggs in negligence had been:

complete at an early stage, meaning that the architect and the engineer had either to rectify the situation or, failing that, to bear the Corporation's losses, such of its losses, that is, as having regard for their nature, were within the scope of the Corporation's causes of action; were caused by the conduct of the architect and the engineer; were incapable reasonably of being avoided; and were not in fact avoided. [At para. 108.]

[31] With respect to Kelly, "what remained essentially was to identify the losses correctly, carry them appropriately, and determine whether and to what extent they had been recognizably avoided." As for the action against Briggs, the tort of negligence could be regarded as arising either from the making of a representation or the manufacture of a product. On the first basis, direct economic loss would be recoverable; on the second basis, the financial loss

arising other than as a result of physical injury was not at that time regarded as recoverable, "at least not on the traditional view." (At para. 112.) Briggs, however, had not raised this point on the appeal, leading the Court to conclude it was "fair to proceed" on the assumption that Sedco was entitled to look to Briggs to satisfy its losses, even to the extent they were purely economic. (Citing, *inter alia*, *Kamloops v. Nielsen* [1984] 2 S.C.R. 2.)

- [32] Proceeding on this assumption, the Court of Appeal could see no reason why Sedco should not recover its expenditures for initial modifications and Yoneda's fees. (At para. 114.) The much larger part and "by far the most troublesome" of the claims consisted of the expected cost of bringing the air conditioning system up to the standard originally expected. In the Court's view, this was a loss that Sedco was "quite entitled, subject to its duty to mitigate and its avoidance of the loss, to look to Kelly and Briggs to satisfy." (At para. 116.) This component fell to be valued on the basis of what the Court called "cost of performance" (i.e., the cost of bringing up the air-conditioning system to the standard originally intended), rather than on the basis of the diminution in value of the building (being the difference between its commercial value as built and as it ought to have been built. (At para. 117.))
- [33] What then was the effect of Sedco's sale of the land and building to Hospital Laundry? The sale could not be attributed to Sedco's duty to mitigate, since it was a result of a decision of the provincial government to have Sedco divest itself of some of its properties. Nor was the sale related to Kelly's breach of contract or Briggs' breach of its duty of care. In the Court of Appeal's opinion, the proper approach was that taken by the English Court of Appeal in *Haviland v. Long* [1952] 2 Q.B. 80, a case that bears some resemblance to the case at bar. In *Haviland*, the plaintiffs were owners of premises in London. They had granted a 20-year lease to the defendants, who had in turn sublet a portion of the premises to others. The head lease contained a covenant requiring the tenants to keep the premises in good repair. That covenant was breached due in part to the conduct of subtenants, and when the lease expired, the cost of restoration was estimated to be £1770. In the meantime, however, the plaintiffs re-let the premises for a further term of 14 years at a profitable rent which was not reduced on account of the state of disrepair. In fact, the new tenants covenanted to reinstate the premises at their own expense, in return for which the plaintiffs agreed to take all necessary steps to recover the costs of repair from the former tenant and, if they were successful, to pay the amount over to the new tenants.
- [34] At trial, the plaintiff recovered the estimated cost of repairs from the original tenants. On appeal, the defendants contended that the plaintiffs had suffered no loss in that the premises had not diminished in value and the new tenants had assumed the burden of making the repairs. The Court of Appeal did not agree: in the analysis of Somervell, L.J.:

I find [the defendant's] argument very difficult to follow. The landlords, when they entered into the new lease, had certain rights against the tenants under the old lease, and these included the then contingent rights of recovering damages from those tenants if they failed to put the premises into repair. If they should perform the covenant, *cadit quaestio*: the premises for which the new tenants would be paying the stipulated rent would then be, as was intended, premises

which were in a good state of repair, and they would not have had to expend any money on repairing them. But as the premises were not left in a good state of repair, the landlords plainly would have the right to recover damages from the old tenants. The damage to the reversion would be measured by the cost of the repairs, because it was everybody's intention to go on using the building as it was before, and it was economic to do so. I cannot see why that right should be lost because it is made a term in a bargain. I cannot myself understand how it can be that because a man has bargained with a right he loses it.

His Lordship concluded by adopting a passage from the trial judge's reasons:

In my judgment it is the fact that they - ie, the repairs - required to be done and not the circumstances in which the landlord and his new tenant agree upon the manner of meeting the charge, which is the governing consideration. [At 83; emphasis added.]

Lord Denning concurred, observing:

In cases where (repairs) have been or are going to be done the cost of repairs is usually the measure of damages. The fact that the landlord has an undertaking from a new tenant to do the repairs does not go in diminution of damages. It is *res inter alios acta*. [At 84; emphasis added.]

