Indexed as:

Middlemiss v. Muller

Between
Barry John Middlemiss and Victoria Patricia Middlemiss, plaintiffs, and
John Muller and Violet Muller, Regional District of Central Okanagan, defendants, and
John Muller and Violet Muller, third parties

[1998] B.C.J. No. 3274

Kelowna Registry No. 33229

British Columbia Supreme Court
Kelowna, British Columbia

Brenner J.

Oral judgment: June 23, 1998.

(32 paras.)

Limitation of actions -- Actions against municipalities -- When limitation period commences -- Actions in tort.

Application by the defendant Regional District of Central Okanagan for the dismissal of the action of the plaintiffs Barry and Victoria Middlemiss for their failure to comply with the six-month limitation period. The Middlemisses bought a house from the defendants John and Violet Muller in April 1993. John had built the home that was within the boundaries of the District that performed the required inspections before issuing the final approval in 1993. In July of 1993 there was a heavy rainfall in and around the house and surface water entered the house because of improper grading and roof draining facilities. Other deficiencies were discovered in that month. Muller excavated to try to resolve some of the problems. Further deficiencies came to light. The floor slab in the living room had settled two and a half to three inches. In 1994, John called the District who wrote to Muller twice. There was no response. John consulted a lawyer in the fall of 1994. In the spring of 1996, further floor slab settlement became apparent. John retained a geo-technical and a structural engineers. Their reports indicated that the house was built on loose fill and that the floor slabs,

footings and foundations had settled as a result. This action was commenced in October 1996. John had some experience in the construction field. He confirmed that very early he understood that there were fairly serious problems. He was aware of the settlement problem.

HELD: Application allowed. The deficiencies identified in 1993 were statute-barred since the Middlemisses were aware of those defects then. John was aware in February 1994 that there was a subsistence problem with the house. That was the point at which the limitation period commenced to run for this part of the claim. The latest date on which it could be said that the six-month limitation period commenced to run would have been November of 1994, after consulting counsel.

Statutes, Regulations and Rules Cited:

Municipal Act, R.S.B.C. 1996, c. 323, ss. 285, 286.

Counsel:

T. Richard Brooke, Q.C., for the plaintiffs.
Leonard S. Marchand, for the defendant, Regional District of the Central Okanagan.

---

1 **BRENNER J.** (orally):-- On this application the defendant, Regional District of Central Okanagan ("RDCO") applies for a dismissal of the plaintiffs' action for their failure to comply with the six-month limitation period as provided by Section 285 of the Municipal Act R.S.B.C. 1996 c. 323. Both sides agree that this matter is suitable for an 18A determination and seek to have this issue decided on the basis of the filed evidence.

2 The plaintiffs own a house at 2223 Hayman Road, Kelowna. They purchased that home from the defendants, John and Violet Muller, on April 30, 1993. The home had been built by Mr. Muller. The home is within the boundaries of the defendant, RDCO. Preparation of the site and construction of the home were subject to the building bylaws of and inspections by the RDCO, which performed the required inspections before issuing a final approval on April 27, 1993.

3 In July of 1993, there was a heavy rainfall in and around the plaintiffs' house. Surface water entered the house because the level of the ground around the house was graded towards instead of away from the house together with inadequate roof drainage facilities. Other deficiencies in the house and the landscaping were discovered by the plaintiffs in that month, including the fact that the south foundation wall had not been damp-proofed; sod had been placed above the top of the south foundation wall; the top of the south foundation wall had imperfections allowing water to enter the home; the eaves troughs around the home sloped in the wrong direction; and there were numerous problems relating discharging roof water off-site. After this flood event in July of 1993, Muller

excavated to try to resolve some of these problems.

4 Between July 10 and August 16, 1993, further construction deficiencies came to the attention of the plaintiffs, including a drip in the en suite closet, a water leak from one of the living room windows, a water leak through the front entrance ceiling, and a broken floor tile.

5 On August 16, 1993, the plaintiffs wrote to Mr. Muller setting out the deficiencies and seeking rectification. Mr. Muller did not respond.

6 The plaintiffs experienced further problems between August of 1993, and early in 1994. In particular, they noted that other parts of the foundation walls had not been damp-proofed, the floor slab in the living room had settled two and one-half to three inches, and the vinyl siding, mouldings, and trim had numerous gaps. In addition, a number of the earlier problems remained outstanding.

