Grey Condominium Corporation No. 27 v. Blue Mountain Resorts Limited, 2007 CanLII 5368 (ON S.C.)

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GREY CONDOMINIUM CORPORATION NO. 27 v. BLUE MOUNTAIN RESORTS LIMITED et al.

BEFORE: CORBETT J.

COUNSEL: Jonathan Speigel for the Plaintiff

Hillel David for the Defendant Town of the Blue Mountain

J U D G M E N T

It would be most unjust that time should run against a plaintiff when there is no possibility of bringing an action to enforce it…[1]

*It may seem hard on the [defendant] that he may find himself sued many years after he left the work; but it would be harder on the householder that he should be without remedy….****[2]***

1. This case concerns the commencement of a limitations period for claims respecting serious latent defects in condominium buildings. In the first section of these reasons I set out my disposition of the issues and a brief summary of the facts. In the second, I review the applicable limitations law. In the third, I return to the facts in light of the legal analysis. In the fourth, I summarize my conclusions and final order.

Part I – Issues, Disposition and Summary of the Facts

(a) Issues

2. There are three issues:

(a) Did a letter from its property manager dated October 25, 1993[3] (the "Letter"), put the plaintiff ("GCC27") on notice of serious fire safety deficiencies in internal structures of its buildings?

(b) If the answer to (a) is no, then would a reasonable and competent investigation of the concerns raised in the Letter have uncovered these deficiencies in internal structures?

(c) If the answer to (b) is no, then did the limitations period nonetheless start to run on these claims because the Letter did put the plaintiff on notice of another serious deficiency, in the exterior walls of its buildings?

(b) Disposition

3. The first two issues are factual. GCC27 has satisfied me that the answer to both is "no". The third issue is a legal question. The defendant Town of the Blue Mountains (the "Town") says that there is competing authority from the Supreme Court of Canada and the Ontario Court of Appeal on this question. On the strength of the Court of Appeal decision in *Carleton Condominium*,[4] the answer to the third question is "no", and GCC27 is entitled to succeed. The Town says that on the basis of the Supreme Court's decisions in *Peixeiro*,[5] *Cahoon**[6]* and *Winnipeg Condominium*,[7] the answer is "yes", and the claim should be dismissed. The Town argues that I should follow the Supreme Court of Canada, and I should not follow the Court of Appeal because it is wrong.

4. I see no conflict in the jurisprudence. In my view, *Carleton Condominium* can be reconciled with the Supreme Court jurisprudence, is good law in Ontario, and is binding on me. I shall follow it.

5. Accordingly GCC27 shall have judgment.

(c) Summary of the Facts

(i) The Construction Deficiencies

6. For GCC27, this saga begins with the Letter, sent to it by its property manager, Blue Mountain Resorts Ltd. ("Resorts"), on October 25, 1993. It advises GCC27 to review certain aspects of its construction because of problems recently discovered at another project, Sierra Lane. The Letter bears full repetition since it lies at the heart of this case:

> As you may be aware, the Technical Audit that is currently being done on the Sierra Lane project, has brought to light some deficiencies which is causing concern for the Sierra Lane Board of Directors.
>
> Although your project is of different construction and despite the fact that Robert Halsall and Associates who performed your Technical Audit did not raise any of the concerns that are affecting Sierra Lane, the principal ones being, fireplace construction and potential lack

> of one hour fire retardant material on the exterior panels. We feel that a sample review of the fireplace construction as well as a review of the fire separations could be seen as prudent.
>
> We recommend that the Board give us authorization to look into these matters further.[8]

7. The Letter was addressed to the President of GCC27, Mr. Irwin Koziebrocki. He handwrote a response on the face of the letter: "DALE: I AGREE".[9] This note is dated October 26, 1993.[10]

8. No one is sure what was done following this exchange. Apparently the problem involving fireplaces was investigated.[11] The problem respecting exterior walls was not.

9. Unknown to GCC27, there were several serious problems with its buildings:

> (a) risk of fire spreading rapidly between its buildings. This risk arose because the buildings are close together and the exterior walls do not create a sufficient fire barrier (the "EIFS[12] problem");
>
> (b) risk of fire spreading rapidly between dwelling units in the same building because walls and floors do not provide a proper fire barrier (the "internal fire separation problem");
>
> (c) risk of rapid building collapse during a fire because load-supporting steel beams are not insulated to provide a proper fire barrier (the "structural beams problem").[13]

Each of these risks is a breach of the Ontario *Building Code*.***[14]*** None is apparent to a non-professional. Each represents a serious risk to people and property. Indeed, it is fortunate that this case is about defects, rather than injury, loss of life, and destruction of the condominium.[15]

10. GCC27 learned of these serious problems in letters sent to it in February and September, 1996.[16] GCC27 has spent over $800,000 on remedial work.[17] Further work still needs to be done.[18]

11. GCC27 now seeks to recover its remedial costs from the Town (among others[19]). It says the Town was negligent in reviewing construction plans and inspecting the project during construction. The Town admits its negligence but says the claim is out of time. It says that the Letter put GCC27 on notice in October 1993 and its failure to investigate then was a lack of diligence. Therefore, the Town says, GCC27 had constructive knowledge of the deficiencies in October 1993.

(ii) Summary Judgment Motion

12. The Town moved for summary judgment prior to trial. At issue on that motion was whether the Letter had the effect urged by the Town in respect to the EIFS problem, the internal fire separation problem, and the structural beams problem. My colleague, Justice O'Connor, found that the Letter did give GCC27 notice of the EIFS problem[20] and granted summary judgment dismissing that portion of GCC27's claim. Justice O'Connor also found that it was not clear that the Letter gave notice of the internal fire separation problem or the structural beams problem. He declined to grant summary judgment on those portions of GCC27's claim.

13. Justice O'Connor's decision was not appealed and is binding for the purposes of this trial.[21] This binding effect includes the questions decided by Justice O'Connor and "all issues of fact or law which were essential to the [these] conclusions".[22]

14. Arguably, Justice O'Connor's decision disposes of the first and third questions on this trial.[23] In

declining to dismiss GCC27's claim in respect to internal fire safety issues, His Honour found:

> The issue, then, is whether notice of an inspection respecting one problem would inevitably have led to finding the second problem.[24] For example, if an inspector had been contracted to inspect the adequacy of the exterior panels, to expect him to look for other possible deficiencies outside the terms of his contract would not seem to be reasonable, unless it can be argued that it is the standard practice in the industry to do so. It must be left to the trier of fact to determine whether the two problems are so inextricably linked that the investigation of one would have led to the discovery of the other. Or whether it was the standard practice in his field of expertise to conduct an inspection of other problems, given what he would have found when inspecting the adequacy of the exterior panels.[25]

Obviously, Justice O'Connor determined that it was not clear, on the face of the Letter, that it gave notice of the internal problems. However, the Letter is not a contract, or a technical document. Extrinsic evidence may be considered to interpret its meaning. I proceed on the basis that Justice O'Connor left this issue for trial.

15. In respect to the third issue, it could be argued that Justice O'Connor must have determined that the commencement of the limitations period for the external walls did not necessarily commence the limitations period for the internal walls. Otherwise, as a matter of law, His Honour would have been bound to grant judgment for the Town on all issues. The issue was raised on the motion, as is shown from the following passage of the decision:

> The defendants argue that the plaintiff does not have a separate cause of action respecting each deficiency, so[26] the discovery of one would inevitably lead to the discovery of the others. Knowledge of one, which it had, starts the clock running on the others…. [s]ay the defendants.[27]

16. Summary judgment may be given where the only issue is a question of law. But where the legal issue is complex, and may benefit from a full factual record to provide context, the legal issue may be left for trial. I proceed on the basis that Justice O'Connor also left this point for trial.