[35] Similarly in *Sedco*, the Saskatchewan Court of Appeal said, the parties had always intended to "overcome" the deficiencies in the laundry facility, even though what was done fell short of bringing the plant up to the standard originally intended. But, Cameron J.A. continued, that was of no concern to Kelly and Briggs "for *Sedco* was entitled in keeping with the objects of an award of damages to be placed in a position it would have been had the contract been performed and the negligence not occurred." (At para. 133; my emphasis.) In the result, *Sedco* was entitled to recover the estimated cost of bringing the plant up to standard, which were estimated to be some \$677,000 in addition to the cost of initial modifications and Yoneda's fees. The Court awarded *Sedco* total damages of \$780,880 against Kelly and Briggs. Hospital Laundry's damages against Briggs remained at \$12,210.82, which was the amount awarded at trial.

Sedco and the Case at Bar

[36] Returning to the case at bar, the trial judge reviewed *Sedco* at paras. 312-321, first in connection with the plaintiffs' argument that Globalnet and the trusts should be considered as a "single economic unit". He could find no support for this proposition in *Sedco* and indeed noted that the phrase "single economic unit" was nowhere to be found in Cameron J.A.'s reasons.

[37] The plaintiffs in their argument also emphasized that here, as in *Sedco*, both the former owner and the new owner of the property in question were before the Court and that the Court "did not need to differentiate between the owners". The trial judge here said he did not read *Sedco* that way, since the claims in contract against Kelly and tort against Briggs had been analyzed separately. In his analysis, the existence of the assignment agreement from

Sedco to Hospital Laundry appeared to have been a "relevant factor" in Sedco - a factor not present in the case at bar. The trial judge suggested that to the extent Sedco suggested there might be recovery by a former owner for the estimated costs of refitting the facility, such comments could have been obiter "given the fact that there was an assignment between the plaintiffs in that case and so those comments were arguably unnecessary." (At para. 319.) (Again, I note that the architect's contract could not be assigned without its consent.)

[38] Finally, the trial judge stated:

Perhaps the more relevant issue in Sedco was the court's award of damages to Sedco for the estimated cost of bringing the facility up to the standard originally intended. It appears to have been an important consideration for the court that the facility had been planned in conjunction with Hospital Laundry Services and on completion Sedco had entered into a 33-year lease with that company. The court said:

[142] The [design] error placed the appellants in an extremely difficult position. SEDCO, especially, was in a tight spot when it became apparent, well after the lease had been entered into, that the Crown Corporation might have to spend some additional \$450,000.00, more or less, overcoming the design flaws. Whether it could have recovered that cost from Hospital Laundry through increased rents was not argued and is uncertain given the provisions of the lease, but that the Crown corporation was then in a very real bind is certain.

Whether this means that Sedco had an obligation to make things right by Hospital Laundry Services, either by through the terms of its lease or other contract or by the imposition of some other duty or obligation, is not clear from the reasons. Again, it is difficult to discern a clear point of principle here. [At paras. 320-321; emphasis added.]

(I pause to interject that in my view, para. 142 of Sedco signified that the Crown corporation had already entered into the lease with Hospital Laundry when it learned that it might have to spend some \$450,000 overcoming the design flaws. If the building was not suitable for Hospital Laundry, it was unlikely the tenant would stay there for long. As it was, the Province directed Sedco to sell the property to Hospital Laundry for \$4,400,000 - an amount that did not include the cost of the land itself: see para. 106.)

Other Authorities

[39] Carrying on with the trial judge's reasons, in addition to Sedco, the plaintiffs relied on Gentra, which concerned deficiencies in two mortgages that had been assigned to the plaintiff by Royal Trust. The mortgages went into default and the assignee, who had been aware of the deficiencies when it took the assignment, sued the law firm that had prepared the mortgages for Royal Trust. The plaintiffs were permitted to recover losses that had accrued both before and after the date of assignment on the basis that what had been assigned was a cause of action for breach of contract in tort against the defendants and not simply the mortgages. (See para. 75 of the lower court's decision.)

[40] In reaching this conclusion, the Gentra Court referred to the English case of *Technotrade Ltd. v. Larkstore Ltd.* [2006] EWCA Civ. 1079. There, the Court of Appeal permitted recovery by a subsequent purchaser ("Larkstore") of real property. The owner had assigned to Larkstore the contract under which an allegedly deficient soil investigation report had been prepared by a geotechnical consultant. The consultant resisted Larkstore's claims on the basis that it could recover no more by virtue of the assignment than the original owner could have recovered from the consultant at the time the sale took place. (See Gentra at para. 72.)