7 In early 1994, Mr. Middlemiss called the offices of the RDCO, and spoke with its Deputy Chief Building Inspector, Ray Patterson. On February 2, 1994, Patterson visited the plaintiffs' home, and Middlemiss showed him the deficiencies.

8 Patterson advised the plaintiffs that "the contractor is responsible for building the home to the codes, even though the Regional District does the inspections." Mr. Patterson also advised the plaintiffs that he would write a letter to Mr. Muller on their behalf, which he did on February 3, 1994.

9 Over the next four months Muller failed to respond to Patterson's February 3, letter. The RDCO took no further steps on behalf of the plaintiffs.

10 On June 13, 1994, Middlemiss wrote to Patterson asking him to follow up with Muller. On June 27, Patterson wrote the requested follow-up letter to Muller.

11 Muller did not respond to Patterson's June 27, 1994, letter, and Middlemiss consulted with his lawyer, David Rush, periodically in the fall of 1994. At approximately this time Middlemiss came to understand that to get the RDCO to take action he would have to sue them, or at least threaten a suit, and ultimately the plaintiffs instructed Rush to put the RDCO on notice of a claim against it.

12 On November 1, 1994, Rush wrote the requested notice letter to the RDCO. The notice letter specifically alleged that, "there were substantial defects to the construction," of the home, and it provided notice under the Municipal Act of a claim against the Regional District for negligence arising out of the improper inspection of the construction of the project, and the failure to ensure that the home was constructed in accordance with the Building Code.

13 In the spring of 1996, further floor slab settlement became apparent to the plaintiffs. At this time their neighbours, Mr. and Mrs. Swirski, whose house had also been constructed by Muller, obtained the services of a private building inspector, one Owen Dickie, of Home Pro Inspection

Services to inspect their house to determine whether it complied with the Building Code. As a result of this, and Middlemiss' continuing concerns about the property, he also engaged Dickie and Home Pro, who provided the plaintiffs with a written report on May 21, 1996. Dickie also advised Middlemiss that the construction defects could be far more serious than Middlemiss had first imagined on the basis of his own inspection. Dickie advised Middlemiss to seek the assistance of a geo-technical engineer, and a structural engineer.

14 By letter dated May 24, 1996, from their then lawyer, Neville McDougall, the plaintiffs provided the RDCO with further notice pursuant to the Municipal Act. The plaintiffs eventually retained the services of geo-technical engineers, Interior Testing Services Limited, and a structural engineer, Mr. Ron Molina, to assess the settlement of the floor slabs. These consultants reported to the plaintiffs that the home was built on loose fill, and that the floor slabs, footings, and foundations had all settled as a result.

15 The plaintiffs commenced this action on October 8, 1996.

16 It is to be noted that Mr. Middlemiss has some experience in the construction field, having worked for a number of years as a developer of modular home parks. At his examination for discovery he confirmed that he was aware of the function of building inspectors. He also confirmed that from a very early stage, he understood that the plaintiffs had "fairly serious problems."

17 It also appears from his examination for discovery that by February, 1994, because of the two and one half to three inch settlement in the living room floor slab Middlemiss was aware of a settlement problem. He was specifically aware that something was happening with respect to materials under the floor not having been prepared properly leading to settlement. He also testified that when he met with Mr. Rush in the fall of 1994, he advised Mr. Rush that the RDCO had not completed its building inspections properly.

18 Middlemiss also testified that with the exception of the floor slab in the kitchen area dealt with in the consultant's report in 1996, all deficiencies identified in the Home Pro report would have been apparent if a similar inspection had been performed in 1993.

19 The position of the applicant defendant is that this claim is statute-barred by reason of the failure of the plaintiff to commence the action within the six-month limitation period set out in the Municipal Act.

20 The respondent plaintiffs take the position that it was not until the report was received from Home Pro that they appreciated the potential nature and extent of the construction deficiencies and structural defects with the home. They say that it was not until the reports from Interior Testing and Molina were received that they appreciated that the defects in the construction were structural, that the house had been built on fill, and that the remediation required was extensive.

21 The plaintiffs also say that the first defects that were noticed in 1993 and 1994, related to

surface water drainage, that is, the construction defects associated with surface water drainage and inadequate construction techniques used to cope with rainfall at the house, including the roof and other matters, and that it was only in 1996 that the plaintiffs recognized that there was a serious problem with soil stability which was causing the subsidence.

22 The issue is whether the plaintiffs are time-barred from proceeding with this action, either in whole or in part, by reason of Sections 285 an 286 of the Municipal Act..

