Citation: Armstrong v. Dist. of West Vancouver (Corp. of)
2002 BCSC 135

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Docket: C996141
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WENDY ARMSTRONG

PLAINTIFF

AND:

THE CORPORATION OF THE DISTRICT OF WEST VANCOUVER

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE ROGERS**

Counsel for the Plaintiff: C. Armstrong

Counsel for the Defendant: T.W. Barnes

Date and Place of Hearing: January 17 and 18, 2002
Vancouver, BC

[1] This is an application pursuant to R. 18A to dismiss the plaintiff's claim against the defendant. The action is set for trial on April 15, 2002.

BACKGROUND

[2] In 1963 the defendant's employees inspected the fill and foundation work for the construction of a house at 590 Newdale Place, in West Vancouver. The work was approved and in May 1963 a certificate of occupancy was issued. The house was then occupied. The evidence does not reveal how many people owned the house through the years, but it

does appear to have been lived in throughout the 60's, 70's, 80's, and to the present.

[3] For the purpose of the summary trial the defendant did not contest the plaintiff's allegation that the fill on which the house was built was not up to standard. Whether the defendant's employees were negligent in their duties was not relevant to the application and was not addressed in evidence or argument.

[4] The problem with the fill under the house was that it had organic matter in it. That organic matter included logs. Eventually those logs decomposed. As the wood rotted away gaps developed in the ground soil. Soil moved in to fill those gaps. In the result, the foundation of the house lost support. The foundation settled and cracks appeared in the walls of the house's basement. Those cracks were evident when the plaintiff purchased the house in 1987 but she paid them no particular mind.

[5] About four years after moving into the house the plaintiff noticed that the floor of the house was uneven. However, nothing much was done about the problem. Then, in January 1999, the plaintiff saw that a mudslide had taken place in her backyard. She retained a geo-technical engineer to assess the cause of the slide and to recommend a remedy. The engineer determined that the house was built on improper fill.

[6] In September 1999 the plaintiff moved out of the house. On November 22, 1999 she issued her writ against the defendant claiming, *inter alia*, negligence for failure to properly inspect the house during its construction phase. In December 1999 she sold the property for, she alleges, a substantial loss.

[7] The defendant says that the plaintiff's action is barred by the 30-year limitation period prescribed by s. 8(1)(c) of the ***Limitation Act***. Sections 6 and 8 of the ***Limitation Act*** are relevant to the conclusions I have reached. Those sections read as follows:

> 6(1) The running of time with respect to the limitation period set by this Act for an action
>
> > (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy, or
> >
> > (b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use,
>
> is postponed and does not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

(2) For the purposes of subsection (1), the burden of proving that time has begun to run so as to bar an action rests on the trustee.

(3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

(a) for personal injury;

(b) for damage to property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief from the consequences of a mistake;

(g) brought under the *Family compensation Act*;

(h) for breach of trust not within subsection (1).

(4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

(a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and

(b) the person whose means to knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

(5) For the purpose of subsection (4),

(a) **"appropriate advice"**, in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,

(b) **"facts"** include

(i) the existence of a duty owed to the plaintiff by the defendant, and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff,

(c) if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and

(d) if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

(6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

(7) Subsections (3) and (4) do not operate to the detriment of a purchaser in good faith for value.

(8) The limitation period set by this Act with respect to an action relating to a future interest in trust property does not begin to run against a beneficiary until the interest becomes a present interest.

. . .

8(1) Subject to section 3(4) and subsection (2) of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11(2) or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, no action to which this Act applies may be brought

(a) against a hospital, as defined in section 1 of the *Hospital Act*, or against a hospital employee acting in the course of employment as a hospital employee, based on negligence, after the expiration of 6 years from the date on which the right to do so arose,

(b) against a medical practitioner, based on professional negligence or malpractice, after the expiration of 6 years from the date on which the right to do so arose, or

> (c) in any other case, after the expiration of 30 years from the date on which the right to do so arose.
>
> (2) Subject to section 7(6), the running of time with respect to the limitation periods set by subsection (1) for an action referred to in subsection (1) is postponed and time does not begin to run against a plaintiff until the plaintiff reaches the age of majority.
>
> (3) Subject to subsection (1), the effect of sections 6 and 7 and subsection (2) of this section is cumulative.