[41] The Court of Appeal formulated the question before it in terms that resonate in this case:

whether a contract-breaker can avoid an otherwise inescapable liability in damages as a result of the accident of the transfer of the property and assignment to the benefit of the relevant contract to a third party, either by arguing that the original contracting party or assignor, having parted with the property at full value, has suffered no loss and that the assignee cannot be in a better position, or conversely that an assignee, in a case where he alone can sue, has paid a reduced price, equally suffering no loss. In other words, does the accident of transfer and assignment create a "legal black hole" into which the right to damages disappears, leaving the contract-breaker with an uncovenanted immunity? [At para. 4; emphasis added.]

The Court rejected this possibility, noting that it would enable the consultant to escape all potential liability for the damage caused by a 'landslip' in the property. "As a matter of legal principle and good sense", the Court said, it could not possibly be the law that the negligent consultant could escape all potential liability for the damage.

[42] For similar reasons, the lower court in Gentra ruled that the plaintiff could recover from the law firm the damages Royal Trust could have recovered had it continued to own the mortgages: see para. 77. The Court of Appeal agreed with this result: see paras. 57-9 of its reasons.

[43] The trial judge in the instant case did not find any support in Gentra or *Technotrade* for the plaintiffs' arguments. Both, he noted, had involved assignments of causes of action; there was no "assignment" here. (At para. 327.) The defendants relied on the absence of an assignment and in support of their position, cited *Vanguard Properties Ltd. v. Gauvin Construction Ltd.* (1991) 58 B.C.L.R. (2d) 53 (B.C.S.C.), a decision of Mr. Justice Anderson. In *Vanguard*, the plaintiff developers had retained the defendant to build a residential multi-family building project that included an underground parking garage. During construction, water leakage in the underground slab and perimeter walls of the garage were observed and were brought to the defendant's attention in June 1988. At some point, the plaintiffs had sold all the units in the project to individual owners and ceased to hold any interest in it. Each unit was sold on terms that excluded any representations or warranties other than those expressly stated in the agreement. Nevertheless, the new owners of the units continued to complain to the plaintiffs of leakage in the garage floor and the exterior walls. The plaintiffs obtained an estimate of the cost of carrying out the necessary repairs and gave further

"verbal assurances" to the owners that the deficiencies would be remedied.

[44] One of the issues before the Court was whether the plaintiffs could recover the estimated costs of repairs as general damages (in contract) if there was no contractual obligation obliging them to effect the repairs. The plaintiffs' position was that:

they are entitled to be restored to the same position they would have been in had the defendants' breach not occurred. They say that the mere fact that the plaintiffs have sold their interest in the Burlington Estates project does not preclude them from recovering the cost of repairs actually spent and the cost of future repairs pursuant to their commitments to the purchasers.

The plaintiffs submit that if the court is satisfied that the plaintiffs have an obligation to the new owners to undertake repairs and in fact intend to undertake those repairs, the proper measure of damages should be the cost of those repairs. [At paras. 31-32; emphasis added.]

In support, counsel cited *Sedco and Radford v. De Froberville*, supra.

[45] The Vanguard defendants' response was that the plaintiffs were entitled to recover their actual costs expended as a result of the breach of contract by the defendants, but were entitled only to be indemnified for the cost of fixing defects not yet remedied. (At paras. 50, 56.) Otherwise, it was said, the plaintiffs would be in a better position than if the contract had been fully performed by the defendants. (At para. 50.) (Why this is so is not clear; it may be that the defendants assumed that the plaintiffs would not pay for the outstanding repairs.) With respect to *Sedco*, the defendants in Vanguard submitted that the Court of Appeal's decision was either clearly incorrect or that it did not stand for the proposition that "where an owner of a building incurs the need to do repairs as a result of the actionable wrong of a defendant, the plaintiff is entitled to sue for the cost of repairs, even if he never effects those repairs and even if he suffers no financial loss on the disposition of the building." (My emphasis.) Again, they argued, the most the plaintiffs were entitled to was the recovery of money already spent and a declaration of indemnity for future repair costs. (At para. 56; citing *Marigold Holdings Ltd. v. Norem Construction Ltd.* [1988] 5 W.W.R. 710 (Alta. Q.B.).)

[46] Anderson J. in Vanguard clearly treated the plaintiff's claim as one for breach of contract. (The case was decided prior to the decision of the Supreme Court of Canada in *London Drugs v. Kuehne & Nagel International Ltd.* [1992] 3 S.C.R. 299.) He concluded that under the law of contract, damages may not be awarded on the "mere intention of a plaintiff to effect repairs needed as a result of a breach of contract unless it is clear the plaintiff has a legal obligation to perform the repairs at the time of the award of damages." (At para. 65, quoting from *Fridman, The Law of Contract* (2nd ed., 1986) at 681-2.) The Court answered the question before it ("Can the plaintiffs recover the estimated cost of the future repairs as general damages if there is no contractual obligation obliging them to effect these repairs?") in the negative, but as I read the reasons, the plaintiff was entitled to recover as damages in contract the amount of money already spent on repairs, and to indemnification "against [the] obligation" to do the further work required. (At paras. 50, 63, 66 and 75.)

