

*Constructive* ✓

PROVINCIAL COURT  
OF BRITISH COLUMBIA  
MAR. 1 1997  
SMALL CLAIMS COURT

NO. S10019  
Abbotsford Registry

PROVINCIAL COURT OF BRITISH COLUMBIA  
HOLDEN AT ABBOTSFORD

BETWEEN: )  
)  
ROBERT MINIELLY & )  
RITSA MINIELLY )  
CLAIMANTS )  
AND: )  
CITY OF ABBOTSFORD )  
ET AL )  
DEFENDANTS )  
AND: )  
TOOK STRUCTURAL )  
LABORATORY INC. )  
THIRD PARTY )

REASONS FOR JUDGMENT  
OF  
THE HONOURABLE JUDGE  
T. DENNIS DEWITT

Counsel for the Claimants:  
Counsel for the Defendant:  
CITY OF ABBOTSFORD:  
Counsel for the Defendants:  
CENTRAL VALLEY ENGINEER-  
ING SERVICES LTD., JAN  
SCHOUTEN and TOOK  
STRUCTURAL LABORATORY  
INC.:  
Counsel for the Third Party:

IN PERSON  
JEREMY M. POOLE  
  
JOHN J. KIM  
JOHN J. KIM

DATE: MARCH 6, 1997

This is an action brought by the claimants who are husband and wife. The claim against the defendants is for damages arising out of the negligence of the defendants.

The claimants purchased a house at 3523 Miereau Court in the City of Abbotsford in 1991. They resided at the house until September 1993 at which time they moved to North Vancouver. They rented the house in Abbotsford until 1994 at which time they received a offer for the purchase of the home.

The sale was subject to inspection of the house and the prospective purchaser backed out of the transaction after consulting a building inspector. What the purchaser discovered was that there were cracks in the foundation . Cracks also began to form in the interior which became progressively worse. At the suggestion of a Realtor the Claimants engaged the services of P.S. Lacombenof A.S.H.I. of Metro Home Inspections on June 16,1994. The Claimants were confident that he was a registered Engineer although his report does not disclose that fact. His report indicated an ongoing movement of the soil and the foundation.

Mr. Minielly said that when they bought the home they never noticed any cracks in the foundation although they didn't inspect the home extensively. Because of the implementation of disclosure the Claimants were now compelled to disclose the circumstances to any prospective purchaser. They relisted the house for four months with no success. It was taken off the market in October 1994. It was again relisted on October 21 to March 30, 1995. Their then realtor informed the Claimants in November that on investigation he learned of reports of problems during construction. Upon investigation the claimants learned that to correct the problem the cost would be exorbitant. Mr. Minielly acknowledged that while living in the home he had noticed that there was a space between the post supporting the upper deck and the floor of the deck. He and his father-in-law put a piece of 2 x 4 in the space and he thought no more about it.

The Claimants lay opinion was that the fill on the embankment adjacent to the house was sliding downhill . There was a crib wall built at the bottom however it did not extend fully across the property but stopped half way. The result was that the wall retained the soil behind it but where there was no crib wall the soil continued to slid shifting the house around on a east-west axis where the wall ended.

The contractor who constructed the house was Golden Key Construction. The principal of that company was Mr. Van-T Gloof. The Municipal building inspector overseeing this project was Mr. W. McLean who has since died. On Oct. 12 ,1982 Mr, McLean completed an inspection report in which he remarked that a soil test was required and, "Engineers inspection & approval of designed foundation required--appears to be on fill". As a result approval was not given. Golden Key then consulted Central Valley Engineering Services Ltd. who conducted an investigation of the footings for the proposed house. On October 19, 19<sup>8</sup>2 that company reported through Mr. J. Schouten P. Eng. that the bases as constructed with the seven pillars at the west footing of the house on lot 631 were adequate for the proposed homes.

On October 25, 19<sup>8</sup>2 approval was given for the footing and foundation subject to engineers approval . Mr. McLean noted on February 14 1983 that , "Engineers letter of inspection and approval of this foundation required before anymore construction done". Another note says the foundation is cracked in three places. Mr. Schouten wrote on July 5, 19<sup>8</sup>3 that two major cracks appear near the chimney. He felt that was caused by placing material adjacent to the foundation wall. It was his opinion that there would be no further settlement. The remedy he prescribed for those cracks was to build a wall outside the foundation wall which in his opinion would render the foundation walls adequate for the intended use. However the City of Abbotsford did not share that opinion. On July 15 1983 Mr. Exley wrote to Mr. Schoulten stating in his opinion the

cracks were caused by the settling of the northeast corner of the foundation. He said that the contractor shared his opinion. As a result of his concern Mr. Exley requested an opinion from a third person, namely a engineer with soils and foundation experience. He expressed the concern that the rear of the house would sluff placing the foundation in jeopardy.