Part II – Limitations of Actions

(a) Uncontested Legal Principles

17. The applicable limitation period is six years.[28]

18. The Town's negligence took place during construction, that is, no later than December 1989.

19. The action was commenced on August 2, 2001.[29]

20. The limitation period began to run at the earlier of when GCC27 either (a) knew; or (b) ought to have known that it had a cause of action against the Town. This is known as the "discoverability principle".

21. This principle "applies to all cases in which a limitation period applies. It is a rule of general application."[30]

> [The] principle provides that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been

discovered by the plaintiff by the exercise of reasonable diligence.[31]

This general principle is well established in our law.[32]

22. A plaintiff bears the onus of proving that it commenced its action within the limitations period.[33] GCC27 has established that it did not know of the claims until 1996, satisfying its burden in that respect. But GCC27 must also show that the material facts were not within its constructive knowledge until some time after August 2, 1995.[34] To show this, GCC27 must show that it made "reasonable efforts" to discover the material facts on which the claim is based, and that its failure was not because it failed to act with diligence.[35]

23. A cause of action in negligence accrues when a plaintiff knows, or ought to know, three things:

(a) there is a legal duty owed by the defendant to the plaintiff;

(b) the defendant has breached that legal duty; and

(c) the plaintiff has suffered non-trivial loss or damage as a result.[36]

24. Any non-trivial loss or damage will be sufficient to trigger a claim. Once a claim is triggered, the limitation period starts to run. Neither the extent nor type of damage needs to be known, so long as the plaintiff knows that there is damage or loss that is not trivial:

> The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that *some* damage has occurred and has identified the tortfeasor, the cause of action has accrued. *Neither the extent of the damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.*[37]

This is what the Town calls the "*Peixeiro* principle".[38]

(b) The Town's Legal Argument

25. The Town argues that, in the case of a latent defect, where the claim is for "pure economic loss" (that is, the cost of rectifying the deficiency), the injury takes place at the time the defect is incorporated into the building. The limitations period may not commence until much later, when the plaintiff learns or ought to have learned about the injury. But the injury is present from the outset.[39]

26. The Town argues that the British Columbia Court of Appeal has found that there is a single cause of action arising from a building deficiency.[40] This is said to apply no matter how unrelated the deficiencies may be. And this is so because there is not a separate duty of care owed in respect to each deficiency. Each deficiency may be a basis for a distinct measure of damages, but not a different breach of duty and thus not a separate cause of action.

27. If this is so, then as soon as there is any construction deficiency arising because of a breach of duty, then the cause of action is complete and the limitations clock starts to run in respect to all deficiencies. This holding is said by the Town to have significant support in jurisprudence from the Supreme Court of Canada, both in the general statements of principle in *Peixeiro* and *Cahoon* (which were not construction cases), and in *Winnipeg Condominium* (which was not a limitations case).

28. The net result, the Town says, is that in the construction of the plaintiff's condominium, there was but one project, and any notice of any deficiencies started the clock running on all claims related to deficiencies. Alternatively, but following the same logic, notice of any serious deficiencies posing a material threat to the safety of the occupants of the building would start the clock running on all negligence claims respecting such serious building deficiencies.

29. The Town acknowledges that this can lead to apparent unfairness for plaintiffs in some cases. As argued before me, a relatively minor (though non-trivial) deficiency in, say, wiring, discovered immediately after construction, could have the effect of starting the limitations clock running on all deficiencies, including latent deficiencies that could not be discovered without first demolishing portions of the building.

30. On the other hand, if there is to be a separate limitations clock for each distinct deficiency, then the plaintiff is faced with the prospect of new claims arising "repeatedly and indefinitely into the future".

31. The Town says that the Supreme Court of Canada has weighed these competing interests in *Peixeiro*, and has chosen finality over satisfaction of claims. It says that the Ontario Divisional Court has recognized this choice in the following finding:

> First… it is clear that the Supreme Court of Canada considered and rejected a test similar to that used by the motion judge, namely, that a limitation period is not triggered until the extent and the exact nature of the injury is known or ought to have been known.
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> …
>
> If… the law were to give effect to the position of the respondent, it would effectively give her, and other injured persons like her, the right to extend any applicable limitation period repeatedly from time to time, without any apparent limit, as she gained greater knowledge of the severity of the injury and its consequences. For obvious reasons, such an interpretation would negate the purpose of limitation periods and cause unwarranted confusion to those affected.[41]

(c) *Carleton Condominium*

32. How do these principles fit with *Carleton Condominium Corporation*? In that case, a construction defect to exterior brick cladding came to light and was the subject-matter of a claim in the 1980's. The parties settled the claim. In 1993, the condominium board retained a consultant to perform a reserve fund study. The consultant discovered problems with a block wall behind the exterior brick wall that had been the subject-matter of the previous claim. Ultimately, the brick wall was removed, the block wall repaired, and a new exterior surface applied. The condominium sued, and the builder pleaded *res judicata* and the *Limitations Act*. At trial, Justice Aitken found that the cause of action in respect to the block wall did not arise until 1993, because the problem was not reasonably discoverable until then. The Court of Appeal dismissed the builder's appeal "essentially for the excellent reasons of the trial judge".[42] *Peixeiro*, *Cahoon* and *Winnipeg Condominium* were all decided prior to the trial in *Carleton Condominium*, and were referenced in the trial decision.[43]

33. Justice Aitken distinguished the case before her from *Peixeiro* on the basis that the facts underlying the claims were different, and thus the causes of action were different; in other words, the deficiencies were unrelated. These findings were amply supported by detailed findings of fact. The Court of Appeal found the factual findings "unassailable on appeal", and on the limitations issue

concluded: "[w]e see no error".[44]

34. I quote at length from Justice Aitken's decision:

> 184 CCC21 [the plaintiff] asserts that what is different are the underlying factual allegations supporting the negligence and breach of warranty claims, the allegations in the 1986 action relating to construction of the brick wall and the allegations in this action relating to the construction of the block back-up wall. Minto and the Third Parties assert that the underlying allegations of poor workmanship are in essence in the same in both cases.
>
> …
>
> 186 …. I find that the Statement of Claim referred only to alleged deficiencies in the brick exterior wall and made no reference to any potential deficiencies in the block back-up wall. The work and materials that were allegedly deficient in the last action related to the external brick wall only. Here the work and materials that are allegedly deficient relate to the block back-up wall only.
>
> 187 …. The last action was brought as a result of the costs being incurred by the Plaintiff to deal with moisture problems in the building, which allegedly related to inadequacies in the external brick wall….
>
> 188 This action was brought as a result of costs being incurred by the Plaintiff to deal with concerns about the structural soundness of the block back-up wall. I consider the subject-matter to be different. That being said, in that both actions raised the question of the liability of Minto to the Plaintiff under the headings of negligence and breach of warranty in regard to the construction of the same building pursuant to the same contract, from all participants' perspective, it would have been preferable for the issues in both to have been dealt with at the same time to avoid multiplicity of proceedings. Should the fact that this did not happen preclude the Plaintiff from now seeking redress in regard to alleged deficiencies not raised in the earlier action?
>
> 189 This leads to the question of whether CCC21 could have discovered, through the use of reasonable diligence, the problems with the back-up wall … prior to its settling the earlier action against Minto in 1986. The burden rests upon the party seeking to have a matter litigated to establish that a new fact being relied upon in the second litigation could not have been ascertained by reasonable diligence at the time when the first action was commenced….
>
> …
>
> 191 Until 1993, at the very earliest, there was no reason why CCC21 would have questioned the structural integrity of the back-up wall or whether it had been built in a good and workmanlike fashion in accordance with the plans and specifications and the pertinent building code, aside from the fact that it had been built by the same parties who built what CCC21 believed was a defective brick wall. None of the professionals retained by CCC21 regarding the brick cladding and moisture problems had been mandated to search for problems of a different nature so that any possible deficiency in the building attributable to Minto could be dealt with in the 1986 action. Nor should CCC21 have been put to that expense to ensure that all possible evidence of hitherto unidentified instances of negligence or breach of warranty in regard to the construction of 373 Laurier were alleged in the same action. Such a requirement would go well beyond the standard of reasonable diligence that is expected of a plaintiff before the commencement of an action to ensure that all matters that should be raised are raised in that action.
>
> 192 The standard is a flexible one to be applied in context. It would be impractical and unreasonable when dealing with a complex transaction such as the construction of an

apartment building to expect the owner to be able to identify all latent deficiencies at any given point in time just because a patent deficiency had been identified. Such a requirement could lead to absurd results. It must be remembered that the block back-up wall was not visible to anyone. On the exterior it was covered by the brick wall. On the interior it was covered by insulation, wallboard and surface finishes. For the block wall to be accessed, another part of the building had to be destroyed. In the absence of some reason to suspect deficiencies in the back-up wall, CCC21 was under no obligation to go searching for such deficiencies, and in fact would have been foolhardy and irresponsible to do so.