[47] The trial judge here did not comment specifically on the subject of indemnification. Instead, he observed that the plaintiffs were "in effect" inviting the Court to lift the corporate veil of Globalnet and to treat the individuals behind the company as if they were the persons associated with the trustees and the trusts. As against this, the defendants submitted that the separate legal identity of corporations is a firm principle that is not displaced by "mere unfairness" and that having opted for the benefits of incorporation, Globalnet and its shareholders must bear the corresponding burdens. (Citing *Kosmopoulos v. Constitution Insurance Co.* [1987] 1 S.C.R. 2, *Houle v. Canadian National Bank* [1990] 3 S.C.R. 122 and *B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989) 60 D.L.R. (4th) 30 (B.C.C.A.).)

[48] The trial judge was not satisfied that the circumstances of this case came close to justifying the lifting of Globalnet's corporate veil. He then stated his conclusion on the primary issue of law before him:

Since Globalnet paid all of the repair and related expenses, the Trustees have suffered no loss. Globalnet was under no obligation to pay these expenses as it no longer owned the property and there was no other obligation imposed on it to do so. Globalnet itself suffered no loss because it was paid market value on the sale of the property. Given these circumstances, I conclude that the monies expended by Globalnet are not recoverable. [At para. 337; emphasis added.]

Accordingly, the trial judge dismissed the plaintiffs' claims.

On Appeal

[49] In this court, the plaintiffs assert the following errors in judgment, which I take from their factum:

The appellants submit that the chambers judge erred in law in his application [of legal principles] to the facts of this case relating to voluntary payments. The appellants submit that the law of 'voluntary payment' has no application in this case.

The appellants submit that the chambers judge also erred in law in his application of the law of damages. In particular, he conflated the two concepts of the appropriate measure of damages, in that he expressly found diminution in value was not the appropriate measure of damages - cost of remediation was the appropriate measure (and for which he established the quantum of damages which is not challenged by the appellants) - but then concluded that as Globalnet received the full market value of the Property on transfer to the Trustees, neither party suffered any loss arising from the respondents' wrongdoing.

Since the two are closely related, I will address them together.

[50] I begin, however, with a question of fact that I regard as fundamental to the trial judge's final conclusion that Globalnet was a "volunteer" and was under no "obligation" to pay for the repairs to the building and that the trustees suffered no loss. Earlier in these reasons I reproduced para. 5 of the Agreement of Purchase and Sale between Globalnet and the trustees, which referred to the "fair market value" of the property as of the "Effective Date",

defined as November 25, 2008. It will be recalled that by this date, water leakage problems had been noticed and cracks had been discovered in the retaining walls of the building. However, Globalnet's principals were not yet fully aware of the seriousness of the retaining wall problem and indeed it was not until the summer of 2010 that the company received advice that the walls had failed entirely.

- [51] I also noted earlier that there was no evidence as to what exactly was meant by "fair market value" in the Agreement. As a matter of common sense, however, the leakage and retaining wall problems would have affected the fair market value - i.e., the price that Globalnet would have obtained on the market had it chosen to sell to an arm's length purchaser. Again, we do not know if Mr. Kirkpatrick disclosed these problems to the real estate agent(s) from whom he sought opinions on the value of the building, although the plaintiffs state in their factum that the price paid by the trustees for the property "was not reduced to reflect the then-known and possible defects in the roof and retaining walls, or the unknown costs of repairing those defects." (My emphasis.)
- [52] The plaintiffs cite no evidence on this point, but note paras. 299 and 301(g) of the trial judge's reasons. At para. 299, he stated that Globalnet had sold the property "for fair market value (that is, without a loss)". At para. 301(g) he recounted Mr. Kirkpatrick's evidence that the trustees had authorized him to "organize and oversee all aspects of the investigation into and remediation of the defects in the Property." I am not confident that these statements necessarily support the assertion that the price did not reflect the defects, but the defendants take the same position in their factum. If we assume that counsel are correct, then, it would follow that the trusts received a defective building in return for the purchase price of \$1.385 million, which was calculated without regard for the need to repair the defects. Obviously, an arm's length purchaser in the open market would not pay that 'full' price for a defective building and would want to have the expected cost of repairs reflected in the price. Thus the stated price would not have represented the fair market value of the building at the time.
- [53] It would also follow that the trusts did effectively have a "loss" - the difference between \$1.385 million and the price that the building would command on the market if the defects were disclosed. In a perfect market, this difference would be equal to the anticipated cost of remediation. Globalnet on the other hand would have received the full \$1.385 million for a house that was worth that much less. Seen in this context, it seems to me that Globalnet cannot really be regarded as a "volunteer" in the sense that it made the repairs gratuitously. Indeed unless Globalnet paid for the repairs, the transaction would be regarded as having shortchanged the trusts by some \$500,000 - a possibility that could involve accusations of misrepresentation, unjust enrichment (on Globalnet's part) and conflict of interest on the part of the directors of the corporation, who were also the trustees of the trusts at the time. At the least, most people would regard Globalnet as having had a moral obligation to complete and pay for the remediation.

