IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***410727 B.C. Ltd. et al. v. Dayhu Investments Ltd. et al.,*** 2003 BCSC 1142

Date: 20030717
Docket: S023776
Registry: Vancouver

Between:

410727 B.C. Ltd., Walline Ltd., Minoru Investments Ltd., and Y.H. Canadian Property Investment Trust

Plaintiffs

And

Dayhu Investments Ltd., City of Richmond, Hillcrest Plumbing and Heating (1967) Ltd., Hillcrest Plumbing & Heating (1991) Ltd., Hillcrest Plumbing Discount Centre Ltd., Rick Rice and REDACTED

Defendants

Before: The Honourable Mr. Justice Shabbits

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiffs:	E.A. Dolden
Counsel for the Defendant, City of Richmond:	T.W. Barnes & D.C. Russell
Counsel for the Defendants, Hillcrest Plumbing and Heating (1967) Ltd., Hillcrest Plumbing & Heating (1991) Ltd., Hillcrest Plumbing Discount Centre Ltd., Richard Rice and **REDACTED**:	G.B. Butler

Counsel for the Defendant, Dayhu Investments Ltd.: J.A. Doyle

Date and Place of Hearing: June 19, 2003
Vancouver, B.C.

[1] The City of Richmond (the “City”) applies pursuant to Rule 18A of the ***Rules of Court*** for an order dismissing this action as against it. It submits that the ultimate limitation period of 30 years established by s. 8 of the ***Limitation Act***, R.S.B.C. 1996, c. 266 applies to the plaintiffs’ claims against it, and that the 30 year limitation period expired prior to the issuing of the writ.

[2] Dayhu Investments Ltd. (“Dayhu”) supports the City’s application. Dayhu submits that the claims as against it are also barred by s. 8 of the ***Limitation Act.***

[3] The application is opposed by the plaintiffs and by the other defendants. The other defendants are advancing claims for contribution and indemnity from the City and Dayhu.

[4] For the purposes of this application, the parties provided the court with an agreed statement of facts, from which I quote as follows:

STATEMENT OF AGREED FACTS

The parties to this action agree for the purpose of this agreement only, to facts as set out below:

1. The subject matter of this action is a 69-unit apartment building … located at 6351 Minoru Boulevard, Richmond, B.C.

2. Dayhu submitted the Apartment Building's design to the Defendant the City of Richmond … on or about August 14, 1967 for review in the course of Richmond's processing of the application for the Building Permit. Richmond requested some modifications to the design.

3. Richmond accepted the modified design and issued a Building Permit authorizing construction of the Apartment Building on or about October 10, 1967.

4. Dayhu constructed the Apartment Building between approximately October, 1967 and July, 1968.

5. The Plaintiffs acquired the Apartment Building on April 19, 1995.

6. A fire substantially destroyed the Apartment Building on January 25, 2002.

7. The Fire was started by the use of an acetylene torch being used by the Defendant Rice during the course of conducting plumbing repairs to the hot and cold water pipes located in the building wall cavity forming part of Unit 114 in the Apartment Building.

[5] At the hearing of this application, the parties agreed that Dayhu is a successor company to High Gate Holdings Ltd., and that in fact it was High Gate Holdings Ltd. that submitted the apartment building's design to the City.

[6] The parties also agreed that the fire damaged or destroyed the property of a number of tenants of the apartment building, and that the fire also damaged or destroyed personal property of the plaintiffs that was within the apartment building at the time of the fire.

[7] For the purposes of this application, the allegations of the plaintiffs are presumed to be true.

[8] The amended statement of claim, filed July 25, 2002, alleges that the City and Dahyu are liable to the plaintiffs in negligence. The claim particularizes allegations of negligence. The plaintiffs specifically plead and rely upon the ***Negligence Act***, R.S.B.C. 1996, c. 333.

[9] The amended statement of claim also alleges that the City and Dayhu are liable to the plaintiffs for design and construction deficiencies of the apartment building. The allegations that form the claim for construction and design deficiencies are the same allegations that form the claim in negligence. The plaintiffs plead and rely upon the ***Municipal Act***, R.S.B.C. 1960, c.255, City of Richmond Bylaw No. 2170 as amended, and the ***Fire Marshal Act***, R.S.B.C. 1960, c. 148 and amendments thereto.

[10] The City submits that the ultimate limitation period commenced to run from the date on which all of the elements of the cause of action came into existence. In ***Armstrong v. West Vancouver (District)*** (2003), 10 B.C.L.R. (4th) 305 (C.A.), 2003 BCCA 73, Mr. Justice Mackenzie, for the Court, wrote at para. 9: “It is trite law that an action in negligence requires three elements: a legal duty of the defendant to the plaintiff, the breach of that duty and resulting damage.” The City refers to ***Bera v. Marr*** (1986), 1 B.C.L.R. (2d) 1 (C.A.) and ***Karsanjii Estate v. Roque*** (1990), 43 B.C.L.R. (2nd) 234 (C.A.), and submits that the three elements required to bring a claim were present, and the cause of action accrued, when the apartment building was completed in a defective state in

1968. It submits that the commencement of the 30 year ultimate limitation period was triggered in 1968.

[11] The City submits that the claim against it is for pure economic loss arising out of the alleged defective construction of the apartment building. It submits that the whole of its involvement with the apartment building occurred in 1968, and that it had no involvement in the fire.