193 This same point was made by Humphries J. in *Strata Plan No. VR 1720* v. *Bart Developments Ltd.*, [1998] B.C.J. No. 224 (S.C.)(Quicklaw), another case involving condominium unit owners suing the builder for alleged deficiencies, including a defective roof. Humphries J. stated at para 30: "Certainly the plaintiff could have ripped the building apart at the time the first leak was discovered, but that would not be reasonable". And at para 40: "Insofar as the [first expert's report on defects dated July 1989] did not cover the other defects alleged in the Statement of Claim, and it is uncontested that the [first expert's] representative told [a board member] the building was otherwise above average and solid, the plaintiff cannot be said to have had within their means of knowledge the facts upon which the rest of the claim would eventually be based. In other words, on the evidence presently before me it was not reasonable to expect them to take further advice at that time. Neither was it reasonable, given the information available to them at the time, to expect them to have the building torn apart to discover whatever it is [the second expert] has now discovered [in 1995]."

194 When the 1986 action was dismissed, CCC21 did not know nor could it with reasonable diligence have discovered the condition of the block back-up wall. The cause of action which is the subject matter of this litigation therefore could not be said to have existed in December 1987 when the earlier action was settled. If it did not exist in 1987, the current cause of action cannot be considered as the cause of action which was settled in 1987.

…

207 Minto argues that the Plaintiff's action is statute barred by reason of the … Limitations Act….

…

209 The question therefore is when did the cause of action being dealt with in these proceedings arise. In answering this question, I must apply the discoverability rule. "... discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it ... the discoverability rule is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue." (*Peixeiro* v. *Haberman*, 1997 CanLII 325 (S.C.C.), [1997] 3 S.C.R. 549 per Major J.)

210 As stated by Borins J. (*ad hoc*, as he then was) in *Aguonie* v. *Galion Solid Waste Material Inc.*, supra, at 170: "... [the discoverability] principle provides that a cause of action arises for the purposes of a limitation period, when the material facts on which it is based have been discovered, or ought to have been discovered by the plaintiff by the exercise of reasonable diligence". It has been held specifically that "... in cases which are based on a breach of duty to take care, a cause of action does not arise, and time does not begin to run for the purposes of the *Limitations Act*, until such time as the plaintiff discovers or ought reasonably to have discovered the facts with respect to which the remedy is being sought, whether the issue arises in contract or in tort." (*Consumers Glass Co. Ltd.* v. *Foundation*

> *Co. of Canada* 1985 CanLII 159 (ON C.A.), (1985), 51 O.R. (2d) 385 (C.A.) per Dubin J.A. at 12).
>
> 211 The plaintiff is required to act with due diligence in acquiring facts in order to be fully apprised of the material facts upon which a negligence claim can be based. (*Findlay* v. *Holmes*, supra; *Soper* v. *Southcott*, supra)
>
> 212 "... at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor ..., the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period." (*Peixeiro* v. *Haberman*, supra, para 18)
>
> 213 The alleged facts on which this action is based, as distinct from the 1986 action, relate to the block back-up wall. I have already found that CCC21 did not have any suspicions, let alone information, relating to possible defects in the block back-up wall until 1993 at the very earliest. I have also found that there is no reason why they should have discovered any such defects prior to that date. For the reasons given when dealing with the issue of *res judicata*, I cannot conclude that CCC21 would have discovered any such defects prior to 1993 had they exercised reasonable diligence. This action was commenced in September 1995, well within six years from the date the defects were or should have been discovered.[45]

I take from these passages that the deficiency to the exterior brick wall was entirely distinct from the deficiency to the block wall behind it. The deficiency to the block wall was not discovered during the investigation and rectification of the deficiency to the brick wall, and not through any lack of diligence by the condominium. On this basis, Justice Aitken concluded that these deficiencies gave rise to separate causes of action.

35. The Town argues that Justice Aitken was wrong to find separate causes of action for two distinct deficiencies. It says discovery of the first triggered the limitations clock for the second deficiency. Accordingly, the Town says, Justice Aitken was wrong, and the Court of Appeal was wrong in upholding Her Honour.[46]

(d) *410727 B.C. Ltd.* v. *Dayhu Investments Ltd.*

36. The British Columbia Court of Appeal wrestled with these questions in *410727 B.C. Ltd.* v. *Dayhu Investments Ltd.* British Columbia has an “ultimate” limitations period of 30 years. In this case, the building had been constructed in 1968. A fire occurred in 2002. The owner sued for property damage (from the fire), rather than “pure economic loss” (to rectify the deficiency). The court ruled that the original cause of action arose in 1968, and thus the limitations period expired in 1998. The “discoverability principle” does not apply to “ultimate” limitations periods – the clock starts to run when the cause of action is complete, whether the plaintiff knows or could reasonably know about it, or not. The court held that there are not separate causes of action for property damage and for pure economic loss. Rather, these two separate “heads of damage” arise from the same cause of action.

37. There is an irony here, given the English legal antecedents and their development under Canadian law. Under English law, there is no claim for “pure economic loss”.[47] This can lead to an obvious anomaly: if there is a defect that compromises fire safety, the defendant will not be liable for the costs to remedy the defect. However, if there is fire, that same defendant may be liable for the

damages caused by the fire. The Supreme Court of Canada ruled in *Kamloops* v. *Nielsen**[48]* that in Canada there will be damages for "pure economic loss". This decision effectively widened the ambit of recovery for plaintiffs, especially in building cases. The Supreme Court has confirmed that this continues to be the law in Canada in the aftermath of the English decision in *Murphy* v. *Brentwood*.[49]

38. The policy underlying this decision is that the law ought to encourage detection and rectification of unsafe conditions, and deal with them before they cause a loss to property, injury, or even death. In *410727 B.C. Ltd.,* if there were no damages for "pure economic loss", there would have been no cause of action until the fire, in 2002, and the plaintiff would have been entitled to recover. But, because Canada allows recovery for pure economic loss, and since there is only one cause of action for negligence, with separate heads of damage for economic loss and property loss, the cause of action arose in 1968, rather than at the time of the fire, in 2002. Under English law, the plaintiffs would have recovered, because there was no cause of action until 2002. Under Ontario law, the plaintiffs would have recovered, because the latent defect was not discovered or discoverable until the fire. But under British Columbia law, there was no recovery because of the operation of the "ultimate limitations period".