- [54] If the second alternative was correct - i.e., the price of \$1.385 million did reflect the defects in the house - then the price received by Globalnet under the agreement was considerably lower than it would have been if the house had been in perfect condition. In those circumstances, Globalnet would have suffered a loss, having parted with the property for a substantial lower price than if the house had been free of defects in design and construction. On the other side of the coin, the trustees would have purchased a defective building for its true fair market value but would have to proceed with and pay for the remediation - unless the trustees had some kind of understanding that Globalnet would remedy the defects. This question was not explored in the evidence, although as mentioned, Mr. Kirkpatrick had been "authorized" to oversee the remediation.
- [55] Either way, then, one of the parties suffered a loss. Since counsel are evidently in agreement that the purchase price was not reduced to reflect the defects, the first alternative - that the "fair market value" referred to in the Agreement was that of the building without defects - seems the more likely of the two alternatives. The balance of my analysis will therefore be based on that assumption.
- [56] In my view, the facts that the trusts received a defective building for the price of one without defects and that Globalnet received \$1.385 million for a house that was worth considerably less on the market, substantially weakens the force of the "volunteer" argument. The defendants contend in their factum that it is well-established law that a voluntary payment is not recoverable, citing *Owen v. Tate* [1976] Q.B. 402 (C.A.). The lesson of that case is that a person ("A") who takes on the liability of another ("B") to pay B's debt to a bank without any previous request from B, express or implied, cannot sue B to recover what he, A, has paid. This is a clear rule of the law of guarantee and indemnity and as the Court noted in *Owen*, was stated in *Cheshire and Fifoot's Law of Contract* (8th ed., 1972) thus:

At common law, the mere volunteer, officious or benevolent, has no right of action. Only if the plaintiff has paid money under constraint is he entitled to sue the defendant for restitution. The nature of the constraint varies with the circumstances. (At 413.)

The reason for this rule is said to be that "liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will." (*Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234 (C.A.), per Bowen L.J. at 248.) The case at bar, however, does not involve a third party's payment of another's debt, nor the kind of intermeddling that the rule was meant to prevent. Nor was anything done 'behind the backs' of the trustees or without their consent.

- [57] *Owen* was cited in a British Columbia case, *Society of Notaries of British Columbia v. Dowson* (1995) 4 B.C.L.R. (3d) 97 (B.C.S.C.). It involved a notary public who had absconded with funds of his clients. Under s. 17 of the Notaries Act, the Society of Notaries maintained a special fund for such situations and made discretionary payments out of the fund to some of the clients. The Society then sought to claim the amount of the payments from the auditor of the absconding notary public, claiming that the auditor had negligently failed to ensure

that the notary's accounts were reconciled and to notice irregularities in his bank account. Hall J. (as he then was) reasoned:

I am of the view that the principles enunciated in the cases of Qureshi and Wellington Insurance cited supra strongly militate in favour of the legal position of the defendant herein. I am unable to perceive how the voluntary payment of claims by the plaintiff can found a liability on the part of this defendant to this plaintiff. Although a court in a proper case may be persuaded that it can to a degree operate in a quasi-legislative mode, I am not persuaded that in this case I would be justified in proceeding to create what I view as a new type or species of liability. Just to mention one consideration, such a change would have a clear impact upon existing insurance arrangements. In effect, the association of notaries would receive a benefit and the association of accountants would face a new burden. Legal alterations of this sort in my view are more satisfactorily achieved either by agreement or by statutory amendment. There is here no case of contractual liability against the defendant. There was certainly no direct legal relationship between the plaintiff and the defendant. If some new species of tort or restitutionary liability is to be brought into existence to address the sort of circumstances here disclosed, in my judgment, such a development in the law is a policy matter that is better left to be addressed by a mode other than by judge made law.

