Date: 19980911
Docket: 33612
Registry: Kelowna

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Wilkinson
Pronounced in Chambers
September 11, 1998

BETWEEN:

PATRICK NEAL GRANT and CARRIE-LYN KATHLEEN GRANT

PLAINTIFFS

AND:

TERRY LEE ROBERTSON, MYRNA FAYE THOMPSON,
and THE REGIONAL DISTRICT OF CENTRAL OKANAGAN

DEFENDANTS

AND:

4 DEE ENGINEERING (1993) LTD., INTERIOR TESTING SERVICES LTD., TERRY LEE ROBERTSON and MYRNA FAYE THOMPSON

THIRD PARTIES

Counsel for the Plaintiffs: J. Grant Hardwick

Counsel for the Defendant,
The Regional District of Central Okanagan: Frank Scordo

Appearing on her own behalf: Myrna F. Thompson

[1] **THE COURT:** This case involves claims by Mr. and Mrs. Grant arising out of their purchase of a newly constructed home in Winfield, B.C. in 1995 from the defendants, Terry Lee

Robertson and Myrna Faye Thompson, then and now cohabiting in a common-law relationship. The claims are against the vendors, the builder, and against the Central Okanagan Regional District which was responsible to inspect the building of the home. The Central Okanagan Regional District has joined Mr. Robertson and Ms. Thompson as third parties.

[2] The claims arise out of a number of defects in the construction of the home. Mr. Robertson is in bankruptcy and any recovery from him is problematical at best, so the nature of Ms. Thompson's involvement in the project is of considerable importance. It is clear that Mr. Robertson and Ms. Thompson owned the lot prior to construction and were the vendors after construction. It is clear that Mr. Robertson was a builder of the house. His father had some hand in it although apparently only as an employee or a volunteer. Ms. Thompson takes the position that she was not a builder and should therefore not be found liable. The Regional District admits liability in connection with the improper sewage system of the house, but denies liability for the remaining problems.

[3] The property originally had a mobile home on it and the first application for a building permit, dated in July, 1994, contemplated renovations to it. However, by the time a building permit was issued in September, 1994, a new dwelling was contemplated. Construction then took place until about August, 1995. The Grants signed an interim agreement early in

June, 1995 at $222,500.00, moved into the house in mid-June and the deal closed August 1, 1995.

[4] Because it was summer, problems for the most part did not reveal themselves immediately and some were not discovered until substantially later. I found the plaintiffs to be straightforward and not prone to exaggerate and to have acted reasonably throughout in their attempts to find the cause of their problems and to solve them. The problems are genuine and the only real questions are about quantum and whether recovery can be made against the Regional District and Ms. Thompson. The problems include the following:

(1) The sewer system from the previous mobile home was simply left in. Unfortunately, it had never been approved and it was, in any event, improper.

(2) A two storey veranda or sundeck at the rear of the house was constructed, but was not in the plans upon which the permit was based. It was tied to the house structure at its near end, but there were improper footings at its back-most or far end. The columns supporting that end rested only on single tubes of cement without adequate footings underneath. The result is that the rear deck has already settled some inches.

Temporary relief has been obtained by carefully directing all water and run-off away from the area, but the entire structure should be jacked up and adequate footings installed under the tubes. On the whole of the evidence, I am satisfied that the cracking and subsidence of the ground level concrete deck of the structure is due to the sinking of the columns.

(3) Two basement windows facing Seaton Road on the front of the house had been installed in openings in the cement basement wall, which openings were larger than the windows. An eight or ten inch space at the bottom of the openings, extending across the width of each window, was taken up by a wooden filler. The sidewalk along the front was laid against the wall at the level of the bottom of the inserted windows with tar paper between it and the wood fillers so that the filler could not be seen. On the inside, once the insulation and finishing was installed, the fillers were likewise not visible. The wooden fillers allowed water to leak past them.

The lot was sloping and when snow began to melt and the ground began to thaw in the spring of 1996, water came into the basement. The Grants were unable to fathom the reason and called in an expert and Mr.

Robertson. Mr. Robertson dug a large pit in the front yard and tried to drain melt water away. The expert felt the problem might be due to leakage between the basement walls and the basement floor slab. Mr. Grant dug up the drainage pipes at the side of the house to see if they were working, but found them dry.