39. Of course the Legislature may derogate from the principles in *Winnipeg Condominium* and *Peixeiro* of promoting safe construction of buildings, and according fairness to potential claimants by providing an "ultimate limitations period" that expires before a plaintiff knows about its claim. The British Columbia Court of Appeal has held that this is the effect of the British Columbia legislation, even though that legislation would not have had that effect at the time it was enacted, in 1975, because Canadian law did not then permit recovery for pure economic loss.[50]

40. In reaching this conclusion, the British Columbia Court of Appeal distinguished *Carleton Condominium* on the basis of the differences between the law of British Columbia, Ontario and the United Kingdom:

> I do not read *Carleton* as assisting the plaintiff's position in the case at bar, however. The case was essentially about discoverability in relation to *res judicata*.[51] It was decided in a jurisdiction in which the so-called "common law" discoverability principle (i.e. the rule of interpretation enunciated in *Kamloops* v. *Nielsen*) then applied, with the result that a cause of action did not accrue until the damage could reasonably be known to the plaintiffs *in each instance*. The Court clearly found that the structural problems involving the concrete inner wall were not reasonably discoverable by the unitholders until 1993. (Because of this difference between British Columbia and other jurisdictions, care must be taken in considering such cases as *Carleton* and *Steamship Mutual Underwriting Association* v. *Trollope & Colls (City) Ltd.* (1986) 33 B.L.R. 81 (C.A.). Similarly the English decision or *Nitrigin Eireann Teoranta* v. *Inco Alloys Ltd.*, [1992] 1 All E.R. 854 (Q.B.) is not of assistance to us here, given that in the United Kingdom, pure economic loss remains "ordinarily irrecoverable in negligence." (at 858) As a consequence, of course, the cause of action does not arise until physical damage occurs.)[52]

41. I am not satisfied that *410727 B.C. Ltd.* correctly distinguishes *Carleton Condominium* in this fashion. However, *410727 B.C. Ltd.* can be distinguished on the basis that it concerns economic loss and injury to property arising from the same defect, whereas *Carleton Condominium* and the case before me concern separate deficiencies. To the extent that this distinction does not reconcile these decisions and the principles in the cases are in conflict, I am bound by *Carleton Condominium*.

(e) *Winnipeg Condominium*

42. *Winnipeg Condominium* clarifies the developing law concerning the liability of builders for negligence. The Court found that the builder could be liable in tort to subsequent purchasers, with whom it has no privity of contract, in respect to defects that render the building unsafe. Liability does not extend to shoddy construction that does not create hazard. But a material risk of fire is precisely the kind of potential damage for which a subsequent purchaser could recover under the logic of *Winnipeg Condominium*.

43. *Winnipeg Condominium* was written by Justice La Forest, and marks a culmination of His Honour's work to synthesize the law of tort and contract.[53] This work hearkens back to the powerful dissent of Justice Laskin (as he then was) in *Rivtow Marine*, which is now accepted as the law in Canada:

> In Laskin J.'s view, the courts must be careful to avoid giving redress in tort for "safe but shoddy" products. Where the products are unsafe, however, tort may have a role: prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury treatment.[54]

44. In *Winnipeg Condominium*, the construction defect related to the exterior cladding of the building. The owner became aware of the problem only after a large section of the cladding fell nine storeys to the ground. Had it fallen on people, they would have been killed or seriously injured.

45. Hypothetically, if the cladding had killed or injured someone, that person would have had a claim against all those responsible, including those who did the construction, no matter when the construction may have occurred. The plaintiff would have borne the burden of proving negligence. The older the building, of course, the more likely the fault lay in maintenance and inspection than original construction. But one would suppose that a prudent plaintiff would sue all those who were responsible for building and maintaining the building. Why is this? It is simple. We cannot have buildings falling down and injuring or killing people. Those who are in a position to see that this does not happen have legal duties to try to ensure that it doesn't.

46. Modern buildings are built to last for many decades, perhaps longer. This leads to a concern that builders will have limitless liability for an indefinite period of time. There is some temporal limit, of course:

> … [T]he contractor will only be liable… during the useful life of the building. Practically speaking, I believe that the period in which the contractor may be exposed to liability for negligence will be much shorter than the full useful life of the building. With the passage of time it will become increasingly difficult… to prove at trial that any deterioration in the building is attributable to the initial negligence of the contractor and not simply to the inevitable wear and tear suffered by every building….[55]

47. On its face, *Winnipeg Condominium* seems helpful to the plaintiff. It holds that damages to rectify a dangerous building condition are recoverable in tort, even though there has been no damage to person or property as a result of the defect. The defects in GCC27's buildings are "dangerous" – they concern fire safety, and are not mere matters of "shoddy construction". In England, the plaintiff would not be entitled to recover, because its losses are all "pure economic loss". But in Canada, on the authority of *Winnipeg Condominium* and the authorities on which that case is based, the losses are recoverable.

48. The "rub" comes in a passage, which is arguably *obiter dicta*, concerning the "complex building"

theory once propounded in English authority. The plaintiff's first position in *Winnipeg Condominium* was that damages are recoverable for "pure economic loss" for negligence giving rise to substantial danger to the occupants of the building. As noted, the plaintiff succeeded on this point. The plaintiff also argued, in the alternative, that the negligence related to metal ties used to hold the exterior cladding in place. While there might not be recovery for the metal ties themselves, the negligence caused damage to "other property" (i.e. the cladding), which then fell off the building. Justice La Forest had this to say about that argument:

> I note at the outset that I do not find the Condominium Corporation's argument on this subsidiary point persuasive. In *Murphy*, supra, at pp. 926-28, Lord Bridge reconsidered and rejected the "complex structure" theory he had suggested in *D. & F. Estates*, criticizing the theory on the following basis (at p.928):
>
> > The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect likely to cause damage to "other property".
> >
> > A critical distinction must be drawn here between some part of a complex structure which is said to be a "danger" only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor in the other, can recover damages in tort on *Donoghue* v. *Stevenson* principles.
>
> I am in full agreement with Lord Bridge's criticisms of the "complex structure" theory. In cases involving the recoverability of economic losses in tort, it is preferable for the courts to weigh the relevant policy issues openly. Since the use of this theory serves mainly to circumvent and obscure the underlying policy questions, I reject the use of the "complex structure" theory in cases involving liability for contractors for the cost of repairing defective buildings.[56]

49. The facts in *Winnipeg Condominium* aptly illustrate the obscurantism inherent in the "complex structure" theory. It is rather difficult to see how the ties that hold the cladding to a building are distinct and separate features from the cladding itself. If one were able to see how that might be so, it is rather difficult to see how this would be a feature remarkable to "complex buildings", since every building will contain fasteners which, if they fail, will cause things to fall down. Clearly the only use for such a theory, in law, is to avoid application of the legal principle against damages for "pure economic loss".

50. Justice La Forest refers to this argument as "subsidiary" rather than "alternative". It does not appear to me to be a necessary point for decision in the case, since it is irrelevant if there are damages

for economic loss. However, it does not matter whether the point is *obiter dicta*. The Supreme Court has held that its considered *obiter dicta* are to be treated as binding authority.[57] Justice La Forest wrote for a unanimous court in *Winnipeg Condominium*, and His Lordship's *dicta* on the "complex building" theory is clearly "considered". Justice La Forest's use of the word "subsidiary" rather than "alternative" indicates that the Court intended that this holding would carry precedential force. It is binding on me.

51. *Winnipeg Condominium* did not concern limitation periods, or whether distinct deficiencies in a building can lead to separate causes of action. But it did decide that the "complex structure" theory does not apply in Canada.

(f) The *Peixeiro* Principle

52. In *Peixeiro*, the plaintiff was injured in a car collision. He suffered a back injury. Although it was more than trivial, at first it did not seem serious enough to meet the legal threshold in Ontario for a tort claim. Under s.266(1) of the Ontario *Insurance Act*, car owners and drivers are not liable for damages caused in a car accident unless the injured person has died or has sustained permanent serious disfigurement or impairment.

53. Mr. Peixeiro knew that he had been injured at the time of the accident. His injuries were serious enough that he was off work for over a year. However he did not know that his injuries satisfied the high threshold for a legal claim until much later.

54. Ignorance of or mistake as to damages does not delay the commencement of a limitation period. However, in this case the cause of action itself did not arise "unless the injury meets the statutory exceptions set out in the *Insurance Act*."[58] If the cause of action has not accrued, then the limitations clock has not started to run.

