

CANADA / JUDGMENT

Perrick v. RJS Electrical Contracting Ltd.

2020 BCSC 211

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 211 Perrick v. RJS Electrical Contracting Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Perrick v. RJS Electrical Contracting Ltd.,

2020 BCSC 211

Date: 20200218

Docket: S1812617

Registry: Vancouver

Between:

Otis Perrick and Leanne Taylor

Plaintiffs

And

RJS Electrical Contracting Ltd. and Hemstreet Contracting Ltd.

Defendants

And

Hemstreet Contracting Ltd., Tall Oaks Contracting Ltd. and RJS Electrical Contracting Ltd.

Third Parties

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

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Counsel for the defendant and third party, RJS Electrical Contracting Ltd.:

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J.C. MacDonald

Place and Date of Hearing:

New Westminster, B.C.

February 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 18, 2020

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Introduction

- [1] The plaintiffs are a married couple with young children who purchased property fronting on Sakinaw Lake on the Sunshine Coast. Their plan was to build a luxurious house to use as a rental property, and also for their own use as a vacation property. Just as the house was substantially complete and ready to be shown to prospective renters, it suffered flooding during a period of heavy rainfall. The flooding damaged the house. The plaintiffs cannot afford to repair it. The flooding occurred in September 2018 and the plaintiffs still do not have an occupancy permit, the use of the house, and the rental income they expected.
- [2] The water entered the house through an electrical conduit intended to service an electric vehicle charging station that had not yet been installed. The conduit channelled water into the house from an uphill depression in the ground.
- [3] The plaintiffs contracted with RJS Electrical Contracting Ltd. ("RJS") for the electrical work involved in the construction of the house. RJS installed the conduit. The plaintiffs say that RJS was negligent and its negligence caused the flood. They claim damages.
- [4] The plaintiffs contracted with Hemstreet Contracting Ltd. ("Hemstreet") to perform site preparation, excavation and landscaping for the construction project. Hemstreet dug a trench for the conduit and filled it in after the conduit was placed. The plaintiffs also claim against Hemstreet for negligence.
- [5] RJS and Hemstreet advance third party claims against each other. RJS also advances a third party claim against Tall Oaks Contracting Ltd. ("Tall Oaks"). Tall Oaks was the general contractor for the first part of the house construction project. Its involvement ended in December 2017. The conduit was installed in February 2018, well after Tall Oaks left the scene. The flooding occurred in September 2018.
- [6] The plaintiffs seek judgment including an assessment of damages on a summary trial. The thrust of their case is against RJS. RJS and Hemstreet maintain that the case is not suitable for disposition on a summary trial. Alternatively, both deny liability and submit that the damages claimed by the plaintiffs are overstated. Tall Oaks participated in the hearing only to seek costs against RJS.
- [7] There is much that is not in issue. It is common ground that each of RJS and Hemstreet provided services to the plaintiffs under oral contracts that required them to exercise reasonable care. Both were involved in the installation of the conduit. It is not disputed that the flooding occurred through the conduit and that the plaintiffs suffered damage as a result of the flooding. The central question in the litigation is therefore whether RJS, Hemstreet, or both of them failed to exercise reasonable care in the work they performed with the flooding occurring because of their negligence.