Eventually the cause was discovered, but it was necessary to break away the sidewalk to reveal the problem. The excavation and the works to drain the front yard had ruined the landscaping there. Damage done to the driveway to put a drainage line across it was also reasonably necessary to correct the window problem. Proper windows and window wells have now been installed. Evidence was that the windows were purchased from Happy Harry's, a recycle building material dealer, but were then found to be too small. The only explanation as to why they were not taken back and proper sized windows purchased was that money was tight.

(4) The slender main floor windows in the front, shown on photos one and two of Exhibit 1-41, were designed to be installed horizontally, but were installed vertically. This resulted in an inability to be

drained as the drain holes were on the side, not the bottom. They are also unsuitable for bedroom use.

(5) Three exterior doors -- one at the front, one leading to the garage, and one leaving the garage -- do not meet building code requirements. They also were purchased from Happy Harry's and were probably originally interior doors.

(6) The deck of the front porch does not meet code requirements. Its covering is not thick enough for an area which is over an inhabited space. It should meet both roofing and flooring standards. As a result of being too thin it has developed holes, presumably from foot traffic and that has caused leakage into the area below. In addition, the floor or deck slopes towards the house, rather than away, leading to leakage where it connects with the house and, on occasions, to spills over the sill. The homeowners try to catch rainfall before it accumulates but are not always successful.

(7) The garage floor slopes towards the rear, contrary to the building code, and water pools or puddles inside at the back. Containers or other things left on the floor become wet and unusable.

[5] There have been a number of reports filed, including:

(1) Trans Mountain Engineering Ltd., June 14, 1996, regarding structural footing and drainage.

(2) Oland Engineering, July 8, 1996, regarding sewage system.

(3) MSS Engineering Ltd., May 20, 1998, regarding rear balcony or sundeck.

(4) Pillar to Post, June 24, 1998, regarding exterior doors, windows, front deck, rear deck, stucco, landscaping, garage floor, sidewalks, driveway, et cetera.

(5) Cam Manning (phonetic), April 20, 1998, regarding landscaping.

[6] None of the reports was cross-examined upon. There was additional evidence as to damages and costs of repairs. Witnesses were the plaintiffs, three building inspectors for the District, and Ms. Thompson on her own behalf.

[7] I am satisfied that each of the matters complained of amounts to faulty construction and amounts to negligence. There will be judgment against the estate of the bankrupt,

Terry Lee Robertson in accordance with Exhibit "A" for identification, except for the hereafter noted exception. He is also liable on the implied warranty as to fitness and construction which I will discuss in connection with the claim against Ms. Thompson.

[8] As to Ms. Thompson, I am satisfied that while she took little or no part in the actual physical construction of the house, she must be regarded as an owner/builder. She was a co-owner in the original purchase. She took part, albeit not happily, in the decision to construct a home for sale upon the lot. She was a joint borrower of funds for the purchase. She was a joint borrower, apparently on several occasions, of funds to commence and carry on the building of the house. She would take messages back and forth to the project. She lived just across the street and monitored progress of the project for some time.

[9] She was to share equally in the profits or losses of the project. She was, of course, a joint vendor of the property. She bound herself in the interim agreement to see that the construction was finished. I am satisfied that her involvement is substantial enough as a developer and builder to place her in the category of a neighbour and render her liable to the plaintiffs in negligence. She knew her husband was an inexperienced builder, having built only one house before, and

she knew that money for the project was tight. Both these factors increased the risk of improper completion.

[10] I am also satisfied that she, as well as her common-law husband, are liable under an implied warranty of fitness and workmanlike construction. That warranty arises where, as here, there is a covenant as to completion in the agreement of sale. That warranty survives the closing of the transaction. ***Croft v. Prendergast***, [1949] 2 D.L.R. 708 (Ont. C.A.); ***Riar v. Bowgray Investments Ltd.*** (1977), 1 R.P.R. 46 (Ont. C.A.); ***Liddell v. Van-City Electric Ltd.*** (1994), 91 B.C.L.R. (2d) 331 (C.A.); ***Strata Plan NW2294 v. Oak Tree Construction Inc.*** (1994), 93 B.C.L.R. (2d) 50 (C.A).