In a inspection report issued by Mr. McLean in August 1983 he said that an Engineer's letter of approval of the foundation was required before any occupancy of the house would be allowed and that it was not approved for occupancy. Obviously the house had been allowed to progress beyond the foundation stage without final approval of the foundation having been granted. On February 21, 19~~8~~<sup>8</sup>4 Mr. Exley wrote to the Contractor informing him that unless the Engineer's letter of approval of the foundation was received within fourteen days a "no occupancy notice would be posted on the dwelling". Indeed a no occupancy notice was posted on March 7, 19~~8~~<sup>8</sup>4 by or at the direction of Mr. McLean. That same day the notice was removed at the direction of Mr. Exley. At some point Mr. Exley felt an impasse had been reached between Mr. McLean and the contractor. It was Mr. Exley's view that he ought to become directly involved. The contractor was exerting pressure as he wanted to list the house for sale.

On May 7, 1984 Took Structural Laboratory Inc. had been retained to provide an opinion on the soil condition. They recommended a wooden crib wall be placed according to a sketch which was attached to their letter. It is interesting to note that while the sketch shows the general configuration of the wall to the slope there are no dimensions provided. Nevertheless, Mr. Exley informed the contractor that no occupancy permit would be issued until the recommendation of Took Structural Laboratory Inc. had been completed and approved. Mr. Exley issued the occupancy permit on September 12, 1984 but did not inspect the crib wall before doing so.

A undated note was produced by the City of Abbotsford purportedly in the handwriting of Mr., McLean, or at least Mr. Exley recognized it as such, in which Mr. McLean prophetically states that the crib wall should be across the entire property. Unfortunately, it was not built in that manner and the unsupported portion of the hill continued to sluff away bringing the foundation with it.

In my view the building inspector, Mr. Exley, was too anxious to accommodate the builder and in doing so overlooked his responsibility to prospective purchasers of the property. They were entitled to rely on a proper inspection. Furthermore, Took Structural Laboratory Inc. ought to have known that the contractor would in the absence specific dimensions and direction build the crib wall according to the diagram which displayed the wall as traversing just part of the slope. In my view the engineer had a duty of care to future owners of the property. It was reasonably foreseeable that if the crib wall was not extended across the width of the property the soil where unretained would slide down the embankment. Purchasers who bought from the contractor and subsequent purchasers who were not privy to the concern of Mr. McLean would buy the property without suspecting the risk of which the Engineer was fully aware or should have been. If the Engineer intended the wall to extend across the property that should have been made clear to the contractor. If that was not his intention it ought to have been. Its obvious even to a lay person that unstable fill will follow the line of least resistance. In this case the line of least resistance is the area beyond where the wall ends. That point provided an a east- west axis where the soil sluffed down the embankment causing the house to continue settling. The building inspector, Mr. McLean , appreciated the risk and would not grant approval without an engineering assessment and appropriate remedy. Indeed, he posted a no occupancy notice on the property which was removed the

same day by Mr. Exley. Unfortunately, Mr. Exley decided to accommodate the contractor who was anxious to list the property. As a result a occupancy permit was granted but there was no final inspection to ensure that there had been compliance or whether the remedy recommended was adequate.

Accordingly, I find the defendants City of Abbotsford, and Took Laboratory Inc. jointly and severally liable in negligence to the Claimants. The apportionment of liability as between those defendants is 50% each. The damages awarded is \$10,000.00 with interest at the rate fixed by the Registry from December 1991 to the date of this judgment. In addition the Claimants are entitled to the filing fee and the service fee.

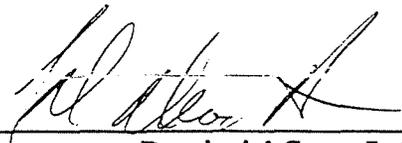
Support for this conclusion is found in Winnipeg Condominium v. Bird Constructions, 18 C.L.R., (2d), p. 1, where La Forest, J., in delivering the judgment of the Court, said as follows:

*“In my view, it is reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves. A lack of contractual privity between the contractor and the inhabitants at the time the defect becomes manifest does not make the potential for injury any less foreseeable. Buildings are permanent structures that are commonly inhabited by many different persons over their useful life. By constructing the building negligently, contractors (or any other person responsible for the design and construction of a building) create a foreseeable danger that will threaten not only the original owner, but every inhabitant during the useful life of the building.....”*

Laforest J. in Rothfield v. Manolakas [1989] 41 B.C.L.R. (2d) 374 said as follows:

*"...the city, once it made the policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers."*

Although Central Valley Engineering Services Ltd. was wrong in its assessment of the footings and foundation its opinion was not relied upon by the building inspector. In fact the building inspector rejected their opinion and required an opinion from a soil engineer. That role was fulfilled by Took Structural Laboratory Inc. In the circumstances Central Valley Engineering Services Ltd . and the defendant Jan Schouten cannot be held liable to the Claimants and the action against them is dismissed.

  
Provincial Court Judge