



NO. C912226
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JAGJEET SINGH BADAL and GURNAM BADAL

PLAINTIFFS

AND:

SARAT CHANDE, KONTROL ENGINEERING LTD.,
KISHAN ANAND, THE CORPORATION OF THE DISTRICT OF
NORTH VANCOUVER, D & J REINFORCING STEEL LTD.,
JIM OSTROWALKER doing business as
JIM'S EXCAVATING and the said JIM'S EXCAVATING,
ROBERT TAYLOR and REMPEL BROS. CONCRETE LTD.

DEFENDANTS

MEMORANDUM TO COUNSEL
FROM
THE HONOURABLE MR. JUSTICE SELBIE

Counsel for the plaintiff: Richard E. Turner
Counsel for the defendant
The Corporation of the District
of North Vancouver: Simon B. Margolis
Counsel for the defendant
Jim Ostrowalker and Jim's Excavating: Robert D. Kirkham
Counsel for the defendant
Sarat Chande: James R. White
Date and place of hearing: July 8, 1993
at Chambers, New Westminster, B.C.

The District of North Vancouver applies pursuant to *R. 18A* of
the *Rules of Court* for the claim against it to be dismissed. The
action deals with the responsibility to be attached to the collapse

1
2
3
4
5 of the retaining walls at the home of the plaintiffs. In the case
6 of the District the contention is that it was negligent in not
7 properly carrying out its responsibilities in inspecting the site.

8
9 A building permit was applied for in November of 1990.
10 Mr. Rice, the 'Plan Checker' for the District dealt with it
11 initially. One of his functions is to determine whether an
12 application requires drawings by a professional engineer to confirm
13 that the plans conformed to the requirements of the Building Code.
14 In this case they did including, in particular, the retaining
15 walls. On November 20th the District received a letter from the
16 defendant Sarat Chande on behalf of the defendant Kontrol
17 Engineering Ltd.

18
19 "The undersigned hereby gives assurance that
20 the design of this building conforms to all of
21 the structural requirements ... of the current
22 Provincial Building by-law. Further that the
23 undersigned will be responsible for structural
24 "field reviews" of the ... building ...".

25
26 Included with the application were plans and design drawings
27 sealed by Chande.

28
29 After satisfying himself that the zoning by-laws had been
30 complied with Mr. Rice issued a building permit.

1
2
3
4
5 Mr. Paul Wiskar was the building inspector for the District.
6 He deposes going to the site pursuant to a request for a foundation
7 form inspection. He found the forms 70% complete but he could not
8 complete the inspection because the ground was frozen. He
9 instructed the plaintiff that he was to call for a further
10 inspection prior to pouring. He also informed the plaintiff that
11 there would be a further requirement for an approval by a
12 professional engineer following this second inspection. He set all
13 this out in an inspection card left on the site. The reason for
14 this extra concern seems to be the exceptional height of a portion
15 of the foundation on the lot.

16
17 It is the responsibility of the owner or his representative to
18 call for inspections as the work progresses.

19
20 Wiskar further deposes that on January 24th he received site
21 inspection reports from Kontrol Engineering dated December 12th and
22 January 20th approving the pouring of the concrete as well as a
23 form survey report required by the original inspection card
24 referred to above. On the same day he said he was advised by the
25 plaintiff that the concrete had already been poured on the 20th or
26 21st.

27
28 The site inspection report of the 12th of December, by Chande
29 to Kontrol Engineering and copied to the District and the plaintiff
30

owner, said, in part — "The works were approved for concrete pour, subject to completing the remaining frame-work." No request for an inspection was made to the District at that time.

The site inspection report dated 1 p.m. on January 20th by Chande, again to his employer Kontrol Engineering and copied to the District and the plaintiff, said: "1) As requested we have re-inspected the footing base and reinforcement and approved the works for concrete pour ... 2) Next site inspection required when foundation walls are poured."

On neither of these reports is it apparent that Chande was aware of the requirement of the District that there be no pour until a further inspection was made as set out in the inspection card left with the plaintiff. Either he did not know or he ignored it. Either way the District says it never received any request for inspection from the plaintiff prior to the pour which was made either on the day the last inspection report was made or the day after.

Wiskar says, in effect, that being faced with this *fait accompli* he did nothing, apparently taking the position that since he was no longer able to do an inspection of the forms prior to the pour he would accept the assurances of the engineer that all was well.

The foundations collapsed in February.

The plaintiff says that, contrary to the regulations and the by-laws, Wiskar told him over the telephone that since Chande had said the concrete could be poured to go ahead without his inspection so long as he brought in Chande's report approving the pour. The plaintiff further deposes that he delivered the January 20th report to Wiskar at least a day before the pour actually occurred. He argues that Wiskar's note on the documents that they were received on the 24th is fraudulent and put there after the event to give credence to his story.

If the plaintiff's position is correct then the District must bear some of the responsibility in that its employee, Wiskar, failed to perform his duty as required choosing to accept the engineers report rather than do an on-site inspection. If Wiskar's position is accepted then the situation is otherwise and the plaintiff bears the responsibility of letting the pour go ahead without calling for the inspection. The affidavits conflict on this critical point. The main particular in favour of the District is Wiskar's own note on the documents as to when he received them. The main argument for the plaintiff, as I see it, is that Wiskar did not go to the site even though he was aware the pour had been done. This arguably confirms the plaintiff's position that he had agreed not to inspect if he got the reports. The applicant cites

1
2
3
4 the case of *Rothfield v. Manolakos*, [1989] 2 R.C.S., 1258 but it
5 only is an authority here if this essential point is decided in the
6 District's favour.
7

8
9 I am unable to determine this question of credibility on the
10 material before me. Neither position is sufficiently clear on the
11 affidavit material to make a finding. I am unable " ... to find
12 the facts necessary to decide the issues of fact ..." (R. 18A(a)).
13 The application is dismissed with costs to the plaintiffs.
14

15
16 New Westminster, B.C.
17 July 12, 1993.
18
19
20
21
22
23
24
25
26
27
28
29
30

A handwritten signature in black ink, appearing to be 'W. F. B.', written over a horizontal line.