23 In Ordog v. District of Mission (1980) 31 B.C.L.R. 371, 380. Mr. Justice Bouck stated:

> First of all, a case of action against the defendants arose at the time the plaintiff discovered the damage or when she ought to have discovered it with reasonable diligence: Sparum Sooter v. Town & Country Developments Essex Limited (1976) 2 L.E.R. 65 at 67. In my view, the law did not require her to know the intricacies of the Building Code and so be alerted to any differences between what was contained therein and what was actually the case; therefore time began to run when she ascertained the wall was beginning to sag due to the excessive overhang, that was when the damage was discovered by her.

24 It is clear, in my view, that for the time to commence to run a plaintiff must not only have suffered damages, but must also, under s. 286, be in a position to "give particulars of the time, place, and manner of the damages," and "be in a position to know that the municipality has committed some act or has omitted to do something which may make it liable in whole or in part for the damage sustained by the complainant." See Grewal v. District of Saanich, (1989) 45 M.P.L.R. 312 at 319.

25 Dealing firstly with the deficiencies that were identified by the plaintiffs in 1993, those deficiencies are set out in the plaintiffs' letter of August 16, 1993, to Mr. Muller, which, at page 3, contains an inventory of the defects. In my view, those claims are clearly statute-barred. The plaintiffs were clearly aware of those defects in 1993, and, hence, the within cause of action cannot be maintained in respect of those claims.

26 The second issue, and the more troublesome is whether the plaintiffs can maintain their action in respect of the soil instability, and the failure of the municipality to detect the alleged failure of the contractor to comply with the Code provisions. In my view, the answer to that issue is to be found in the examination for discovery evidence of the plaintiff, Mr. Middlemiss. At the time of that discovery, counsel for the RDCO reviewed with Middlemiss the February 3, 1994, letter, written by Mr. Patterson, of the RDCO, to Mr. Muller, at Middlemiss' request. That letter contained an inventory of the surface drainage and roof leak and water leak problems, if I can characterize them as such, and it also included under item number 6, "the floor slab is not level on the north east corner of the living room."

27 At his discovery, at page 106, starting at question 665, the following questions and answers

were asked and given:

Q Going through with the numbered problems on this letter of February 3, 1994, which has been marked Exhibit 5, number 6, as "the floor slab is not level on the north east corner of the living room." So by February of '94, you have got a settlement problem that you are aware of?

A Yes.

Q And at this point do you believe it's confined to the living room or is it, in fact, confined to the living room, or is it elsewhere in the house?

A At that point in time the living room was of the main concern.

Q But was there settlement elsewhere?

A At that point in time I would have to say that it was mainly the living room that was the problem.

Q I guess I am just asking you to rule out was there settlement elsewhere that you were aware of at that time?

A No.

Q How much settlement was there or it says the floor slab was not level. How not level was it?

A It would be approximately two and a half to three inches down from the centre of the floor.

Q Did you ask Mr. Patterson how that might have happened, or did you

just say there is some settlement here, my floor slab isn't level?

A I believe he walked over and had a look at it, but his exact remarks I couldn't say.

Q You were aware at that point in time if your floor slab has dropped three inches it means that the materials underneath the floor slab haven't been prepared properly and it's settling?

A Something is happening, yes.

28 In my view, those series of questions and answers indicated that the plaintiff was aware in February of 1994, that there was a subsidence problem with respect to the house. This is consistent with his other discovery evidence, including his evidence that from a very early stage he knew that the plaintiffs had fairly serious problems, and that by February of 1994, the vinyl siding, mouldings, and trim, had numerous gaps and voids throughout, which allowed water into the wall assembly.

29 In my view, when Middlemiss became aware of the sbsidence to which he referred in February 1994, that was the point at which the limitation period commenced to run. By then he was aware of the nature of the damage, and that the action against the municipality ought to have been commenced within the six months from that date. In the event that I am wrong in that conclusion, it seems to me that the latest date on which it could be said that the six-month period commenced to run would have been November of 1994, after consulting counsel, and after the November 1 notice letter was written. In either case I conclude that this action is out of time as against the municipality, and the application, accordingly, will be allowed.

30 Are there any submissions with respect to costs?

31 THE COURT:-- Costs will follow the event if demanded by the municipality, and the municipality.

32 THE COURT:-- Thank you, counsel.

BRENNER J.

qp/d/np/qltlm