C903701
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice E.R.A. Edwards
Pronounced in Chambers
June 30, 1995

BETWEEN:

THE STRATA CORPORATION OF STRATA PLAN NO. VR1378
AND THE OWNERS OF STRATA PLAN NO. VR1378,
ELMHIRST ENTERPRISES LTD., DR. MYRON McDONALD,
GROVE INVESTMENTS LTD., HUNTER PROPERTIES LTD.,
DR. MICHAEL J. ENGLEBERT INC., DR. R. BRUCE BESSIE INC.,
COAST CENTRE FOR MEDIATION AND COUNSELLING INC.,
J.B. McROBERTS AND D. ROVINELLI,
WEST VANCOUVER MUNICIPAL EMPLOYEES ASSOCIATION,
BUILDING SOCIETY, DR. LIAN NG, EVELYN G. MITCHELL,
DIANE GRADLEY, BARBARA J. SPLATT,
JOHN M.B. MORLEY and E.G. MORLEY, CORA WHITING,
MARGERY A. MURRAY, BRONWYN BROWN,
ZARINE VIRANI and ROSEMIN EBRAHIM,
FREDERICK H. SMITH AND RUTH R. SMITH,
MOLLY B. HUSBAND, ERNEST A. JOHNSON and ELIZABETH JOHNSON,
MARGARET H. KNOX, AMY C. ROLSTON,
CLIFFORD J. MOSIER and LORNA B. MOSIER

PLAINTIFFS

AND:

MARA PROPERTIES LTD. formerly POLYGON PROPERTIES LIMITED,
THE CORPORATION OF THE DISTRICT OF WEST VANCOUVER

DEFENDANTS

Rosemary Pawliuk — appearing for the Plaintiffs
F.G. Potts — appearing for the Defendant, the District of West Vancouver

1 **THE COURT:** This is an application under Rule 18A seeking dismissal of the action against the defendant, West Vancouver, on

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the basis it is barred under sections 754 and 755 of the *Municipal Act* or s. 3 of the *Limitation Act*.

2 The action arises from defects in a building principally manifested by water leaks. What caused the leaks is the main factual issue. The allegations against West Vancouver as included in the amended statement of claim are as follows:

> In addition, the loss and damage has occurred in whole or in part as a direct result of the negligence or breach of duty of the defendant District, particulars of which include:
>
> (a) neglecting or failing to ensure that the plans and specifications as reviewed and approved were free of design defects prior to issuing the development permit and building permit;
>
> (b) neglecting or failing to conduct any or any adequate inspections of the development prior to issuing occupancy permits or [sic] any sort;
>
> (c) neglecting or failing to issue and enforce a stop-work order against the development as a result of the breaches set out herein; and,
>
> (d) neglecting or failing to condemn the development and the strata lots as unfit for habitation as a result of the breaches set out herein.

3 I was advised that paragraphs (c) and (d) which I have just read had been abandoned in light of the May 1987 proclamation of s. 755.2 of the *Municipal Act*. West Vancouver seeks an order dismissing those parts of the claim, and I would make such an order.

4 There were evidently problems, including leaks, with the building from the time of first occupancy in 1984. In July of 1986, the Strata Council had commissioned Star Building Inspectors Limited which conducted at that time what it described as a "cursory inspection" and recommended a further detailed inspection. In August of 1986, the Strata Corporation received a letter from Clark Wilson, solicitors, which outlined possible causes of action arising from the circumstances then known. I quote relevant parts of that letter:

> We confirm that Mr. Curtis had requested a letter of the writer regarding the above-noted matter and more particularly how best to proceed, how good a case you had, and the approximate cost of doing so.
>
> . . . .
>
> Based upon the draft management agreement, and a reading of the *Condominium Act*, I would suggest that the present management contract be terminated within 60 days.
>
> . . . .
>
> I would suggest the case as I presently see it as against any number of defendants is a good one with respect to liability.
>
> . . . .
>
> In negligence, the owners appear to have an action in negligence against Polygon, the architect, the structural engineer, the mechanical engineer, the municipality of West Vancouver, and perhaps the real estate company with respect to representations made. Other defendants may come out of the woodwork as time proceeds and examinations for discovery are held.
>
> . . . .
>
> Costs, in a word, expensive. Not only does one have the legal costs, but one also has the disbursements of

> obtaining expert evidence. You are already aware of how much it will cost to have Star Building Inspections Limited do a full study. There will be other disbursements that are incurred with respect to this situation, and one's case is only as good as one's experts.
>
> . . . .
>
> The municipality of West Vancouver is a possible defendant because of faulty inspection.
>
> . . . .
>
> It is my suggestion that you have Star Building Inspections Limited provide a report with an estimate of the costs to correct all deficiencies. Then an approach should be made to Polygon to pay for all of those deficiencies, and if they do not they will be sued.