[12] In submitting that the time period for the calculation of the s.8 ultimate limitation period commenced in 1968, the City refers to ***Cartledge v. E. Jopling & Sons Ltd.***, [1963] 1 All E.R. 341 (H.L.), in which Lord Reid noted that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action.

[13] In ***Armstrong***, *supra,* Mr. Justice Mackenzie said this at para. 9:

> This appeal is concerned only with the damage element. Damage to a building caused by a defect in the building itself or its foundations is characterized as “pure” or non-consequential economic loss in order to distinguish such damage from economic loss resulting from physical damage caused by an external event. Pure economic loss

> includes the cost to repair the defect as well as any manifestations of the defect, such as settling or cracking. Thus "damage" in the context of a claim for pure economic loss begins with the defect itself.

[14] The City submits that its negligence only gave rise to one cause of action against it by the plaintiffs that accrued when the apartment building was completed in a defective state, and that the fire loss is no more than the manifestation of a new measure of damages which did not create a new cause of action. Counsel for the City referred to the reasoning of Lord Pearce in ***Cartledge***, *supra.* At page 350, Lord Pearce held that for one cause of action, a plaintiff must recover all damages incident to that cause of action by law once and forever. He further held that the cause of action accrues when it reaches a stage at which a judge could properly give damages for the harm that has been done, whether or not that harm is known at the time.

[15] The plaintiffs concede that a suit for the cost of repairing latent defects in the building would now be time-barred. They submit, however, that the cause of action in this proceeding is not one of "pure economic loss", but rather one of "injury to property" caused by an external event, namely the fire. The plaintiffs say that the fire did not arise from an internal defect intrinsic to the apartment

building, but from human conduct extrinsic to the construction, that being the starting of a fire with an acetylene torch. The plaintiffs submit that they are not seeking recovery for the cost of remedying building code deficiencies, or inherent defects in the apartment building, but that they are seeking to recover damages caused by or incidental to a fire. They submit that their cause of action, and their right to sue, arose on the day of the fire.

[16] The plaintiffs distinguish causes of action occasioned by defects in the property itself from those involving claims for direct damage from or by an extrinsic act or an identifiable external event.

[17] I am of the opinion that the cause of action in this proceeding is injury to property caused by fire, and that the fire was an identifiable event external to the construction of the apartment building. I am of the opinion that the plaintiffs are claiming for injury to property within the meaning of s. 3(2) of the ***Limitation Act,*** and that that cause of action arose in 2002.

[18] Two of the elements of the creation of a cause of action in negligence are the breach of a legal duty and damage caused by the breach. The breach of the duty giving rise to this

proceeding occurred in 1968. However, in my opinion, it was only with the fire that damage occurred and thus that the cause of action for injury to property arose.

[19] I agree with the submission of the City that a cause of action for pure economic loss arose against it in 1968. I also agree that that cause of action is now barred by s. 8 of the ***Limitation Act***.

[20] However, the same acts can give rise to different causes of action. The City concedes that its acts in 1968 gave the plaintiffs an immediate cause of action against it for pure economic loss. It also concedes that those same acts gave the tenants a cause of action against it in 2002 for damage to property. Those causes of action arose at different times. They are different causes of action created by the same acts.

[21] I see no reason to conclude that just because the owners of the apartment building had a cause of action against the City of Richmond in 1968 for pure economic loss, the owners could not also have a cause of action against the City in 2002 for injury to property, even though the two different causes of action arose from the same acts.

[22] In arriving at this conclusion, I have considered the case authorities on which the City relies.

[23] In ***Seibold Holdings Ltd. v. Wilson & Kofoed Ltd***. (1990), 45 C.C.L.I. 253 (B.C.S.C.), it was held that an action for failure to obtain insurance coverage for property arose at the time of the failure to obtain coverage, and not at the time of a later fire. In my opinion, that claim is different from the claim at bar. Here, the plaintiffs allege that the negligence of Dayhu and the City of Richmond was a cause of injury to property in 2002. There was no claim in ***Seibold*** that the negligence of the defendant caused injury to property, but only that the negligence of the defendant resulted in the plaintiff suffering a loss due to inadequate insurance coverage

[24] In ***Cartledge****, supra,* Lord Reid wrote at page 343:

> It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer; and that further injury arising from the same act at a later date does not give rise to a further cause of action.