55. If Ontario did not have "no fault" insurance provisions for non-catastrophic injuries, the Mr. Peixeiro's limitation period would have started to run at the time of the accident – his injuries were always known to be non-trivial.

56. In simple terms, *Peixeiro* applied the "discoverability principle" to cases brought under the limited no-fault insurance scheme in Ontario. It extended the ambit of liability, to avoid manifest unfairness to people who could not know that they had a valid lawsuit until after the time had expired for bringing it.

> Since this court's decision in *Nielsen* v. *Kamloops (City)*, 1984 CanLII 21 (S.C.C.), [1984] 2 S.C.R. 2 (S.C.C.), and *Central & Eastern Trust Co.* v. *Rafuse*, 1986 CanLII 29 (S.C.C.), [1986] 2 S.C.R. 147 (S.C.C.), at p.224, discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it. See *Sparham-Souter* v. *Town & Country Developments (Essex) Ltd.*, [1976] Q.B. 858 (Eng. C.A.), at p.868 *per* Lord Denning, M.R., citing *Cartledge* v. *E. Jopling & Sons*, *supra*:
>
> > It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury, and therefore before it is possible to raise any action.[59]

Justice Major made it clear that this was the effect of the judgment: "the discoverability rule is an *interpretive tool* for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue…."[60]

57. The rule to which Justice Major refers extends the commencement of claims until the plaintiff knows about them, actually or constructively. It was a major step forward in the law, and eliminated the sort of legal scenario that gives the law a bad name: endowing people with rights of action with no practical way for them to exercise those rights:

> I agree with the Court of Appeal that to hold that the discoverability principle does not apply to s.206 *HTA* would unfairly preclude actions by plaintiffs unaware of the existence of their cause of action.[61]

(g) Causes of Action and Heads of Damage

58. As already noted, a plaintiff need not know the extent or all types of damage for a cause of action to accrue. Difficulties in limitations law arise because the law is evolving in respect to potential claims. *Peixeiro* is one example, where the cause of action does not arise by operation of statute until damages reach a threshold severity. The common law acknowledges that trivial damages do not trigger a limitation period, since a prudent plaintiff would not sue in respect to a trivial loss. But the cases are clear that multiple heads of damage do not give rise to multiple causes of action, but rather different bases of relief in the same cause of action. How should this law apply in the context of building deficiencies?

59. The Town relies on *Cahoon* v. *Franks*,[62] a 1967 decision of the Supreme Court of Canada, for the proposition that there is not a separate cause of action for different heads of damage flowing from the same facts. In *Cahoon*, the plaintiff was involved in a car collision with the defendant. Mr. Cahoon brought a claim for damage done to his vehicle within the statutory limitation period. After that period had expired, he sought to amend his claim to include a claim for injuries sustained in the collision. The defendant opposed on the basis that the plaintiff was asserting a new cause of action outside the limitations period. The court concluded that there was no new cause of action, but a claim for a different head of damages arising from the same cause of action, that being the defendant's alleged negligence causing the collision. Thus the amendment was permitted.

60. The Town argues, forcefully, that the principle in *Cahoon* is not reserved for the exclusive benefit of plaintiffs: it has the effect of enabling plaintiffs to expand their damages claims outside the limitation period, but has the obverse effect of requiring timely commencement of some claim within the limitations period.

61. I was also referred to a series of decisions concerning limitations periods in the area of medical malpractice claims. I did not find these cases pertinent to the legal issue before me. In these cases, generally it was clear that the plaintiff had a complaint and knew of it. The issue was whether the defendant doctor's care was responsible for the plaintiff's malady, and if so, whether it arose because the doctor failed to meet the applicable standard of care. In some cases the court found it was reasonable to await receipt of an expert medical report prior to commencing proceedings. In others, the court found that the plaintiff knew of the cause of action, even if he was not yet in receipt of a report. Thus these cases all turn on factual determinations of when the plaintiff actually knew about his cause of action, or alternatively, whether the plaintiff, knowing that he might have a claim, delayed unduly in obtaining an expert report to establish it. See *Soper* v. *Southcott*,[63] *Morton* v. *Cowan*,[64] *Findlay* v. *Holmes*,[65] *Berger* v. *Benchitrit*.[66]

62. *Smith* v. *Toronto (City)**[67]* was a particularly difficult case because of the sympathetic position of the plaintiff. She dislocated her shoulder in a fall, and noticed rough sidewalk conditions at that time. Of course, she obtained medical treatment for her dislocated shoulder. Subsequently she learned that

her injuries might lead to lasting impairment of her ability to work as a pediatric dentist. She then commenced her action, some six months after her fall. However, the *Municipal Act* accords local governments the benefit of a three month limitations period.[68] Dr. Smith argued that she did not appreciate the seriousness of her injuries immediately, and there was a triable issue as to when she knew of her cause of action. The motions judge declined to grant summary judgment. The Divisional Court reversed and dismissed the action. The motions judge posited the test as a matter of when Dr. Smith discovered "it was reasonable to consider suing". In allowing the appeal, and disapproving the motion judge's statement of the test, the Divisional Court relied on *Peixeiro* in holding that the plaintiff need not know the extent or precise type of damages for the cause of action to accrue.

63. This case turns on the minimum threshold required to give rise to a cause of action. Given the seriousness of the original injuries, they certainly could not be considered "trivial", though they may not have appeared to have been life-altering. This was, no doubt, a harsh result for Dr. Smith in all the circumstances. But this harshness arises from the statutory limitation provided by the Legislature, and not in the principle applied in the decision. And on the basis of the Divisional Court analysis, Dr. Smith knew of her claim at the time she fell, or very shortly thereafter: a dislocated shoulder is non-trivial damage. The discovery that the injury to the shoulder was more serious than believed initially did not give rise to a separate cause of action.

(h) Synthesis of the Applicable Legal Principles

64. If we stand back from the decisions in *Winnipeg Condominium*, *Cahoon* and *Peixeiro*, there is no conflict with *Carleton Condominium*. *Winnipeg Condominium* holds that a cause of action will lie against builder by a subsequent purchaser for pure economic loss caused by negligence that gives rise to serious danger. The pure economic loss in *Carleton Condominium* was found to be recoverable. *Peixeiro* holds that a plaintiff is not deprived of his right to sue by operation of limitations law before he has actual or constructive knowledge of his claim. That is what Justice Aitken held in *Carleton Condominium*. *Cahoon* stands for the proposition that a plaintiff may amend after a limitations period to add claims for different heads of damage arising out of the same set of facts that gave rise to the original claim. Justice Aitken held that different defects in a construction project are different factual bases for claims, and thus different causes of action.

65. Many things can go wrong in the construction of a building. Builders have a duty to their customers, and to anyone using the building, to take reasonable care to ensure the building is safe. Others share this duty with the builder, including architects, sub-trades, inspectors, and the like. At the end of the construction, there are always deficiency lists. These lists itemize things that are not right with the building. Some items may be matters of workmanship, and would not give rise to an action in tort. Some matters may be more significant. On most projects, the deficiencies are then rectified. If there are disagreements, the matter may be taken to court. The owners move in, and life carries on.

66. As time passes, new things come to light. If they are matters of workmanship, and not safety, then the owner may be restricted to a remedy in contract, and subsequent owners may not have a right of action. But if something comes to light that poses a serious risk to the occupants of the building, a tort claim may be made. That is the principle in *Winnipeg Condominium*.

67. If the Town's position is correct, as soon as the first deficiency comes to light, the limitations clock starts to tick in respect to all deficiencies, known or unknown. In my view, the principle in *Winnipeg Condominium* would be narrowed unduly if discovery of one deficiency triggers the limitations period for all deficiencies. As stated in *Winnipeg Condominium*, the duty to take care is owed to all occupants of the building during its useful life, and not just to the original owner until the time of discovery of the first

latent defect in the project.