Background

- [8] The plaintiffs are Mr. Perrick and Ms. Taylor. They bought their property in April 2016. They retained Tall Oaks in January 2017. Tall Oaks introduced the plaintiffs to RJS and Hemstreet, and the plaintiffs contracted directly with them. By prearrangement, Tall Oaks withdrew from the project when it reached the lock-up stage in December 2017. After that, Mr. Perrick dealt with RJS and Hemstreet on behalf of both plaintiffs.
- [9] Mr. Perrick had no prior experience with home construction. He and Ms. Taylor live and work in Vancouver. Mr. Perrick typically came to the site once or twice a week while the house was under construction.
- [10] The principal of RJS is Ryan Stevens. He was the "field safety representative" or "FSR" on this project. An FSR is responsible to certify compliance with the Safety Standards Act, S.B.C. 2003, c. 29 and its regulations, at the conclusion of a construction project. The regulations include the Electrical Code adopted pursuant to s. 20 of the Electrical Safety Regulation, B.C. Reg. 100/2004. Most of RJS's work was done by an apprentice, Derek van der Grinten, who reported to Mr. Stevens.
- [11] The Electrical Code identifies the conduit as an electrical product. RJS acknowledges that, under the regulatory scheme, it was responsible to ensure that the conduit was installed properly.
- [12] The principal of Hemstreet is Darren Hemstreet. Most of Hemstreet's work was done by its employee, Sandy Wright.
- [13] Mr. Wright excavated and laid the conduit under direction from Mr. van der Grinten. Mr. Wright backfilled the trench and took photographs of the completed work. Mr. van der Grinten then ran electrical cable through the conduit. This work was completed in February 2018.
- [14] The result was a conduit - that is, a pipe - that dropped about 10 feet in elevation from the uphill end near a driveway to a breaker panel inside the house.
- [15] Mr. van der Grinten says that he sealed the uphill end of the conduit with plastic bags to prevent rain water from entering the conduit. There is some reason to doubt this evidence. There is also a dispute in the evidence as to whether it was further, subsequent backfilling that placed the uphill end of the conduit into a basin surrounded by higher ground, enabling flooding in the event of heavy rain. I address these evidentiary questions below.
- [16] In early September 2018, the house was substantially complete. Upon completion of a few final items, Mr. Perrick anticipated soon obtaining an occupancy permit. He had the house staged with furniture for the purpose of listing photos for the rental of the property.
- [17] There was heavy rain on September 18, 2018. The next morning, Mr. Perrick travelled to the house and found water inside on the lower floor. He was unable to determine the source. He cleaned up the water and contacted his insurer. He made arrangements with a local

contractor to spend the night in the house in case more water entered. The house remained dry that night. But it rained heavily overnight on September 20/21 and into the day on September 21. Mr. Perrick came to the house and discovered water covering the floor on the lower level with more coming in. The source was not obvious but he was eventually able to trace it to the breaker panel and, by process of elimination, determine that it was coming from the conduit for an electric charging station.

- [18] Mr. Perrick then found the uphill end of the conduit very near to grade level within a depression in the ground. The uphill end of the conduit was unsealed, and there was nothing to indicate that it had ever been sealed. He dug a small trench to allow water to run off over ground and that stopped the flooding through the conduit.
- [19] Mr. Stevens of RJS came to the house on the morning of September 22, 2018. He apologized to Mr. Perrick and sealed the uphill end of the conduit.

Suitability for summary trial

- [20] Pursuant to Supreme Court Civil Rule 9-7(15), the court may grant judgment in favour of any party on a summary trial application, either on an issue or generally, unless:
- (a) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (b) the court is of the opinion that it would be unjust to decide the issues on the application.
- [21] The first question - whether the court can find the facts necessary to decide the issues of fact or law - requires an assessment of the evidence and the law that determines what must be proved to establish or defeat a claim.
- [22] It was established by *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at paras. 43 and 56, in the early days of the summary trial procedure, that a judge conducting a summary trial may find facts on conflicting affidavit evidence, where there is admissible and believable evidence before the court to permit resolution of the conflict on a balance of probabilities. The judge must have a basis for preferring one sworn statement over another; *Cory v. Cory*, 2016 BCCA 409 at para. 10.
- [23] The second question - whether it would be unjust to decide the issues on a summary trial - involves the exercise of judicial discretion, taking a variety of factors into account. The list includes the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings, the cost of the litigation, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices; *Gichuru v. Pallai*, 2013 BCCA 60, at paras. 28-31.

Issues

[24] The overriding question is whether this case is suitable for summary trial. If it is, I must address the following issues:

- a) Was RJS negligent, causing the plaintiffs to suffer a loss?
- b) Was Hemstreet negligent?
- c) Were the plaintiffs contributorily negligent?
- d) What are the plaintiffs' damages?

[25] I will address these issues, considering in each case whether I am able to find the facts necessary to address them. After that I will turn to the question of whether it is unjust to decide the issues on a summary trial.

Was RJS negligent, causing the plaintiffs to suffer a loss?

[26] In oral argument, counsel for RJS helpfully focused the issue of RJS's negligence into a narrow factual question. He pointed to the plaintiffs' contention that, after electrical cable was run through the conduit in February 2018, "the outside end of the tube was left at grade, unsealed and within a depression in the ground of about 5 inches in depth". To the contrary, counsel for RJS contended, when Mr. van der Grinten last touched the conduit, it was one foot above grade and sealed at both ends.