The law has hitherto been understandably cautious in recognizing a right of recovery or indemnity in situations where there is an element of the voluntary in the creation of an alleged economic claim. That is undoubtedly a wise course because there could all too easily exist considerable hazard in allowing a party to proceed too generously if it were only the property of another that was to be placed at risk. [At paras. 14-5; emphasis added.]

[58] Counsel for the plaintiffs referred us to cases that I regard as more analogous to the case at bar than cases dealing with the payment of debts by third parties. Counsel referred us to *Dawson v. Sawatzky* [1946] 1 D.L.R. 476 and *Myers and the City of Guelph v. Hoffman* [1955] O.R. 965 (Ont. H.C.), both of which, like this case, involved tort liability. In *Dawson*, the plaintiff owned a car and authorized his employee "Peters" to drive it while the plaintiff was out of town. During the plaintiff's absence a neighbour, one Carlton, suffered a hemorrhage and had to be taken to the hospital. Peters undertook to drive him there and on the way collided with a truck driven by the defendant. The cost of repairing the car was some \$102.92, which Carlton voluntarily paid, presumably out of gratitude. Other expenses, however, had been incurred in connection with the accident and the plaintiff sued to recover the full sum of \$114.87.

[59] The Court of Appeal rejected the defendant's argument that the defendant should have to pay only the \$12 difference, since the car repairs had already been paid for. Gordon J.A. for the Court stated that he could not see on what principle of law "the voluntary payment of a third party can relieve a tortfeasor from liability for his wrong." He cited with approval a passage from the *Canadian Law of Motor Vehicles* that "A defendant who is a wrong-doer and who has to pay in damages as a result of his negligent act, cannot be allowed any benefit of a provision in an agreement, made ex gratia by a third party to the injured party or, in the

case of his death, to his representatives." Similarly, the following statement from Mayne on Damages (10th ed.,1927) was noted with approval:

Matter completely collateral, and merely *res inter alios acta*, cannot be used in mitigation of damages. Hence where the defendant was sued for injuring the plaintiff's ship, or the plaintiff himself by negligence, he could not obtain a reduction of damages on the ground that the plaintiff had recovered from the insurers. [At 124-5; emphasis added.]

[60] Myers concerned a police officer who had been injured by the defendant's negligence and was unable to work for nearly three months. During that time, his employer, the City of Guelph, had continued to pay his wages although it was under no legal obligation to do so. Myers obtained judgment against the defendant, which the Court refused to reduce by reason of the City's payments to the plaintiff. In so ruling, Chief Justice McRuer adopted a statement from *Dennis v. London Passenger Transport Board* [1948] 1 All E.R. 779. At 779, Denning J. (as he then was) had said:

The cardinal point to remember is that it is the defendants who are responsible for what has occurred. In my opinion, a wrongdoer is not to be allowed to reduce damages by the fact that other persons have made up to the plaintiff his wages, like the London County Council and the Ministry of Pensions in this case. The plaintiff has lost his wages. In point of law, therefore, *prima facie* he should have them paid by the wrongdoer. As they have been made up to him by other people who expect to be repaid I think it is proper that that sum should be included as damages, but subject to the direction that the amount paid to the plaintiff by the Ministry of Pensions and the London County Council shall be paid to those bodies out of the sums recovered.

In the result, Chief Justice McRuer reasoned in Myers:

A wrongdoer is not entitled to the benefit of a payment made *ex gratia* which some beneficent person or corporation may have seen fit to make to the victim of his wrongdoing. If the donor wishes to trust to the honour of the donee to repay the amount so paid instead of taking an undertaking to do so that is his business and the mere form of the payment cannot enure to the benefit of the wrongdoer. The payments were not paid as wages or salary for services rendered; in fact he had no earning-power during the time the payments were made. They were in law purely *ex gratia* gifts made because he had been injured while on duty. [At 975; emphasis added.]

[61] Questions similar to those in *Dawson* and *Myers* continue to arise frequently in personal injury cases today but the basic principle remains that damages payable by a negligent defendant will not be reduced by "voluntary" payments made or services rendered by a third party to or on behalf of the plaintiff: see, e.g., *Vana v. Tosta* [1968] S.C.R. 71; *Ratych v. Bloomer* [1990] 1 S.C.R. 359 at 369-370; *M.B. v. British Columbia* 2003 SCC 70 at para. 30; see also *Waterman v. Canada* 2013 SCC 70 at paras. 39-40. Often, the court does impose a constructive trust in favour of the third party, where for example, it is a family member or an employer that may have a reasonable expectation of reimbursement: see, e.g., *Rawson v. Rawson* (1956) 3 D.L.R. (2d) 376 (Ont. C.A.); and *Thornton v. Prince George School District* (1976) 73 D.L.R. (3d) 35 (B.C.C.A.), varied (1978) 63 D.L.R. (3d) 480 (S.C.C.).