[8] It falls to the court on this application to determine the date on which the plaintiff's right to bring an action for the alleged negligence arose. If that date was between May 1963 and November 21, 1969, then the plaintiff's writ was issued more than 30 years after her right to sue arose and the action must be barred. If the cause of action arose on November 22, 1969, or later, or if the date cannot be determined, then the plaintiff says that s. 8(1)(c) can have no application to her action and as such, the defendant's application must be dismissed and, the case must go to trial.

ISSUES

[9] The issues to be determined are:

> 1. When, for the purpose of s. 8(1)(c) of the ***Limitation Act*** R.S.B.C. 1996, c. 266, does a cause of action arise; and
>
> 2. If the claim is for pure economic loss, is the claimant's knowledge of the elements of a cause of action a necessary ingredient to the beginning of the running of time under s. 8(1)(c).

ANALYSIS

[10] The central question here is: "When did the plaintiff's right to bring an action arise"? The test for determining the happening of that event was articulated by Esson J.A., in ***Bera v. Marr*** (1986), 1 B.C.L.R. (2d) 1 (C.A.), at 25:

> The discussion of the limitations issue in *Kamloops v. Nielsen* does not involve any interpretation of the words of the Act and does not, in my view, support the conclusion that when the Act uses the words "the right to do so" *(i.e., to bring action) it refers to any time other than that which has traditionally been held to be the time in which a cause of action accrues, i.e., when all the elements exist irrespective of the plaintiff's state of knowledge or, in the words of Lord Pearce in *Cartledge* which I

> quoted earlier:"... the time runs from the accrual of the cause of action whether known or unknown..."

[11] This statement stands for the proposition that for the purpose of determining when a cause of action arises so as to start the running of the limitation, the plaintiff's knowledge of the existence of the elements of the action is not relevant. Whether the facts were 'known or unknown' or were, as other authorities have termed them, 'discoverable', is relevant only to the application of s. 6 of the ***Limitation Act***. Section 6 contains provisions that operate to suspend or postpone the running of a limitation period. Those provisions do not relate to when the cause of action itself arose.

[12] As held in ***Bera***, the cause of action arises when 'all the elements exist'. The elements that form a negligence claim were discussed in ***Brook Enterprises Ltd. v. Wilding et. al.*** (1973), 38 D.L.R. (3d) 472 (B.C.S.C.), where McIntyre J. held at 476:

> As pointed out in that case, to have a cause of action for negligence, three elements must be present, a duty, a breach of duty, and damage.

[13] In the present application, the duty and the breach of duty are givens for the narrow purpose of determining the s. 8(1)(c) limitation issue. The real question is whether the damage that completes the elements of the cause of action of negligence was extant on or before November 21, 1969, i.e. more than 30 years before the writ was filed.

[14] The plaintiff says that the damage was not present, or in the alternative, that the presence of damage by November 23, 1969 has not been proven by the defendant. The plaintiff argues that in the context of a claim for the defective construction of a house, 'damage' means physical damage to the structure. In this case, the plaintiff says that the only physical damage in evidence is the cracking of the foundation and that we cannot know when the cracking first appeared. It may have been before November 21, 1969, or it may have been after. The plaintiff says that without proof that the physical damage was extant by November 21, 1969, there is no proof that the cause of action arose more than 30 years before she issued her writ and her claim cannot be barred by s. 8(1)(c).

[15] In support of her position, the plaintiff compiled an intricate argument founded on the interrelationships of, among other things, decisions of various courts, including ***Sparham-Souter and others v. Town and Country Developments (Essex) Ltd. and another***, [1976] 2 All E.R. 65 (C.A.), ***Pirelli General Cable Works Ltd. v. Oscar Faber & Partners,*** [1983] 1 All E.R. 65 (H.L.), and ***Kamloops v. Nielsen***, [1984] 2 S.C.R. 2.

[16] It comes down to the plaintiff saying that the claim arising out of the defendant's negligence is for pure economic loss. She says that because such a claim is founded on damage to or diminution in the value of the property, and because value can only be determined when there is enough known about the property to appreciate its worth, then if one is ignorant of a defect in the property, there is no reason to discount

its value. If there is no reason to discount value, then no loss has been suffered and as such, there is no damage and no right to sue. The plaintiff concludes that if there is no right to sue, then the clock does not start to run under s. 8(1)(c) of the ***Limitation Act***. This position, if correct, would make it necessary to assess the 'discoverability' of a defect when a claim for pure economic loss is brought. As the plaintiff would have it, no cause of action arises until the defect on which a claim for pure economic loss is based, is discoverable by the party advancing that claim. She maintains, therefore, that a claim for pure economic loss for a defect in property cannot arise until that defect transits from latent to patent.

