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Citation: Wedel v. Loewen et al.  
2000 BCSC 1406

Date: 20000922  
Docket: S0003897  
Registry: Chilliwack

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**ROBERT JACOB WEDEL AND  
TRUDEEN CAMERON ARCHIE**

PLAINTIFFS

AND:

**HELEN LOEWEN,  
THE ESTATE OF HANS LOEWEN, DECEASED  
AND BLUE JAY DEVELOPMENTS LTD.**

DEFENDANTS

AND:

**CENTRAL VALLEY ENGINEERING SERVICES LTD.,  
JAN SCHOUTEN, BLUE JAY DEVELOPMENTS LTD.,  
AND THE CITY OF ABBOTSFORD, THEN KNOWN AS  
THE CORPORATION OF THE DISTRICT OF MATSQUI**

THIRD PARTIES

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE MR. JUSTICE DROST  
(IN CHAMBERS)**

Counsel for the Plaintiffs:

W.R. Neufeld

Counsel for the Defendants:

K.G. Sawatsky

Counsel for The City of  
Abbotsford:

C.L. McLean

Date and Place of Hearing:

Chilliwack, BC  
April 3, 2000

***Introduction***

[1] This is an application by the defendants Helen Loewen and the Estate of Hans Loewen, Deceased (collectively "the Loewen Defendants"), pursuant to Rule 2(7) of the ***Rules of Court***, for an Order dismissing the plaintiff's action against them for want of prosecution.

***The Action***

[2] The action concerns a residential house ("the Residence") built by the deceased, Hans Loewen, in 1988.

[3] Mr. Loewen died on December 12, 1990. His widow, the defendant Helen Loewen, was the sole administratrix of his estate. On August 28, 1991, she sold the Residence to the plaintiffs.

[4] The action was commenced on September 7, 1994. In a Statement of Claim filed that day, the plaintiffs allege that, in or about November, 1992, they discovered that the Residence was settling unevenly and rotating on its concrete foundations to such an extent that its structural integrity was threatened. They say that the Residence was built on a subsurface layer of peat over which sand fill was placed by one or more of the defendants, their servants or agents, and that the settlement and rotation of the Residence was a natural and foreseeable result of inadequate and improper site preparation.

[5] The plaintiffs allege that by failing to carry out adequate site inspections or soil tests, and by designing and installing inadequate preload, the defendants breached a duty of care owing by them to the plaintiffs and other future

owners of the Residence to ensure that the subsurface composition of the site was reasonably suitable for the construction of the Residence.

[6] They further allege that, having regard to the presence of subsurface peat, the construction of the Residence was performed negligently and contrary to the provisions of the **National Building Code**.

[7] The plaintiffs claim damages, including the cost of remedial works which they say were a foreseeable consequence of the defendants' negligence.

[8] On August 21, 1995, the Loewen Defendants filed a Statement of Defence. They amended it on February 12, 1997. They deny liability and, in further answer to the plaintiffs' claims, say that any loss or damage suffered by them was solely attributable to, or contributed to by, the negligence or negligent misrepresentation of one or more of the Third Parties whom they joined.

[9] The Loewen Defendants raised several other specific defences including a denial that Helen Loewen was involved in the construction of the Residence and owed a duty of care to the plaintiffs.

[10] In further answer, the Estate of Hans Loewen, Deceased, also pleads *plene administrative* on the ground that it had been fully administered before the action was commenced.

[11] The only steps taken on behalf of the plaintiffs since their Statement of Claim was filed have been:

- (a) the examination for discovery of Helen Loewen on December 18, 1997;
- (b) the filing and delivery of a Notice of Intention to Proceed on or about February 16, 1999; and
- (c) the sending of a letter to defendants' counsel on May 13, 1999, asking for certain information and documents for which requests had been made during Mrs. Loewen's examination for discovery. The request was answered on June 15, 1999.

[12] No trial date has been arranged.

[13] The City of Abbotsford supports the application. It seems that three of its former building inspectors were involved in construction of the Residence. One of them, apparently the person who signed the building permit application, has since died. The other two, one of whom apparently signed a building inspection report, retired some years ago.

**The Test**

[14] In ***Star-Ten Contracting Ltd. v. Laurentian Pacific and Zurich Insurance Company*** (1997), 97 B.C.A.C. 92, Hollinrake J.A. said that, in order to determine whether an action should be dismissed for want of prosecution, the following questions must be answered:

- (a) Was there inordinate delay? If so,
- (b) Was the inordinate delay inexcusable? If so,

- (c) Did the delay cause serious prejudice or was it likely to have caused serious prejudice to the applicant? If so,
- (d) On a balancing of justice between the parties ought the action be dismissed?

***Discussion***

[15] In this case, the plaintiff concedes that the six-year delay since the action was commenced has been both inordinate and inexcusable. That leaves to be decided only the question of prejudice, and the balancing of justice between the parties.

[16] As to prejudice, because Mr. Loewen died before the action was commenced, it cannot be said that the unavailability of his evidence can be attributed to the plaintiffs' delay.

[17] But, there is evidence that Mrs. Loewen is not in good health, and has only a limited recollection of the relevant events. In answer to that, the plaintiffs say that no prejudice has resulted from the delay because, on her examination for discovery, Mrs. Loewen demonstrated that she never had any clear understanding of the details of the construction. Moreover, they say, this is largely a "document case" and the Building Permits speak for themselves.

[18] With respect to the deceased and retired building inspectors, the plaintiffs say that there is no indication of the relevance of their testimony, or what "impact" the fact of retirement might have upon the evidence of the two survivors.

**Conclusions**

[19] I am satisfied that the Loewen Defendants have been prejudiced by the inordinate and inexcusable delay. While it may be the case that Mrs. Loewen's knowledge of the relevant facts was always sparse, I am not persuaded that this is a pure document case. I accept the defendants submission that, in order to meet the plaintiffs' allegations regarding site inspections and the application of preload, which appear to be critical issues, the testimony of third parties such as the subcontractors and the surviving building inspectors, would be most required. Some of those persons may now be difficult to locate; others may no longer have a clear recollection of events that occurred ten or more years ago.

[20] Moreover, the Loewen Defendants do not have to establish actual prejudice. Where there has been inordinate and inexcusable delay, there arises a rebuttable presumption of prejudice: *Busse v. Robinson Morelli Chertkow* [1999] B.C.J. No. 1101 (B.C.C.A.).

[21] In my opinion, the plaintiffs have failed to rebut the presumption of serious prejudice and justice requires that the action be dismissed.

[22] Unless counsel wish to address the matter, costs shall follow the event.

"I.L. Drost, J."  
The Honourable Mr. Justice I.L. Drost

September 27, 2000 -- Memorandum to the Legal Publishers issued as directed by Mr. Justice Drost advising the following:

*"Counsel for the Plaintiffs: W.R. Neufeld and  
Counsel for the Defendants: K.G. Sawatsky"*