68. Therefore, separate deficiencies do give rise to separate causes of action. The holding in *Carleton Condominium* is clear that the limitations period for a claim based on a specific deficiency does not arise until that deficiency is known or ought to be known by the plaintiff.

69. This principle must be stated in such broad terms in the context of this case. When the claim is against builder, it could be possible to finesse the issue by an atomization of the builder's duties (what might be referred to as the "complex builder" theory, in counterpoint to the "complex building" theory). For example, the builder could be found to be negligent in distinct ways, on distinct occasions, in creating two separate dangerous situations. In the case at bar, for example, one could argue that builder was negligent in its construction of exterior walls, and it was negligent in the construction of fire separations for the interior walls. These separate incidents of negligence arose from factually distinct conduct – different materials, used in different areas of the building, at different times, creating two distinct sets of risk, and requiring two distinct remedial plans. But this case is not against the builder. It is against the Town, for negligence in its review of the building plans, and in its inspections of the project. There was but one review of the plans, and all defects were missed. There may have been more than one inspection of the construction, but there is no evidence that the two distinct hazards were inspected on separate occasions. The focus here should not be on the conduct of the tortfeasor, but on the nature of the deficiencies themselves. If they are truly distinct, such that one is not going to be uncovered at the same time as the other, then the limitations period will be separate. And it does not matter whether they arose because of a single act of negligence (such as failing to review plans), or in factually separate incidents of negligence (such as installing the wrong exterior paneling, failing to insulate steel beams, and failing to construct internal walls and floors to form a suitable fire barrier).

70. The reconciliation of these principles lies in drawing a distinction between claims for "pure economic loss", where a claim will always be triggered by the facts that give the plaintiff actual or constructive knowledge of a defect, and claims for damage caused to persons or property, which will usually arise at the time of injury.

71. *Peixeiro* places the focus of analysis on the plaintiff, not the tortfeasor, and provides that a plaintiff must have a reasonable opportunity to assert his claim. From the perspective of GCC27, it endured separate wrongs in the form of separate deficiencies, each of which, independently, creates a serious risk to people living at the condominium.

72. In balancing the interests of plaintiffs and defendants, the Supreme Court has been clear that potential claims may well arise "during the useful life of the building". In the construction context, those involved in building a condominium must understand that people are relying on them to build safely. People's homes and their very lives are at stake. When builders fail in their duty and there is loss of life or property, they will be liable. When builders fail in their duty, and their failure is discovered before loss of life or property, they will be liable for the cost of rectification to avoid these greater losses. In accordance with the interpretive principle set down in *Peixeiro*, plaintiffs must have an opportunity to assert these claims, which means that they cannot be barred from doing so before they know about them.

73. Finally, different considerations may apply to legislation that provides for an "ultimate" limitations period. Where the Legislature has directed that the focus of the long-stop date is on the defendant, and when its work was completed, then the Legislature may have abrogated from the principles in *Peixeiro* and *Winnipeg Condominium* to provide a "long-stop" date of repose for defendants, regardless of the resulting unfairness for plaintiffs.[69] But that issue does not arise in this case.

Part III – The Evidence in this Case

(a) The Direct Evidence

74. I now turn to a detailed review of the facts in light of this discussion of the issues and the applicable legal principles.

75. GCC27 is a condominium whose premises were constructed during a building boom in Collingwood in the late 1980's. Many of the projects in the Blue Mountain area at this time were built by the defendant Resorts in concert with a builder, Mr. Bruno Suppa. The corporate vehicle for development of GCC27 was BMP Wintergreen Inc. ("BMP"), a company owned by a company controlled by Mr. Suppa, and a different company owned by Resorts.[70]

76. The building permit for GCC27 was issued on April 5, 1988.[71] Construction took place between May 1988 and December 1989.[72] At the first meeting of the Board of Directors, on April 1, 1990, the Board decided to seek proposals for a technical audit of the project.[73] The Board decided at its meeting of August 24, 1990 to retain the defendant Halsall and Associates for this task.[74] Halsall and Associates did this work and noted deficiencies.[75] GCC27 unitholders were advised of these findings at the Annual General Meeting held on March 2, 1991.[76] These deficiencies were corrected. Initially the rectification work was performed by BMP. That company became insolvent and the remaining deficiency work was done by Resorts.[77] As far as GCC27 was concerned, everything had been addressed by the end of 1992.[78]

77. Development continued in the Blue Mountain area. One subsequent project, Sierra Lane, became rather notorious. It was a Bruno Suppa project, but this time Resorts was not involved. I was not given details of the problems at Sierra Lane. At some point before that project was completed, work was stopped by the Town. Fences were erected around the project. The economic climate had turned, and rumours abounded that Mr. Suppa and his companies were "in trouble". Halsall and Associates performed a technical audit for the Board of Sierra Lane and uncovered serious deficiencies. The project was closed down by the Town.

78. I can draw inferences about the nature of the problems at Sierra Lane from communications to GCC27 that are in the record, notably the Letter. But I do not have a record of what the specific defects were, or who knew what about them. It is clear from uncontested evidence from GCC27 that the debacle at Sierra Lane was a *cause celebre* in the area, and that GCC27 knew there were very serious problems with that project. Mr. Koziebrocki notes that he saw one of the walls blow over in the wind at Sierra Lane.[79]

79. In October 1993, GCC27 received two letters from Resorts raising new concerns about construction issues. The first was dated October 21, 1993, and warned of deficiencies discovered in the fireplace installations at Sierra Lane and at other unrelated condominiums.[80] The second letter, dated October 25, 1993, is the Letter, which is set out in full at the outset of these reasons.[81]

80. GCC27's current President, Mr. Michael Grace, and its former President, Mr. Irwin Koziebrocki, both gave evidence on behalf of GCC27.[82]

81. Mr. Grace says that he was not concerned about the fireplaces for two reasons. First, he was not concerned about construction defects in projects built by persons other than Mr. Suppa and/or Resorts. There was no reason to suppose that defective work by an unrelated developer would have any bearing

on GCC27's building. Second, the fireplace problems in Sierra Lane, a Suppa development, had been discovered by the defendant Halsall & Associates. This was the same consultant that had reviewed GCC27's construction and had given GCC27's fireplaces "a clean bill of health".[83] Mr. Koziebrocki doesn't recall receiving the Letter, or writing the handwritten note, but acknowledges that he must have done so.[84] He speculates that he was not greatly concerned, for the same reasons Mr. Grace gave in his speculations.[85] Mr. Koziebrocki also relied upon the fact that Mr. Suppa, his family, and other relations, lived at GCC27. For this reason he supposed that GCC27 was built to the highest safety standards.[86]

82. Nonetheless, GCC27 authorized Resorts to have the fireplaces inspected. This was done in 1993 or 1994,[87] but GCC27 does not recall details.[88] Mr. Koziebrocki believes that he was advised orally by Resorts that the fireplaces had been checked and were fine.[89] Resorts, which was responsible for arranging the inspections (in its capacity as property manager), did not report any deficiencies arising from those inspections.[90]

83. As found by Justice O'Connor, the Letter put GCC27 on notice that there was a need to inspect the exterior walls of its buildings for fire safety issues:

> The [L]etter… referred to 'concerns' with 'fire retardant material on the exterior panels'…. I find the plaintiff was given a sufficiently specific notice in this letter that it knew or ought to have known of the problems with the EIFS.[91]

Had GCC27 inspected the EIFS, that deficiency would have been discovered.

84. In his affidavit, Mr. Grace speculates on what he had thought at the time the Letter was received (he speculates because he does not have a present recollection). In this speculation, Mr. Grace notes that Halsall and Associates performed the technical audits on both Sierra Lane and GCC27. It did not raise the concerns it found at Sierra Lane with GCC27 either before or after the Sierra Lane audit. The Letter raised an issue respecting the fireplaces, and in respect to one-hour fire retardant on exterior walls. It did not expressly reference fire retardant concerns with internal structures. GCC27 would have no cause to be concerned about fire retardant on its external walls on the basis of the Letter, because its external construction was different from that used at Sierra Lane.