[17] Further, the plaintiff says that she had no cause of action until she acquired the property. The plaintiff cites ***Brook Enterprises*** in support of that proposition. In ***Brook Enterprises***, the plaintiff was the subsequent owner of an improperly designed motel, and had no contractual relationship with the negligent architect. McIntyre J. held in ***Brook Enterprises*** at 476:

> The damage complained of here is associated with the motel building. The plaintiff had, therefore, suffered no damage until the motel building was acquired.

[18] The defendant, for its part, argues that the cause of action arose when the house was built on defective soil. The defendant says that the later development of cracks in the foundation was a consequence of the underlying defect, that is the defective soil, and the cracks are not the defect on which the action is founded. The damage, then, according to the defendant, was visited upon the property as soon as the house was constructed. The home owner was, and here I paraphrase Lord Diplock in ***Bagot v. Stevens, Scanlan & Co.***, [1964] 3 All ER 577 (Q.B.) at 579, damaged when he was landed with property which had bad foundations when he ought to have been provided with property which had good soil and the damage, accordingly, occurred on that date. What happened later when the house settled and cracks appeared was merely a consequence of the damage resulting from the original breach that occurred when the bad soil was installed on the property.

[19] The question of whether a property is damaged by bad construction and before its consequences are physically manifested was considered by this court in ***Privest Properties Ltd. v. Foundation Co. of Canada*** (1995), 11 B.C.L.R. (3d) 1 (S.C.), aff'd (1997), 31 B.C.L.R. (3d) 114 (C.A.), leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 216. The plaintiff there made claims for the cost of removing asbestos fireproofing, known as MK-3, that had been installed in its building. The asbestos worked fine, but the plaintiff argued that it was simply too dangerous a material to remain in proximity to the building's occupants. A question arose: when did the building owner's cause of action arise? Was it when the asbestos was installed or on some other date? Drost J. stated, at para. 158 of the trial decision:

> I think it is clear that all of the elements necessary to the plaintiffs' cause of action came into existence during the period 1973 to 1975, when the MK-3 was installed in the Building.

[20] There was nothing in that case to indicate that physical manifestation of damage is a prerequisite for giving rise to a cause of action. The B.C. Court of Appeal did not disturb Drost J.'s conclusion on that point.

[21] This question arose also in the case of ***Emms v. Prince George (City)*** (1999), 3 M.P.L.R. (3d) 106 (B.C.S.C.), aff'd (2001), 18 M.P.L.R. (3d) 200 (C.A.). Loo J. had to consider there whether a cause of action arose when a building was completed in 1972 on improperly built foundations, or at some later date. There was some evidence in that case that cracks began to appear in the building's walls some time after construction was completed. Loo J. referred to ***Privest***, and concluded at para. 11:

> In this case, all of the elements necessary to the plaintiffs' cause of action, on which its claim is founded, including constructing the building on organic soil without a proper foundation, and the failure, if any, to tie the wall to the roof, arose between the fall of 1971 and the spring of 1972.

[22] ***Emms*** was affirmed by the Court of Appeal, and they did not consider Loo J.'s conclusion noted above.

CONCLUSIONS

[23] I have great respect for the research and intellectual effort expended in the preparation of the plaintiff's argument. It is nearly, but not quite, persuasive. I accept that the property at 590 Newdale Place in West Vancouver was damaged in 1963 when it was constructed on bad fill. The plaintiff's narrow focus on the house and its damage does, with the greatest respect, miss the point. The cause of action arose because the fill was bad. The later cracking of the foundation walls was a manifestation of that damage. That the property was damaged can be established by asking this rhetorical question: On the day after taking possession in 1963, if the original owner of the home decided to sue for improper construction and inspection, would he have had a cause of action? At that point in time he would have paid full price for a property that was supposed to have been built on solid ground. Instead, he got a house built, in part, on logs. Would the original owner have had to wait until his foundation started to crack before he could be said to have suffered damage? The answer is no - the property was delivered to him in damaged condition and he could have sued for that damage then. All the elements of his cause of action were therefore in place on the day in 1963 when the house was occupied. As noted in ***Bera***, for the purposes of determining when a cause of action arises, discoverability of the damage element is irrelevant. Discoverability only becomes relevant if and when s. 6 of the ***Limitation Act*** applies, and s. 6 is specifically excluded from the application of s. 8(1)(c).