[27] For the following reasons, I find that RJS's position on this question is unsustainable on the evidence.

[28] RJS's theory of the case requires that, after Mr. van der Grinten left the conduit with both ends sealed, someone else graded over the area, leaving the upper end of the conduit barely above grade in a depression in the ground. The evidence of Mr. Hemstreet and Mr. Wright is that Hemstreet did no further work in the area. Hemstreet was the contractor responsible for excavation, site preparation and landscaping. It is highly implausible that anyone else was doing this kind of work on the project.

[29] Mr. van der Grinten's affidavit evidence presents various difficulties and I do not accept some of it. He states as follows:

10. On the same day as I pulled the tech cable through the conduit, I:
 - a. Sealed the conduit entering the mechanical room of the house with duct seal, and
 - b. Sealed the top of the conduit/tech cable with EECOL plastic bags to prevent rain water from entering the conduit at that location.
11. The tech cable/conduit were left about 1 foot above the excavated area at this time.

12. When I sealed and capped the tech cable, I was of the impression that rain water would not be permitted to enter the conduit/tech cable or into the mechanical room because of the duct seal and the EECOL plastic bags as well as the 1 foot of clearance above the excavated area.
13. At this time, I told the general contractor that a concrete foundation would have to be poured for the future electric charging station.
14. It was my expectation that I would complete installation of the car charging station with the tech cable after the concrete foundation had been poured.
15. It was also my expectation that the conduit/tech cable would remain 1 foot above the excavated area until the concrete foundation for the charging station was poured.
16. RJS returned to the plaintiffs' property some time later, when the property was now in lock up stage. I believe it was April 2018 when RJS returned.
17. When RJS returned to the plaintiffs' property the area where the conduit/tech had been left had been graded over and the tech cable/conduit had been buried such that there was no longer any clearance between the tech cable/conduit and the ground. I was told at that time that the plaintiffs no longer wanted an electric charging station in that location. RJS had no involvement in the decision or the work that took place in the area surrounding the conduit/tech cable after it left the site in February 2018.

[Emphasis added]

- [30] Mr. van der Grinten's statement in paragraph 13 that in February 2018 he told the general contractor that a concrete foundation would have to be poured for the future electric vehicle charging station is clearly mistaken. Tall Oaks was no longer on site in February 2018.
- [31] Mr. van der Grinten's account of a gap in RJS's attendance on site between February and April of 2018 is an important element in his explanation for how the uphill end of the conduit was transformed from a safe configuration to one in which rainwater might enter the conduit. It is fundamental to RJS's argument that it was no longer responsible for what happened to the conduit after February 2018.
- [32] The assertion that RJS left the site in February 2018 and did not return until April is contradicted by its records. RJS invoiced Mr. Perrick for 90.5 hours of Mr. van der Grinten's time in February, 13 hours in March and 18 hours in April. According to his timesheets, Mr. van der Grinten's longest absence from the site in this period was 16 days from March 3 through 18.

- [33] The explanation cannot be that Mr. van der Grinten has misremembered a lengthy gap in his involvement on the project that actually occurred later in 2018. RJS's activity on the site increased in the months of May through July. It further invoiced Mr. Perrick for 71 hours of Mr. van der Grinten's time in May, 64.5 hours in June, 148 hours and a further 3.5 hours in July, and 2 hours in August.
- [34] In light of these deficiencies in Mr. van der Grinten's memory and Hemstreet's clear evidence that it did not adjust the grading in the vicinity of the uphill end of the conduit, I conclude that Mr. van der Grinten's account of how the uphill end came to be in the state it was found in on September 21, 2018 is unreliable. It is the product of an unsuccessful reconstruction of events on his part.
- [35] The fundamental difficulty with Mr. van der Grinten's account is that, in paragraph 17, he must be describing what he saw in April 2018. It follows that he saw that uphill end of the conduit was now almost at grade and, as other evidence establishes, in a depression or hollow in the ground.
- [36] On all the evidence, I find that RJS was aware in April 2018, and probably in February 2018, that the uphill end of the conduit was almost level with the ground. Mr. van der Grinten and RJS were still working on the site through those months and subsequently.
- [37] Was the uphill end of the conduit sealed? Photographs taken by Mr. Perrick on September 21, 2018, show a considerable length of electrical cable protruding from the uncapped end of the conduit and lying in loose coils on the ground. If Mr. van der Grinten securely sealed the upper end of the conduit with plastic bags in February as he maintains, the bags would have had to be large enough to encompass the protruding cable. Such bags might possibly have ruptured or broken, but they would not have simply disappeared unless they were so loosely secured that high winds blew them away. It is highly implausible that a third party removed bags carefully fixed in place by Mr. van der Grinten and took them away.
- [38] It is most probable, and I find, that Mr. van der Grinten neglected to seal the upper end of the conduit after he ran the electrical cable through it. If he sealed it at all, he did not do a careful job as was required in light of the placement of the conduit opening close to ground level.
- [39] In view of Mr. van der Grinten's actions and what he knew no later than April 2018, Mr. van der Grinten ought reasonably to have appreciated that there was a substantial risk that groundwater would get into the conduit, and flow from there into the house. The same may be said of Mr. Stevens who was Mr. van der Grinten's superior and the FSR on site.
- [40] I am satisfied that these are conclusions I can safely draw on the record before me.