85. Mr. Grace concludes this review as follows:

> Had I suspected that there was a real issue regarding fire separations at GCC 27, I would have acted to determine what the true state of affairs was. I never suspected that there was a real issue regarding fire separations. Fire separations were never an issue until February 1996.[92]

Mr. Koziebrocki echoed these thoughts in his evidence.[93]

86. In February 1996, GCC27 received a letter that identified several potential deficiencies in its buildings, including those that are the subject-matter of this litigation (the "Tatham Letter").[94] The Tatham Letter was "evidence… that there were problems with the construction" of GCC27.[95] The concerns raised in the Tatham Letter were amplified in a letter from the Town dated September 6, 1996, [96] a subsequent report from Halsall & Associates regarding fireplaces,[97] and a report from Allen Larden dated September 1999 detailing other deficiencies.[98] It does not matter which of these events triggered commencement of the limitation period if it was not the Letter. Taking the earliest of these subsequent communications (the Tatham Letter), the limitation period would have commenced no

earlier than February 11, 1996. The six year period would have expired no earlier than February 10, 2002, and the action was commenced in 2001. Nothing occurred between the Letter (October 1993) and the Tatham Letter (February 1996) to trigger the limitation period.[99]

87. Why did GCC27 wait so long to start its action? Mr. Grace answers that question as follows:

> The GCC 27 directors knew in 1996 that the Town had uncovered many deficiencies in many Blue Mountain area condominiums that Bruno Suppa had developed, condominiums that [Resorts] had a hand in building. We also knew that the limitation period in commencing actions was 6 years. As far as we knew, the 6-year period commenced February 22, 1996.
>
> The GCC directors decided that, before we incurred significant legal expense, we would await the results of the actions of other Blue Mountain area condominiums and attempt to negotiate a settlement with the Town. When it became apparent that this strategy would not insulate GCC 27 from legal action, we commenced our action in this matter.
>
> The Town's allegation that the limitation period would somehow run from October 1993 came as a total shock to us….[100]

Mr. Grace amplifies this description by noting: (a) the Town knew at least as much as GCC27 about the problems with Sierra Lane and other developments built by Mr. Suppa's companies; (b) the Town had a positive duty to ensure compliance with the Fire Code and certified that it had done so; (c) the Town did not raise concerns with GCC27 about that state of its construction until 1996.

88. I find that GCC27 has acted reasonably throughout, aside from its failure to investigate the EIFS problem in 1993 (as found by Justice O'Connor). In particular:

> (a) it relied reasonably on BMP, Resorts and the Town to do their work with all due care;
>
> (b) it relied reasonably on Halsall and Associates to do the Technical Audit with all due care;
>
> (c) in reliance on BMP, Resorts, the Town and Halsall and Associates, it believed reasonably that there were no safety deficiencies in its buildings after 1992;
>
> (d) it reasonably had no further concerns prior to receipt of the Letter in October 1993;
>
> (e) although it was not reasonable for GCC27 to have failed to investigate the EIFS problem in October 1993 (as found by Justice O'Connor), the Letter did not put GCC27 on notice of the internal fire separation problem or the structural beam problem, and GCC27 reasonably did not know of these problems;[101]
>
> (f) it was not until receipt of the Tatham Letter in February 1996, at the earliest, that GCC27 was put on notice of the internal fire separation problem and the structural beam problem.

89. It remains, then, to consider whether a reasonable and competent investigation of the concerns raised in the Letter would have uncovered the internal fire separation problem and the structural beam problem.

(b) The Expert Evidence

90. The experts opined on what a reasonable and competent expert would have done to investigate the concerns raised in the Letter. GCC27's expert, Mr. Lischkoff, said an investigation of the EIFS problem would not have uncovered the internal problems. The Town's expert, Mr. Woods, said that an expert investigating the concerns raised in the Letter would have discovered the internal problems.

91. On balance, I prefer Mr. Lischkoff's evidence. I find that on the strength of the Letter, GCC27 ought to have retained a consultant to examine potential concerns in the external walls. That expert would have discovered the EIFS problem. That expert would not have needed to review the internal fire separations or the insulation of the structural beams to do a competent professional review of the EIFS problem. In this regard, I find that the Letter did not alert GCC27 or any reasonable consultant retained by it of potential problems with internal fire separations or with insulation of internal structural beams.

92. The Letter was written by a property manager (an employee of Resorts) to the then President of GCC27 (Mr. Koziebrocki). It is not couched in difficult or technical language. It is clear on its face. No doubt any consultant retained to address the concerns identified in the Letter would have spoken with GCC27 and Resorts, and perhaps others, to identify the scope of work required.

93. I was unconvinced on this issue by the defence expert, Carson Woods. He is undoubtedly a senior architect, and very knowledgeable about construction projects and deficiency rectification.[102] However, his evidence was essentially that, on the face of the Letter, a competent consultant would have done a review of all fire safety features of the project. When pressed on this point, he retreated into general statements about standards of professionalism and doing a thorough job. All of this is well and good, but surely GCC27 would have been concerned if its consultant, retained to review the fire safety of its external walls, started ripping up internal walls to check fire retardant coatings on steel beams unrelated to the external walls. Mr. Woods indicates that he is "supported in this opinion by the conclusions… of [Mr.] Larden… who found omissions in fire separation design during his review of the plans as did I."[103] With respect, Mr. Larden's findings do not assist Mr. Woods, since Mr. Larden was asked to look at the issue of internal fire separations. I agree that a consultant asked to review internal fire separations would have found those deficiencies; the question is whether a consultant who was unaware of any concern with the internal problems would have found them while reviewing the EIFS.

94. Mr. Woods also opined that "a reasonable and prudent inspector would have examined the plans and found both the exterior and interior fire resistance issues as flaws…. This is because the exterior and interior fire separation construction is inextricably interwoven as a result of the O.B.C. mandate for continuity."[104] This may be so, but if it is, Mr. Woods never explained why. The evidence before me is that the exterior wall issue arises because of the proximity of the buildings to each other, and not as a result of the internal fire safety structure of the building. It may be that the requirements of the Building Code are determined with a "mandate for continuity" in mind, but it was never suggested to me that a determination of the proper requirements for the external walls would require a consideration of the fire separation features of the internal walls. With the greatest of respect, this aspect of Mr. Woods' opinion, which bears the form of analytical reasoning, is merely conclusory because of the lack of analysis to support the conclusion.

95. The Letter does not expressly cast doubt on all aspects of compliance with the Fire Code – it identifies two specific concerns. For example, difficulties identified with the fireplaces presumably would prompt an investigation of the fireplaces and features related to them. One would not expect a problem with fireplaces would automatically lead to concerns about fire barriers unrelated to the fireplaces.

96. The internal problems are unrelated to the fire retardant qualities of the EIFS system, or the proximity of buildings. The specifications for the external and internal walls were not the same or

related to each other. They were not made from the same materials. Their specifications were not determined by the same or related calculations. It would have been possible for one of these problems to exist, and the other not. In simple terms, there is really no relationship between the problems, other than the fact that they both relate to fire safety.

97. The *Fire Code* is a lengthy document, and many provisions would be relevant to GCC27's buildings – from the wiring to the heating to demising walls, placement of windows, stairways, construction of the roofs, setbacks from other buildings, and so on. Mr. Woods could not explain to me why a concern with the EIFS system and building proximity would prompt a consultant to also investigate the internal structure. He did not point to any relationship between the two issues that would lead me to agree with his conclusion.

98. As a final comment, the value of expert evidence lies in the analysis presented. I cannot adopt Mr. Woods' opinion simply because he holds it and is a respected architect. In the absence of reasons, flowing from the facts of this case, and analysis, I am not prepared to accept his conclusion.