[24] The plaintiff argues as well that a new cause of action arose each time a new owner acquired the house. She says, then, that her cause of action arose in May 1987 when she bought the property. Simply put, she says that the 'cause of action' contemplated by the ***Limitation Act*** is her cause of action, not a cause of action having to do with the

property that could have been brought by the original or successive owners of the property. As the argument goes, because she could not have sued for damage to the property before she owned the property, then her cause of action did not arise until she bought it in May 1987, and not before.

[25] The plaintiff urges me to conclude that Loo J. in ***Emms*** was wrong when she discussed the effect of s. 6(5)(c) at para. 18:

> More importantly, the plaintiffs cannot overcome s. 6(5)(c) of the Act. The knowledge of or means of knowledge of any previous owner is attributed to any subsequent owner.

[26] The plaintiff points out that s. 6(5)(c) is expressly limited in its application to facts that involve a consideration of s. 6(4). Section 6(4) has to do with the suspension of the running of a limitation period based on issues having to do with discoverability. Loo J. found it was necessary for her to discuss the application of s. 6(5)(c) in the case before her. In the case before me, we are dealing with the ultimate limitation period and because s. 6 has no application to that ultimate limitation period, I do not need to consider whether ***Emms*** was rightly or wrongly decided on that point.

[27] I cannot accede to the plaintiff's argument that a new cause of action arises every time the property changes hands. To do so would be to render the ultimate limitation period prescribed by the ***Limitation Act*** nugatory, and would frustrate the policy reason for its existence. That policy reason was described by Esson J.A. in ***Bera*** at 27 as follows:

> There are strong policy reasons for not construing the date as of which the right to bring action arose in a manner different from that which has heretofore been given to them in the Limitation Act. To do so would be destructive of a balanced legislative scheme. Sections 6 and 8 are obviously designed to work together with s. 3(1) to provide relief against the injustice which can be created by hidden facts and, on the other hand, to provide reasonable protection against stale claims. All of that is premised upon the 'right to do so" meaning the date of accrual of the cause of action without reference to knowledge. If that premise is disturbed, s. 6 will be made more difficult of application and s. 8 will cease to provide any real protection against stale claims.

[28] I would observe that if the 30 year ultimate limitation period exists to protect against stale claims, then how can the section provide such protection when all that needs happen to create a new cause of action is the transfer of the property from one party to another? How could s. 8 provide protection to potential defendants if that were the law? It could not.

[29] It is for this reason that I conclude that I am not bound to come to the same conclusion on this point as McIntyre J. did in ***Brook Enterprises***. In ***Brook Enterprises***, McIntyre J. was not considering the ultimate limitation period. I cannot say whether he would have reached the same conclusion he did if he had been wrestling with s. 8(1)(c). Further, it has to be noted that when he decided ***Brook Enterprises*** in 1973 he did not have then, as I have now, the benefit of Esson J.A.'s description of the policy that underpins the ***Limitation Act***.

[30] I cannot adopt the plaintiff's position that the right to bring an action for pure economic loss for a defect arises when that defect moves from being latent to being patent. To accept that proposition would be to frustrate the purpose of the ultimate limitation prescribed by s. 8 of the ***Limitation Act***. Also, if discoverability were a necessary element in determining when a cause of action for pure economic loss arises, then we would not need the saving and postponing portions of the s. 6 of the ***Limitation Act*** at all.

[31] The plaintiff here will, no doubt, complain that it is unfair to deny her the right to sue for a defect visited on her property long before it came into her possession. I have no answer to that complaint, other than to say that the Legislature, in its wisdom, must have felt that the utility of preserving defendants from claims for misdeeds 30 or more years past outweighs the utility of permitting such claims to proceed.

[32] I conclude, therefore, that the defendant's application for summary dismissal of the plaintiff's action must succeed. The plaintiff's action is dismissed with costs.

"P. Rogers, J."
The Honourable Mr. Justice P. Rogers