> A warranty extends to work done before the interim agreement as well as after, unless the complained of workmanship and material was visible on inspection.
>
> (***Liddell v. Van-City***, *supra*)

[11] The matters complained of were not visible or apparent in 1995 to other than a trained eye. The only problem in the items claimed that became known was difficulty with the upper windows when washed directly with a hose. This became known to Mr. Grant after signing the interim agreement, but before closing. He was not aware that the windows were installed "wrong way up" or that they were unsuitable for bedroom use. Further, he was disarmed by being told by Mr. Robertson that the fault was his for washing the windows with a hose.

[12] As to liability of the Regional District, counsel concedes that if I find the inspectors to have negligently missed the complained of matters, the District is liable. I will deal with the matters in the same order as previously mentioned.

[13] As to the sewer system, the District admits that its inspectors simply missed the fact that an unsuitable system was held over from the previous mobile home and the lack of a health certificate was not noted by them.

[14] As to the rear veranda or sundeck and its lack of footings, Mr. Rippel, the inspector in question, says that he attended in response to a call for a footings inspection for the house and found the house footings to be already filled with concrete and therefore incapable of inspection. When he asked Mr. Robertson about that, he was told that an engineer had been retained. He was satisfied and did not look further at the site and did not go around to the back of the house at all.

[15] He did not check the house plans prepared by the engineer, although there was a copy at his office and under the applicable by-law a copy was required on site. If he had checked, he would have found that the rear veranda was not on the plans at all and thus was not being looked after by the engineer.

[16] I do not wish to be taken as holding that it would be in order to rely on the engineer in any case. By his failure to check at the site and at his office, the inspector negligently put it beyond his power to have caught the lack of footings under the veranda. As I understand, there is not and has not been a problem with the footings under the house that were on the engineered plans.

[17] As to the basement windows, the District takes the position that they were not in at the time when they were supposed to be installed, at the time of the framing inspection November 4, 1994. They say that if they were installed later, it would be difficult to detect the wooden inserts under them.

[18] First, it is not clear from the November 4th inspection report or from the witnesses that those windows were absent. The report only notes that "all missing windows" were to be installed. Next, if an item is noted as missing; which is supposed to be installed by the time of the inspection in question, it seems eminently reasonable to me that the inspectors ensure that if they allow construction to proceed, that it proceed in a manner enabling subsequent inspection to confirm proper installation of the missing item.

[19] Finally, there is evidence from Ms. Thompson that the windows in question were installed with wooden fillers on November 2, 1994. On a balance of probabilities, I accept that

it was so. The problem should have been caught and I have no difficulty in holding that the inspector or inspectors were negligent in failing to catch it.

[20] As to the upper windows, when Mr. Grant brought a glazier to the house to ask about the main floor bedroom windows, the problem with them was recognized immediately. They were windows with a solid pane in the middle and sliders at each end. The problem was that they were installed vertically instead of horizontally, thus for purposes of escape from the relevant bedrooms, the lower sliding portion would close itself by gravity. The windows were unsuitable for bedroom use.

[21] Further, it was obvious on inspection by a trained eye that they had drain holes on the side where they would do no good. That caused the windows to leak. It was not stated whether they also were purchased from Happy Harry's. The problems with them should have been spotted on inspections, including final inspection.

[22] As to exterior doors, I am satisfied that they did not meet code requirements, either as to the presence of manufacturer's name or their description as exterior doors or as to their construction, and that that should have been detected on inspection. I understand counsel to concede as

much if I held that the standards in the code applied, and I do.

[23] Similarly, the problems with the front porch deck should have been caught. Mr. Rippel, who did the final inspection, said that he was not aware that there was a living space under the porch. For some reason he said that if he was in the basement, he could not tell if an area in it matched a similar area on the floor above. The coating on the deck was insufficient for a deck over an inhabited space and was contrary to code and should have been checked into on the final inspection, if not before. Mr. Rippel said he could not detect a slope in the wrong direction of two inches over eight to ten feet, but another inspector said that he could and I prefer the evidence of the others. It too should have been noted.