- [62] The facts of the case at bar are unusual in that they involve a non-arm's length sale and purchase of the subject building. Perhaps because it was non-arm's length, the parties seem to have assumed that Globalnet could simply be "authorized" to carry on the remediation work and pay for it, and that those costs would be adjusted later between them. It seems doubtful that either expected, or should reasonably have anticipated, that a court would rule that as a result of the transaction between themselves, any right of recovery against the tortfeasors would be lost.
- [63] This case is also unusual in that with the possible exception of Sedco - which is complicated in itself - all the authorities to which we were referred may be distinguished on one basis or another. In the final analysis, it seems to me that this court should decide this case, and is free to decide it, as a matter of principle - the principle being that wrongdoers should be held responsible for their conduct and persons in the position of Globalnet should be compensated for the costs they incur in remediating such (mis)conduct. The "rule" that a voluntary payment made on behalf of a debtor does not create an obligation on the debtor's part to reimburse or indemnify, is certainly an important one in the context of guarantee and indemnity, but its relevance in the context of tort law in the circumstances of this case is highly attenuated.
- [64] In specific response to the submissions made by counsel for the defendants, I summarize my analysis of four points.
- [65] Existence of a Legal Relationship between Globalnet and the Defendants: First, it cannot be said that the relationship between Globalnet and the defendants is analogous to that between the plaintiff society and the notary's accountant in Dowson, or between the City of Guelph and the negligent defendant in Myers. In the case at bar there was a clear and direct legal relationship between the plaintiff Globalnet and the defendants. Cornerstone owed both a contractual duty and a duty of care to Globalnet; Linwood owed a duty of care. Globalnet is seeking to recover from the tortfeasors the substantial amount it expended on remediating the building. Had no sale of the property taken place, or had the sale been delayed, there would have been no question but that Globalnet would have been entitled to recover.
- [66] Globalnet's Causes of Actions were not Assigned Away: In his discussion of Sedco and Gentra at paras. 318-327, the trial judge in the case at bar emphasized that there were "no assignments in this case". This was one of the bases on which he distinguished Sedco at para. 319, stating that since there had been an assignment between Sedco and Hospital Laundry, the Court of Appeal's comments that it was "immaterial" to consider the effect of the assignment since "both parties were before the court" may have been obiter. The Court of Appeal in Sedco was concerned in this part of its reasons only with the claim in contract and not that in tort. Interestingly, Cameron J.A. found it difficult to understand why the appellants had directed "a good deal of argument" to the question of the assignment, given that both Sedco and Hospital Laundry were parties to the action and given the fact that Kelly had not consented to any assignment. Cameron J.A. continued:

It is not as though the trial judge had found that neither company had a right of action on the contract, in the sense, that is, that neither could sue on it. That such a right existed in one or the other was beyond contention, and since both were before the Court, the matter, in that sense, was immaterial. [At para. 66.]

- [67] As the trial judge in the case at bar noted, the more important issue was Sedco's claim in negligence for its expected costs in bringing the building up to the standard originally intended. In this context, the assignment was seen as "immaterial". Sedco had by this time sold the subject property to Hospital Laundry, but in the result, that did not affect its right to damages including the expected costs of remediation. Relying on *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London* [1912] AC 673 at 689-90 and *McGregor on Damages* at 200, Cameron J.A. observed that "matters completely collateral and merely *res inter alios acta* cannot be used in mitigation of damage". Sedco's sale of its building had, he noted, occurred outside its duty to mitigate. The appropriate approach was that taken by the Court of Appeal in *Haviland*: what was important was that the repairs were "require[d] to be done" - not what the two plaintiffs had agreed on between themselves.
- [68] If it is correct that there was no assignment of the causes of action in contract and tort in favour of the trusts, those causes of action still belong to Globalnet. If on the other hand they were assigned in the Agreement of Sale and Purchase, they belong to the trusts. In either event, they have not been extinguished or released and as in *Sedco*, both plaintiffs are before the Court.
- [69] Obligation? At para. 321 of his reasons, the trial judge said it was unclear to him whether the Court of Appeal in *Sedco* had found that Sedco had an obligation to "make things right by Hospital Laundry" either "through the terms of its lease or other contract or by the imposition of some other duty or obligation". In my respectful view, the plaintiffs were by virtue of the fact the repairs were required to be done, obliged as a matter of fact to remediate the building, just as in *Haviland* the premises had to be brought up to good repair so that they would be useable in the future. Thus in *Sedco*, the Court of Appeal agreed that "there was really no choice" but to "overcome the deficiencies in the plant" and that Sedco remained "entitled in keeping with the objects of an award of damages to be placed in the position it would have been had the contract be performed and the negligence not occurred." (At para. 133.) Sedco was awarded damages not only for the out-of-pocket expenses it had already incurred, but for the future costs of remediation. In the case at bar, of course, those costs have already been expended by Globalnet; there is no risk that these damages could go to any purpose other than compensating Globalnet for its actual costs laid out to cure the defects.
- [70] The Floodgates Argument: The defendants argued strongly that if recovery were permitted in this case, the principle of caveat emptor in real estate transactions would be undermined. Bad facts would make bad law, the defendants suggested. I cannot agree that the floodgates to liability in the general law relating to real estate transactions would be opened. This case