- [41] Three expert reports are in evidence: from Mr. van Leeuwen, an electrical engineer, Dr. Cepus, a mechanical engineer who describes himself as a "Forensic Engineer", and Mr. Baker, an electrical contractor with extensive experience in loss investigation. I find that each expert is qualified to give the opinions offered in his report. While there are differences in their opinions, many of them are attributable to differing factual assumptions.
- [42] I accept Mr. van Leeuwen and Mr. Baker's uncontradicted evidence that RJS was responsible to supervise the installation of the conduit.
- [43] The following evidence of Mr. Baker accords with common sense:

Once the electrical cable has been pulled through the conduit, the electrical contractor is required to seal the conduit if s/he does not intend to complete the work for which the conduit and the electric cable were originally installed within a 2 months period. Sealing the conduit is required to prevent foreign bodies such as gravel or rodents from entering the Conduit, both of which can cause damage to the cables/conductors. Sealing also prevents ingress of water which is a safety concern as the other end of the conduit terminates within the residence behind an electrical panel.

Electrical work conducted, as well as the methods and materials employed, should provide a product that can withstand safely the stresses of the environmental conditions characteristic of its location and to which it may be subjected. This includes any attempts to seal conduit to prevent ingress of foreign bodies.

Mr. Baker observes that the uphill end of the conduit could have been sealed at a very modest expense.

- [44] At paragraph 17 of his affidavit, Mr. van der Grinten says that he was told in April 2018 that the plaintiffs no longer wanted an electric charging station at this location. Mr. Baker observes:

Once the electrical cable has been pulled through the conduit, an electrical contractor is required to seal the conduit when instructed not to complete the work for which the conduit and the electrical cable were no longer installed. The work completed must be left in a safe state and provide no opportunity for damage or hazards to develop. Leaving a conduit with no suitable barrier to prevent ingress of water into an area housing electrical equipment, is considered an unsafe condition.

[Emphasis added]

- [45] I accept Mr. Baker's evidence and find that RJS failed to take reasonable care, in accordance with prevailing standards of practice applicable to electrical contractors, to ensure that uphill end of the conduit was sealed and left in a safe state. In short, RJS was negligent.

[46] RJS's expert, Mr. Cepus, gives his opinion on the footing that an unknown party buried the conduit after RJS left the property. These are not the facts as I have found them. Notably, however, Mr. Cepus observes:

To be clear, the placement of the conduit below grade resulted in the leak. Leaving it standing 1 foot proud of the ground would not have resulted in a leak.

Mr. Cepus' opinion does not assist RJS.

[47] Had the uphill end of the conduit been properly sealed - that is, sealed in a manner appropriate to its location at grade in a depression uphill of the house - the plaintiffs would not have suffered damage from flooding in September 2018. I find that RJS's negligence caused the plaintiffs' loss.

Was Hemstreet negligent?

[48] Hemstreet's role in placing the cable was limited, and it acted under RJS's direction. There is no evidence that Hemstreet had involvement with the conduit after Mr. Wright filled in the trench in which the conduit was laid. Hemstreet was not involved in running electrical cable through the conduit. It had nothing to do with sealing the conduit. Its work on the conduit ended in February 2018, seven months before the damage occurred. There is no evidence from which I might conclude that an excavating contractor, acting reasonably, ought to have done anything differently than Hemstreet did.