[24] The only item about which I have some reservation is that of the garage floor and whether the average competent building inspector would test it for slope or notice that the slope was in the wrong direction. Clearly, the B.C. Building Code adopted by the Regional District by-law requires a slope to the outside. Mr. Rippel testified that he does not inspect garage floors.

[25] The garage is a part of the construction. I am not at all sure I should encourage individual inspectors to opt out of checking on possible code violations without some indication

in the code or by-law allowing for that. It is not such a slope as would be apparent to the naked eye. At the same time, it could easily be checked with a level or with water and the inspectors must be taken to know that a breach of the relevant provisions would make for a garage much less suited to its use for storage as well as giving rise to dampness and potential rotting. With some hesitation, I allow that claim against the District.

[26] The plaintiffs will have judgment jointly and severally against the defendants. The next issue is the third party claim of the District against Mr. Robertson and Ms. Thompson based in the first instance upon negligence. I would apportion liability against the District and the builders at 50% each and would limit contribution by Ms. Thompson to one-half of the amount for which the District is liable.

[27] Unfortunately for Ms. Thompson, the building permit issued by the District and signed by Mr. Robertson obliges the builder and owner to indemnify the District. A similar provision was held to cover such indemnity in ***Jensen v. City of Kamloops et al***, unreported, (December 11, 1992), Kamloops Registry 8591, before Mr. Justice Houghton. Having held that Ms. Thompson's involvement was that of a joint builder as well as owner, I can see no alternative but to hold that she, as well as her common-law husband, is bound by his signature.

[28] However, I am reluctant to apply the clause in the manner proposed which will in effect render the contribution provisions of the ***Negligence Act*** nugatory. There is some authority for the application of contribution provisions to contractual claims particularly where, as here, the (third party) claims are both in tort and contract -- see the discussion in ***Hancock v. Jade Excavating***, unreported, (June 9, 1986), Victoria Registry 82/0034, before Hutchison, L.J.S.C., as he was then.

[29] That application of contribution to contractual cases may not apply in the face of a specific contractual provision negating it -- see the ***Negligence Act***, R.S.B.C. The provision in question here reads:

> In consideration for the granting of this permit, I agree to indemnify and keep harmless the Regional District of Central Okanagan and its employees against all claims, liabilities, judgments, costs and expenses of whatsoever occurring, which may accrue against the said Regional District in consequence of and incidental to the granting of this permit.

[30] I am not satisfied that the clause in the circumstances of this case can be or should be interpreted to relieve against the negligence of the District as opposed to the negligence of the builder or that the District's liability arises "in consequence of and incidental to the granting of this permit".

[31] The liability of the District arises out of its own negligence. I am satisfied that if most of the problems had been detected when they should have been, they could have been rectified by the builder for a fraction of what it will now cost. One outstanding example is the basement windows which could have been replaced, with window boxes added, for much less than the present consequential costs of investigation, destruction of sidewalks, total replacement of front yard landscaping, damaged driveway, et cetera. Another example is the absence of footing on the back veranda which should have been caught at the beginning before cement was ever poured. Now the entire structure must be jacked up.

[32] An exact mathematical determination of the proportions of liability and quantum attributable to each is, of course, impossible. In my view, the disposition of the matter at equal liability is the maximum extent by which I should accede to the District's third party claim.

[33] There are a number of other issues. First, I am not satisfied that this is a proper case for an award of general damages. Next, I am not satisfied that the plaintiffs were contributorily negligent in this matter. The claim for a rear yard railing at $300.00, part of Item G on the schedule of plaintiffs' losses, filed as Exhibit "A" for identification herewith, is not allowed. There is no basis for it in either contract or tort.

[34] The plaintiffs will have their costs against the defendants on Scale 3. There is to be no duplication of costs against the separate defendants. The plaintiffs will be liable for costs assessed against the defendant District in connection with the dismissal of its claim against Interior Testing Services Ltd., from and after April 15, 1998. I am satisfied that the plaintiffs should have been prepared to abandon any claim based upon footings or foundations of the main house by that time, at the very latest.

[35] The third party claim of the Regional District against 4 Dee Engineering is to be dismissed without costs.