In November of 1986, a further, more detailed legal opinion was obtained from Douglas Symes Brissenden. It did not mention suing West Vancouver.

5 Some time in December of 1986, the Strata Council passed a special resolution imposing a special assessment to accumulate a war chest, partly to repair the problems as then manifest and partly as a basis for proceeding with possible litigation. I quote from that document as follows:

> We should also make ready, if necessary, to initiate legal action against all parties involved in the design, construction and sale of the building. Though full engineering reports are not in, council makes the following rough estimate of costs: water-proofing and restoration of decks, $22,000-$25,000; re-fitting of air conditioning systems, $18,000-$20,000; water-proofing and restoration of the three towers, $30,000-$50,000; resolution of settling of building and restoration of resulting damage, $50,000-$150,000; legal fees incurred

> in actions to reclaim actual costs, $20,000-$25,000; engineering services, $10,000-$20,000; total, $165,000-$315,000. The purpose of this resolution is to raise the initial needed funds over the year beginning November 1, 1986. Council hopes that work can begin to have the greater part of it, chiefly the leak problems and the air conditioning, completed within the year. If necessary, funds to complete all the repairs will be raised by special assessment in the following year.

It is clear from that special resolution that water-proofing and restoration of the decks were only a minor part of the problems envisaged by the council at that time.

6 This action, in effect, alleges against West Vancouver negligent inspection in respect of decks which are also the roofs of units in the residential portion of the building.

7 The plaintiffs' position in resisting this application is that the cause of action against West Vancouver arose in June or July 1990 when some of the decks just referred to were removed. That removal disclosed, according to affidavit material, the following. First of all, I quote from the affidavit of Douglas McRae Mitchell (phonetic), a resident of the building, sworn on June 27, 1994, at paragraph 21. I would like to interject that I am making allowances here in respect of this, although I am quoting it verbatim, a certain amount of this is editorial in nature, but it does reflect the facts as disclosed at the time, as well.

> 21. In June of 1990, Pacific Restorations Limited was hired to commence lifting the decks and doing the

> work to correct the problem. When we removed the decks, we were horrified at what we saw. It was only upon lifting the decks that it struck me that this construction should never have been approved. Specifically, the trusses were rotted to such a degree that they provided little, if any, structural support to the building. The decks and the support beams were rotted extensively. Many of the plywood deck sheets were not nailed properly to the trusses. In some cases, several feet of joists were encountered with no nail penetration holes at all. At other locations, the spacing of the nails greatly exceeded the B.C. Building Code. The membrane was not bonded to the sub-straight, and in all cases the polyethylene backing of the membrane was not even melted, contrary to the manufacturer's specified technology for installation. The concrete which was supposed to 1-5/8" aerated concrete, and was so represented in the reports that we paid for earlier, was in fact at some locations 4, 5 and 6" thick. It was regular concrete.

8 I quote as well from the affidavit of Mr. Mosier, a resident of the building and one of the plaintiffs. That affidavit was sworn also on the 27th of June 1994. I quote at paragraph 11, again making similar allowances for editorial comment:

> 11. Speaking for myself, and I think I can speak for the entire Strata Council, until the decks were lifted in June and July of 1990 we had no idea of the enormity of the problem. We understood that there was some degree of rot because of the leakage that had been occurring at Unit 206, but nobody was expecting what the lifting of the decks revealed. I recall someone stepping on a portion of a beam and his foot going right through the beam. I recall that the trusses were so rotten our initial plan of repairing them was abandoned and most of them had to be replaced. Some of the trusses were not nailed to the walls at all. There was virtually no structural integrity in the building. There was plywood on the deck that had never been nailed down, it was just sitting on top of the boards.