[49] I find that Hemstreet was not negligent.

Were the plaintiffs contributorily negligent?

[50] RJS argues that the plaintiffs were contributorily negligent by failing to keep Tall Oaks or another general contractor on site after December 2017. In effect, the argument is that the plaintiffs, having taken on the role of general contractor themselves, were at fault for failing to supervise RJS and prevent it from making the mistakes that led to the flooding.

[51] RJS offered no authority for the proposition that a negligent contractor may attribute fault to the owner for failing to supervise the contractor. I think that the proposition is doubtful. In any event, RJS does not point to anything in particular that Mr. Perrick did or failed to do that would have prevented the loss in this case. Mr. Perrick's evidence is that he was unaware of the manner in which the conduit was installed until the flooding occurred, and there is no evidence to suggest that he ought to have paid close attention to the installation. The defendants did not seek to cross-examine Mr. Perrick for this summary trial.

[52] I am not persuaded that Mr. Perrick failed to exercise reasonable care for the security of his building project. He was not contributorily negligent. I am satisfied that there is no real prospect that a full trial would lead me to a different conclusion on this point.

What are the plaintiffs' damages?

[53] The plaintiffs seek damages as follows:

- a) \$52,288.08 in special damages in respect of emergency remediation work following the flooding;
- b) \$324,032.33 for the cost of repairs not yet undertaken;
- c) \$315,000 for lost rental income; and
- d) \$25,000 for the diminution in value of the house.

[54] The special damages are not contested. I am satisfied that the plaintiffs incurred a loss of \$52,288.08 for emergency remediation work following the flooding.

[55] The plaintiffs having established that they suffered a loss, the court's task is to do the best it can, on the evidence, to quantify the loss; S.M. Waddams, *The Law of Damages* (Thomson Reuters, Toronto) (looseleaf, November 2019), para. 13.30; *Cruise Connections Canada v. Cancellieri*, 2012 BCSC 53, para. 291.

Cost of repairs

[56] It is undisputed that the water damage is not yet fully repaired and the plaintiffs will incur further costs. The plaintiffs do not have expert evidence of the expected further cost. They rely on three estimates obtained from third parties. The defendants object that the estimates are hearsay.

[57] Two of the estimates are offers by contractors to do the repair work at an estimated cost. One is an offer by Gibbs Construction to do the work for \$312,447 plus GST. The other is an offer by Sumoka Developments Ltd. to do the work for \$349,650. I am satisfied that these are genuine proposals to create contractual relations by the contractors. As such, they are not hearsay and offer some evidence of the likely cost.

[58] The defendants rely on an expert report prepared by a quantity surveyor, Mr. Dmytriw. He suggests that the contractor estimates are overstated because the contractors have included healthy contingencies to reflect repair work whose full scope cannot be ascertained until demolition takes place. Mr. Dmytriw estimates that the repairs will likely cost between \$170,184 and \$262,731. He says:

Based on my scope and estimating methodology, the likelihood of the costs being closer to \$170,184 is stronger than the likelihood of the costs being closer to \$262,731 due to the fact that I have assumed a 24" removal of drywall to all affected rooms and that the cabinets did not have a lot of noticeable damage.

Mr. Dmytriw says that a further 5% savings could be achieved by having the repairs performed under a cost plus or construction management contract, "however, the risk of cost overruns then rests with the owner and not the contractor".

[59] In my view, Mr. Dmytriw's report offers a more carefully considered and reliable guide to the cost of future repairs than the contractor estimates. Notwithstanding his observation quoted above, I am not persuaded that I should award damages under this head at or near the low end of the range identified by Mr. Dmytriw. The plaintiffs, who have suffered loss and damage resulting from RJS's negligence, should not bear a significant risk of being undercompensated for the repair costs they will incur. I accept that a modest reduction from the upper end of the range is in order and assess the plaintiffs' damages under this head at \$250,000.

Lost rental income

[60] The plaintiffs seek \$350,000 in compensation for lost rental income. It is common ground that this kind of loss is compensable as a head of damage; *Houweling Nurseries Ltd. v. Fisons Western Corporation* (1988), 37 B.C.L.R. (2d) 2 (C.A.) at 7-9. The claim is one for loss of an opportunity and negative contingencies must be taken into account.