[25] In that same case, Lord Pearce wrote at pages 349 and 350;

> …In cases of personal injury the law is clear and has been settled for many years. Although two separate actions may be brought one for personal injury and one for damage to property, both being

caused by the same negligence (***Brunsden v. Humphrey*** (12)), only one action may be brought in respect of all the damage from personal injury. In 1701 in ***Fitter v. Veal*** or ***Fetter v. Beale*** (13) the plaintiff, after recovering damages for an assault and battery, discovered that his injuries were more serious than had been supposed. He sought to bring a second action for the fresh damage. It was held, however, that he had but one cause of action which had been extinguished by the judgment in the former case. That principle has never since been doubted. It has been applied daily in countless actions for damages for personal injuries. In each case the judge assesses the damages once and for all, with the knowledge that the plaintiff can get no further damages for the possible traumatic consequences, such as arthritis or epilepsy, which may occur in the years to come. LORD HALSBURY said in ***Darley Main Colliery Co. v. Mitchell*** (14):

> "No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once show all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained."

[26] Relying on ***Cartledge,*** the City submits that there can only be one cause of action arising from its alleged

negligence, and that a new cause of action does not accrue when a new measure of damages manifests itself.

[27] In my opinion, the principles of law set out in ***Cartledge*** do not assist the City. The fire loss damage of 2002 was not the manifestation of a new measure of damages arising from a claim in pure economic loss for construction deficiencies, but was a new claim caused by an external event. In ***Cartledge,*** Lord Pearce said at page 350 that two separate actions could be brought, one for personal injury and one for damage to property, even though both were caused by the same negligence. I see no reason why the plaintiffs at bar could not have brought two separate actions, one for pure economic loss and the other for damage to property, (leaving aside the consideration that the first action is now statute barred).

[28] The limitation periods set out in the ***Limitation Act*** start at the time that a cause of action accrues. A cause of action in negligence may accrue long after the breach of the legal duty giving rise to it. See ***Armstrong,*** *supra*.

[29] I am of the opinion that ***Kaiser v. Bufton's Flowers Ltd.*** (1995), 2 B.C.L.R. (3d) 85, a decision of our Court of Appeal, is directly on point. In ***Kaiser,*** the Court of Appeal held that a cause of action against the City of Vancouver for

damages suffered as a result of a fire arose at the time of the fire, even though it was based upon negligent acts or events which occurred long before the fire. The Court found that the facts giving rise to the cause of action were not complete until the fire and consequent damage. The Court was considering whether the cause of action accrued before the implementation of an amendment to the *Vancouver Charter* which relieved the City of Vancouver from liability for damages for loss sustained as a result of neglect by the City of Vancouver and its officers and employees in the enforcement of bylaws. Mr. Justice Finch, as he then was, said this for the Court at para. 32:

> While the appellant attempts to characterize a portion of a cause of action in negligence (carelessness in discharge of an existing duty) as an “act or event”, the legal consequences of which are being interfered with retrospectively, the most that the appellant can be said to have had, at the time s. 294(8) was enacted, is an expectation that, if damage occurred at some time in the future, a cause of action would then become available against the City.

[30] The City and Dayhu sought to distinguish this case on the basis that the Court at para. 18 said that it was an “incontrovertible fact” that there was no damage until December 25, 1988, the day of the fire, and that the amendment of the *Vancouver Charter* did not deprive the plaintiff of any

right because he had no cause of action before the fire. The City submits that the plaintiffs had a cause of action before the fire, that being a claim for pure economic loss, and that it could not be said that there was no damage before the fire in the case at bar. In my opinion, the Court at para. 18 in ***Kaiser*** was referring to a claim for injury to property, and not to a claim to redress deficiencies in construction. Following construction of his residence, the plaintiff in ***Kaiser*** must have had the same claim for pure economic loss as did the plaintiffs at bar.

[31] The plaintiffs' claim must be distinguished from the authorities that relate to claims arising from construction deficiencies that result in damages that manifest themselves over or after many years, sometimes with precipitous and dramatic injury. ***Armstrong*** *supra,* and ***Emms v. Prince George (City)*** (1999), 3 M.P.L.R. (3^{d})106 (S.C.), aff'd (2001), 18 M.P.L.R. (3d) 200 (C.A.) are examples of two such claims. In each of these cases, the injury had its genesis in inherent defect, and was not caused by an external event.

[32] In my opinion, the plaintiffs' claim is the same as that in ***Flora Farms Ltd. v. Galaxy Agri-Products International Inc.*** (1998), 52 B.C.L.R. (3^{d}) 223 (S.C.), where it was held that a wind storm was an identifiable external cause of damage to

property, and that the cause of action arose with the wind storm, even though the injury to property may not have occurred, or may not have been as severe, but for construction deficiencies.

Order

[33] I order that the application of the City be dismissed. There were several related applications advanced by the parties, the success of all of which turned on whether the ultimate limitation period was found to apply. Should the parties be unable to agree as to the form of the order, the form of the order to be entered may be spoken to by telephone.

[34] Costs may be spoken to, again by telephone. Unless a submission is made otherwise, I would order that R.57(12)(b) be applied, and that Dayhu and the City are not entitled to the costs of this application as costs in the cause, but that the other parties who opposed the application are entitled to costs as costs in the cause.

"S.J. Shabbits, J."
The Honourable Mr. Justice S.J. Shabbits