does not involve a claim by a purchaser of real estate against a vendor; nor does the order I propose provide any remedy to such a purchaser. (An exception has been made in Winnipeg Condominium to caveat emptor in this context, without apparent adverse effects on the market.) Allowing recovery by Globalnet simply preserves, and gives effect to, the rights of owners of real estate as against negligent actors - despite the transfer of such property (in this instance, to a related party.) As we have seen, the law already recognizes the right of former owners to be indemnified in respect of remediation costs expected to be incurred 'voluntarily': Vanguard, Marigold. Sedco goes further and allows such costs to be the subject of a damage award.

- [71] At least in this case, I see no principled basis to deny the recovery of costs already laid out. It is surely desirable as a matter of policy not to discourage vendors from carrying out necessary repairs. The "failure" of the vendor and purchaser to reflect an express assignment of Globalnet's cause of action in their sale and purchase agreement is unfortunate, but it is not a 'wrong' that outweighs the principle that tortfeasors should generally be held responsible for their carelessness. Paraphrasing Mummery L.J. in Technotrade, it simply cannot be the law that a transaction such as the sale and purchase has the effect of enabling the defendants to escape all liability for the damage caused by their carelessness. It should not lie in their mouths to rely on the owner's sale of the land to a non-arm's length party as a bar against recovery.

Defendants' Argument

- [72] Finally, I cannot agree with the defendants' argument that the trial judge erred in finding that defects in the retaining wall were dangerous to occupants. While expert evidence would usually be helpful, I know of no authority that requires it as a matter of law on the issue of dangerousness. The trial judge had before him extensive evidence, including expert evidence, which he reviewed at paras. 286-295. He accepted the opinion of Mr. Chakrabarti, a structural engineer, that the walls had failed. The judge then concluded:

Finally, I note that there is no expert, whether for the plaintiffs or for the defendants, who said that nothing need be done about the walls. In saying this I wish to reiterate my full appreciation for the fact that the plaintiffs bear the burden on this issue (and, of course, generally), but nonetheless the absence of that evidence places the other points I have listed in their proper context.

Given all of the above, and in particular the finding that the walls had in fact failed and the expert consensus that something had to be done about it, I conclude that the retaining walls posed substantial danger to the health and safety of the occupants of the house. [At paras. 296-297.]

This was a conclusion of fact that has not been shown to be clearly wrong. Accordingly, I would not accede to this argument of the defendants.

Disposition

[73] In the result, I conclude, with respect, that the trial judge erred in ruling that neither plaintiff suffered loss by reason of the defendants' breach of contract or tortious conduct. Whichever party to the Agreement of Sale and Purchase benefitted, Globalnet retained its causes of action; the repairs were required; and the building has been brought up at its cost to the standard it would have been had the negligence not occurred. In my opinion, it would be unjust and contrary to principle to permit the defendants to avoid responsibility by virtue of dealings that are *res inter alios acta*. As stated in *Winnipeg Condominium*:

the duty to construct a building according to reasonable standards and without dangerous defects arises independently of the contractual stipulations between the original owner and the contractor because it arises from a duty to create the building safely and not merely according to contractual standards of quality. It must be remembered that we are speaking here of a duty to construct the building according to reasonable standards of safety in such a manner that it does not contain dangerous defects. As this duty arises independently of any contract, there is no logical reason for allowing the contractor to rely upon a contract made with the original owner to shield him or her from liability to subsequent purchasers arising from a dangerously constructed building. [At para. 47.]

In this instance, it is not necessary to differentiate between a dangerously constructed building and a merely defective one.

[74] I would allow the appeal and grant judgment in favour of Globalnet in the amount of \$320,174.05 together with court order interest. Unless the parties wish to make (written) submissions on costs, and so notify the Court within 21 days, costs should go to the plaintiffs.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Fisher"

[1] This phrase is taken from the English Court of Appeal's reasons in *Technotrade v. Larkstore Ltd.* [2006] EWCA Civ. 1079, at para. 3, which in turn cites a Note by I.N. Duncan Wallace, Q.C. in 110 L.Q.R. 42 at 44.

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