[61] The plaintiffs' claim is not supported by expert evidence, only the evidence of Mr. Perrick. There is a 'back of the envelope' quality to Mr. Perrick's calculation. Mr. Perrick says that the plaintiffs have suffered 16 months of lost rental income. He estimates that he should have been able to rent the house for \$1,500 a night and achieve an occupancy rate of 50%. He allows management fees of 12%.

[62] Plaintiffs' counsel concedes that this calculation - 15 days per month at \$1,500 x 16 months, less 12% -- does not take into account negative contingencies for breakage and repairs. He further concedes that Mr. Perrick has neither expertise nor much relevant personal experience to support his estimate of anticipated rental income, but says this goes merely to weight.

[63] The defendants submit that Mr. Perrick's estimate of rental losses is little more than conjecture. They rely on *Canadian Faces Inc. v. Cosmetic Manufacturing Inc.*, 2011 ONSC 6171 at paras. 49-51, where the court refused to make an award for lost future profits in the absence of a supporting evidentiary basis for the assessment of the claim.

[64] The legal framework for the assessment of a loss of opportunity claim is well established. First, I must determine, on a balance of probabilities, whether the plaintiffs had a real possibility of earning rental income from the house, but for the flooding; *Greybriar Investments Ltd. v. Davis & Co.* (1990), 46 B.C.L.R. (2d) 164 (S.C.) at 193, *aff'd* (1992), 72 B.C.L.R. (2d) 190 (C.A.); *Zoic Studios B.C. Inc. v. Gannon*, 2015 BCCA 334 at para. 78. Second, I must evaluate the positive and negative contingencies that might have affected the plaintiffs' ability to earn rental income and the amounts they likely would have obtained; *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2019 BCSC 802 at paras. 82-83.

[65] The first stage is easily addressed. I find that there was a real possibility that the plaintiffs would earn rental income from the house.

[66] On the evidence, the second stage is much more difficult, because Mr. Perrick's calculation is only tenuously grounded and has an optimistic quality. He states:

Based on the historical rental of my dad's cabins on Sakinaw Lake, and discussions with other people who rent their properties on Sakinaw Lake, a 50% occupancy rate over the course of a year constitutes a conservative estimate (certain times of year, e.g. summer and winter, are busier than others - but the demand is substantial enough year-round that an occupancy rate in excess of 50% will certainly be achieved). Based on the historical rental of my dad's cabins, discussions with neighbours who rent their properties, discussions with people at the lake who have rented properties and my own online monitoring of rentals available on Sakinaw Lake, the Residence is likely to achieve an average of about \$1,500 per night over the course of a year (i.e. taking into account pricing fluctuations for variations in length of stays, time of year, etc.). Attached as Exhibit "N" is a printout from homeaway.ca for the rental of a home comparable to the Residence which averages \$1,700 per night (this property is very close in location, sleeps a similar number of people, has the same amenities, etc.).

[67] The printout from homeaway.ca exhibited to Mr. Perrick's affidavit is revealing. It is an advertisement establishing that the owners of the allegedly comparable property are listing it for an average price of \$1,700 per night, but one may doubt that the owners actually realize that level of income, even at a 50% occupancy rate. That property is described as featuring seven bedrooms: four in a main building and three in guest villas. An appraisal of the house appended to Mr. Perrick's affidavit describes it as featuring four bedrooms without reference to a guest villa. The allegedly comparable property boasts 492 square metres or 5,296 square feet; the house has 3,390 square feet and is only 64% as large.

[68] The two properties are not truly comparable. I conclude that Mr. Perrick's calculation is not a reliable guide.

[69] On the other hand, the house was brand new. Mr. Perrick's evidence does establish that there is an active rental market in the area. But for the flooding, the house was undoubtedly an attractive high end rental property. An appraisal based on the plans and site in July 2017 forecast that it would be worth \$4.35 million.

[70] Doing the best I can with the evidence, I would award the plaintiffs \$125,000 for their lost opportunity to earn rental income from the house due to the flooding.

Diminution in value of the house

[71] The plaintiffs rely on the affidavit of a realtor, Mr. Pilkington, who says that, in his experience, a buyer will pay less for a property that has suffered flood damage than for one that has not. Mr. Pilkington says that he has viewed photographs of the flood damages and, while it is difficult to put a dollar value on the discount a prospective buyer would apply in this case, "given its market value, the discount would likely be in excess of a relatively de minimus amount of \$25,000".