9 On July 10, 1990, notice in the following form was given by letter to West Vancouver by counsel for the plaintiffs:

> We are the solicitors who represent the Strata Council of the properties located at 2419 Bellevue Avenue in West Vancouver. Our clients have learned in the last few months that your inspectors did not properly discharge their duties in inspecting the construction of this project. Of particular concern to our client is that the blueprints called for 1/5" lightweight concrete and 4" and more of standard concrete was used, which lead to serious leakage problems in the building, requiring major reconstruction. The purpose of this letter is to put you on notice of the same and to advise you that we will be bringing action immediately.

10 On July 12, 1990, the writ was issued.

11 The plaintiffs say that until the decks were removed it was not known exactly what had caused the leaks. That cause, they say, was disclosed when the facts as outlined in the portions of the affidavits I have just read were evident, and those facts were that there was no ventilation beneath the decks in question, that the concrete on the decks was heavier by far than what was called for in the plans, and that there was rot occasioned to the trusses which supported the decks. The latter factor, that is the excessive concrete had, the plaintiffs theorized, caused the waterproof membrane to fail, and this had permitted water to enter beneath the decks. As a result of the lack of ventilation, this water could not dry and that in turn rotted the structural components. This, the plaintiffs say, was only manifestly related

to negligent inspection by the municipality when all of these factors were revealed and related, one to the other, when the decks were raised, that is in June or July of 1990, giving rise to the cause of action against West Vancouver.

12 Alternatively, the plaintiffs argued that the cause of action arose at the earliest in September 1989 when a series of expert reports disclosed the presence of rot, the lack of ventilation, and the excess weight of concrete which were all known or suspected at that time.

13 The plaintiffs argue that if the court finds that the cause of action arose in September of 1989, then they had provided notice, albeit imperfect notice, as required under s. 755 of the *Municipal Act* in a timely way in September of 1989, and since West Vancouver then knew all that the plaintiffs knew of the situation, West Vancouver was not prejudiced in its defence.

14 The defendant West Vancouver's position is that the plaintiffs' cause of action arose at the latest in September of 1989, and that even if the imperfect notice was adequate to satisfy s. 755, the action was nonetheless barred by s. 754, since it was started outside the six month limitation period provided in that section.

15 I agree that if the plaintiff's cause of action against West Vancouver arose in September 1989, it was statute-barred by s. 754 regardless of whether notice was given under s. 755.

16 I have also concluded that the alternative argument offered by the defendant, West Vancouver, that is that the cause of action arose in 1986 when the plaintiffs were first advised they might have a cause of action against West Vancouver must be rejected. At that time, although the nature of the problems in terms of the symptoms were known, nothing pointed in my view to negligent inspection by West Vancouver as the cause. The more thorough opinion of November 1986, which I have already referred to, as I indicated does not mention any action possible against West Vancouver. Therefore, the plaintiffs proceeded after it received the November 1986 report to diligently pursue the problems which it considered largely the responsibility, if not entirely the responsibility, of the developer Polygon. I was advised that no fewer than 18 engineering or other expert reports were obtained between 1986 and 1989. In fact, by December 1987 to January 1989, there is evidence that the plaintiffs had concluded that the problem of leaking decks was largely resolved.

17 I quote from the minutes of the Strata Council, first of all the minutes of December 2, 1987. It says, in part:

> One year ago this building was in very poor shape. Our financial situation was in even poorer shape. I am happy

> to report to you that this evening our financial situation is good. The building, although there are a few minor persistent problems remaining, is vastly improved over one year ago. Our necessary contingency fund which as you remember was nil, is now back up to the required amount.

Then in January 1989, I quote from the minutes of that meeting of the Council:

> Mr. Smith reported that he has not located the leak to 206 from 306. Other leaks have been rectified, i.e. 205 from 305. Some typical problems result from bad workmanship. One leak from 205 comes from the roof level. Four leaks have been solved, and one remains to be rectified. There are some other small leaks. In general, most leaks could be traced to incorrect installations of metal flashing.