- [72] The defendants object that Mr. Pilkington's affidavit is expert evidence not contained in an expert report prepared pursuant to Supreme Court Civil Rule R. 11-6. I agree that Mr. Pilkington's affidavit offers an expert opinion based on his specialized knowledge and experience as a licensed realtor. However, generally speaking, the requirements of Part 11 of the Rules, including R. 11-6, do not apply to summary trials; R. 11-1(1)(a). While expert reports are admissible in a summary trial (R. 9-7(5)(e)), they are not required and expert evidence may be put in evidence by affidavit; R. 9-7(5)(a).
- [73] I do not find Mr. Pilkington's affidavit substantively helpful in this case. It offers only a bare bones statement of his qualifications and the basis for his opinion. It does not state that Mr. Pilkington understands that, in offering opinion evidence, his duty is to assist the court and not to be an advocate for any party. Mr. Pilkington does not describe his experience with sales of properties that have suffered flood damage. One might wonder about the number of sales he has experience with, the extent of the damage in those cases, and whether the damage was fully repaired. It is not obvious why the price of a property that has been fully repaired would be discounted. The opinion Mr. Pilkington offers is, on its face, only tentative in its reference to the difficulty of quantifying a discount and the statement that it may be only "a relatively de minimus amount".
- [74] Accordingly, the plaintiffs' claim for compensation for the reduction in the value of the house is unproven.

Summary with respect to damages

- [75] For these reasons, I find that the plaintiffs have established that they have suffered damages of \$427,288.08, broken down as follows:
- a) Special damages of \$52,288.08 in respect of emergency remediation work following the flooding;
 - b) \$250,000 in respect of the cost of repairs not yet undertaken; and
 - c) \$125,000 in respect of lost rental income.

Is it unjust to decide these issues on a summary trial?

- [76] In my opinion, it is not unjust to decide the issues as set out in these reasons on a summary trial, taking the following matters into account.
- [77] While the amount involved is significant, the issues are not complex. A conventional trial is expected to require 10 days and is scheduled to take place in January 2021. There will be prejudice to the plaintiffs if they must wait another 11 months to have their claim resolved. The cost of a 10-day trial will be far higher. This will enure to the disadvantage of the parties generally, but especially to the plaintiffs who have been unable to this point to afford to repair the house.

- [78] While I have rejected portions of Mr. van der Grinten's affidavit evidence, the rejection is not critical to my conclusion that RJS was negligent. Summarizing what I have already stated, the critical consideration is that, on his own evidence, Mr. van der Grinten was aware that the uphill end of the conduit was at or close to grade no later than April 2018. From this point forward, there was a real risk of flooding through the conduit for which RJS was responsible. RJS did not take effective steps to manage or forestall that risk which eventuated in the flooding in September 2018.
- [79] The resolution of the issues I have addressed in these reasons permits a final resolution of all the claims in this litigation. RJS's third party claims should be dismissed because neither Hemstreet nor Tall Oaks was negligent. With the dismissal of the plaintiffs' claim against Hemstreet, Hemstreet's third party claim against RJS is moot. This is not a case in which there will be litigation in slices.
- [80] It is possible that a conventional trial with more evidence would result in a different and more precise assessment of damages. The plaintiffs have put their best foot forward. The defendants examined Mr. Perrick for discovery in September 2019 and tendered the expert reports of Mr. Dmytriw and Mr. Cepus. No one applied to cross-examine any of the affiants or the experts. In my view, the defendants have a reasonable opportunity to address all aspects of the plaintiffs' claim, including quantification of the damages.
- [81] Accordingly, I exercise my discretion to decide this case on a summary trial in order that straightforward issues may be finally resolved without further delay and expense. In my view, this is not unjust to any party.

Disposition

[82] For these reasons, I order that:

- a) the plaintiffs will have judgment against RJS for special damages of \$52,288.08 and general damages of \$375,000, together with prejudgment interest and costs;
- b) the plaintiffs' claim against Hemstreet is dismissed with costs; and
- c) all the third party claims are dismissed.

[83] If there are further or other matters pertaining to costs that must be addressed, the parties may arrange through the registry a hearing before me at 9:00 a.m. on a day when I am sitting in Vancouver.

"Gomery J."

The Honourable Mr. Justice Gomery

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