18 In fact, the problems of leaking decks were not solved, and by May of 1989 there is this reference in the minutes to that problem:

> Roland Hawes (phonetic) gave a detailed explanation as to contents of the engineer's report submitted by Gibson Harvey Backhouse (phonetic), consulting engineers. This dealt primarily with balcony deflections on the third floor and leakage into the second floor. Because of the seriousness of the problems, a committee was struck to oversee implementation of the recommended repairs outlined in the engineer's report. Committee members were R. Hawes, R. Mitchell, B. Johnson. This committee was authorized to spend up to the amount budgeted, $15,000, less expenditures to date.

After that, a series of reports was received between May and September 1989 from engineers and other experts.

19 It is clear that by September 1989 the plaintiffs knew that there was no ventilation under the decks raised in 1990. They knew that there was some rot as a result of that, and they knew that there was concrete in excess of specifications, presenting a potential load problem on the decks. They had been advised by September 1990 that the decks would have to be raised and repaired.

20 West Vancouver argues at this point, that is September of 1990, the plaintiffs knew all of the components of the problem, and simply because their expert had not related them to a possible negligent inspection by West Vancouver, that is not to say that the plaintiffs should not now be imputed with knowledge that they had a cause of action in or around September 1989 against West Vancouver.

21 Alternatively, West Vancouver argues that with the knowledge they had, including the recommendation that the decks be lifted, the plaintiffs unreasonably postponed until June of 1990 lifting the decks, and therefore they ought to have known in September or as shortly thereafter as that work could be done, the facts which, when the decks were lifted, revealed a cause of action against West Vancouver.

22 With respect to West Vancouver's first submission, I am not satisfied that knowledge of excess weight of concrete, rot, and lack of ventilation necessarily disclosed a cause of action against

West Vancouver. As late as September 28, 1989, West Vancouver confirmed it would accept ventilation of the area in question. Until then, the plaintiffs experts had apparently thought that West Vancouver had probably prohibited ventilation of the area to ensure fire separation, implying that a lack of ventilation, if approved or required by West Vancouver, probably wasn't a contributing factor to the problem.

23 West Vancouver's alternative submission, it seems to me, implicitly concedes, and in any event I find as a fact, that it was not until the decks were lifted that the entire nature of the problem and the possibility it was occasioned by or exacerbated by negligent inspection was revealed. West Vancouver argues in effect that the plaintiffs were obliged with the knowledge they had in September 1989 to take steps to reveal earlier than June or July of 1990 precisely what the problem was. West Vancouver says that there was no evidence that they waited for dry weather and that there is evidence that the decision to delay raising the decks was cost-driven.

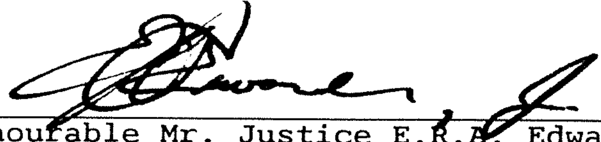
24 In my view, this argument fails because it cannot be ascertained at what point it would have been reasonable to raise the decks. In other words, I cannot say what specific date would have been more or less reasonable than June 1990, and therefore I cannot say whether that date fell in or outside of the six-month limitation period antedating July 12, 1990 when the writ was

issued. There was evidence that the plaintiffs considered weather, and were advised by experts, that lifting the decks could be postponed. In light of that, and photographic evidence of how extensively the building had to be open to the elements, it does not seem unreasonable to have waited over the winter. It might have been possible to do it during the winter at a higher cost to keep the elements out and the heat in, but again there is simply no evidence upon which I can conclude with sufficient certainty to fix the last date on which this could reasonably have been done for purposes of establishing the date of the running of the six-month limitation period.

25 In other words, I cannot say that the June date selected by the plaintiffs was unreasonable. I do not see that that reasonability factor here relates solely to any potential prejudice to West Vancouver from the delay, but if it did, I can see none. West Vancouver's defence of the case on its merits depends as much as the plaintiffs' prosecution of the case on what was revealed when the decks were lifted, so there was no prejudice to West Vancouver until that revelation was made, and within days of the July 10 notice, that is, around July 18, there is evidence that West Vancouver's experts were invited to the scene and attended.

26 Accordingly, in light of my earlier finding that it was not until the decks were lifted that the cause of action against West Vancouver became clear, I am going to dismiss this application

except with respect to paragraphs 75(c) and (d) of the statement of claim which are dismissed.



The Honourable Mr. Justice E.R.A. Edwards