99. There were different problems with the plaintiff's expert, James Lischkoff. Like Mr. Woods**,** Mr. Lischkoff is clearly very knowledgeable about his field.[105] He styled himself an "EIFS expert", and said he would bring in an expert on the Fire Code for more generalized concerns beyond the external cladding of the building.

100. I had two concerns with this evidence. First, it seemed that Mr. Lischkoff might have been the wrong expert for this case. He said that he would not provide opinions on the overall fire safety compliance of the building – but would restrict himself to the status of the EIFS.

101. Second, Mr. Lischkoff was not given the entire history of the matter and then asked to opine on the scope of review that would have been undertaken by a reasonable and competent consultant in 1993. Instead, Mr. Lischkoff was given only the information that was available in 1993, and then asked for his opinion as to what should be done.[106] Initially, I had thought this a very clever approach. However, I fear it made Mr. Lischkoff too much of a protagonist in the trial. For the issue for trial is not whether Mr. Lischkoff would have found the internal problems on the strength of the Letter. The issue was whether both problems would have been uncovered if the first problem had been investigated appropriately by a reasonable and competent consultant.

102. The net result was a rather personal disagreement between the two experts – since the defence evidence was, in effect, that Mr. Lischkoff would not have done a reasonable and competent job. Naturally, Mr. Lischkoff took that rather badly, and was quite defensive in cross-examination.

103. The proper analysis, in my view, is as follows. Justice O'Connor decided that GCC27 ought to have investigated the concerns raised in the Letter. The Letter was clear on the issue of EIFS, and so the consultant would have reviewed the external walls of the buildings to determine whether they had been constructed in compliance with the Fire Code. This review could have been conducted by looking at the plans, attending at the site, and reviewing the materials specifications for the EIFS that had been used. It would not have been necessary to do destructive testing on the EIFS (assuming that the EIFS had been made in accordance with its own product specifications). If these steps had been taken, the consultant would have learned that the external walls did not provide a sufficient firewall, given the proximity of buildings.

104. Unless there was something else uncovered that would have prompted the consultant to go further, the investigation would have ended at this point. There would have been no reason to go

further. Common sense, Mr. Lischkoff's evidence, and Mr. Woods' inability to tell me of any logical connection between problems with the outer walls and the internal problems lead me to conclude that there is none.

105. That having been said, given that the Letter is not a technical document, the course of prudence would have led GCC27 and its consultant to ask Resorts of any known concerns arising from the debacle at Sierra Lane. It may be that the consultant would also have spoken with persons involved in Sierra Lane. All of these would have been prudent things to do, to ensure that any investigations covered areas of possible concern. These steps were not done, of course.

106. As stated above, I do not have evidence about the particular defects in the Sierra Lane project. That is an important omission in the evidence. Resorts was aware of the problems at Sierra Lane. Indeed, so was the Town, which ultimately shut down Sierra Lane. As I have indicated, Sierra Lane was well known in the area, and perhaps the directors of GCC27 were generally aware of the kinds of problems on that project. If so, the common understanding of Resorts and GCC27's directors could have informed the Letter, leading to an interpretation that would not be readily apparent in the absence of that context. However, the information I do have about Sierra Lane is very limited, and does not provide context that illuminates the Letter. In the absence of this contextual information, the Letter stands by itself. Should GCC27 have understood from the Letter to investigate the internal structures? Should an independent consultant have reached that conclusion?

107. On a simple reading of the Letter, the answer is "no". The only portion of the Letter that could be seen to relate to internal construction is the second last sentence, which reads: "[w]e feel that a sample review of the fireplace construction as well as a review of the fire separations could be seen as prudent." What is meant here by the term "fire separations"? The answer is found in the previous sentence of the Letter: "concerns that are affecting Sierra Lane, the principal ones being, fireplace construction and potential lack of one hour fire retardant material on the exterior panels." The former sentence followed immediately after the latter phrase makes it clear that by "fire separations", the writer was referring to "potential lack of one hour fire retardant material on the exterior panels". In grammatical terms, this is a parallel construction. In the first sentence the writer refers to two principal problems; in the second he suggests investigating those two problems.

108. My conclusion is strengthened by the Larden Report,[107] a technical review of the project undertaken on behalf of GCC27. Section 3 of that report describes the deficiencies in detail. Section 3.1 of the Report describes the problem with the exterior walls. Section 3.3 addresses protection of steel beams. Section 3.4 addresses compartmentalization and structural fire-resistance. In simple terms, Section 3.1 indicates that the project buildings are so close together that the facing walls must be constructed of noncombustible construction. They are not. As a result, there is an unacceptable risk that fire in one building will spread to another. Section 3.3 says that the steel beams need to be protected with appropriate fire-resistance materials. They are not. As a result, if there is a fire in the building, there is an unacceptable risk that these beams will fail, causing the building to collapse, perhaps before people have a reasonable time to escape. Section 3.4 indicates that the building plans do not call for internal walls of sufficient thickness. Assuming construction was in accordance with the plans, this means that these internal walls do not impede fire sufficiently, and they need to be thickened (presumably by adding more drywall).

109. These problems all relate to fire safety. But they are distinct deficiencies, none dependent on the others. The latter two were identified by a review of the building plans. So they may not have been difficult to spot. However, they were identified by Mr. Larden after he had the benefit of being told that there were concerns in these areas. It is not clear that these concerns would "leap off the page" if one was not checking those issues. They didn't "leap off the page" for the original architects, the builder, or

Halsall and Associates when it performed its technical audit after construction. And I see no reason why a consultant engaged to review the fire safety qualities of the exterior walls, which arise because of the proximity of the buildings, would have looked for or found the problems with the steel beams or the internal walls.

Part IV – Conclusions and Final Order

(a) Liability

110. On the basis of its admission, I find the Town negligent in its review of GCC27's building plans, and in its inspections of construction of GCC27's buildings and that this negligence caused or contributed to causing the defects identified in this proceeding as the EIFS problem, the internal fire separation problem, and the structural beam problem.

111. Justice O'Connor found that the Letter put GCC27 on notice of the EIFS problem in October 1993. I find that the Letter did not put GCC27 on notice of the internal fire separation problem or the structural beam problem. I find that a competent consultant engaged by GCC27 in 1993 to investigate the EIFS problem would not have discovered the internal fire separation problem or the structural beam problem. I find that separate causes of action arise for these deficiencies, on the facts of this case, because the facts giving rise to each is distinct. I find that GCC27 was put on notice of these problems no earlier than February 1996. This action was commenced in August 2001. The limitation period is six years. And so the action is in time.

112. Accordingly, the Town is liable for its negligence to GCC27.

(b) Damages

113. The parties settled damages. They agreed that, if liable, the Town shall pay half of this sum: $535,000, plus interest, plus costs, less $50,000. Judgment shall issue accordingly. If interest or costs are not agreed within 21 days, counsel should schedule a teleconference with me for directions.

(c) Trial Counsel

114. I commend both Mr. Speigel and Mr. David on their presentation of this case. The evidence was focused on the real issues. No time was wasted. Legal argument was thorough, thoughtful, and directed my attention to the pertinent authorities. It is a delight to preside in a trial conducted by such competent, well prepared counsel.

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Corbett J.

DATE: January 31, 2007

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[1] *Sparham-Souter* v. *Town & Country Developments (Essex) Ltd.*, [1976] 2 All E.R. 65 at 68 (C.A.) per Lord Denning.
[2] *Sparham-Souter*, supra, at p.70, per Lord Denning.

[3] *Joint Documents Brief*, vol.1, p.85.
[4] *Carleton Condominium Corp. No. 21* v. *Minto Construction Ltd.* (2001) 15 C.L.R. (3d) 23; 47 R.P.R. (3d) 32 (Ont. S.C.J.), per Aitken J.; appeal dismissed (2004) C.L.R. (3d) 1; 15 R.P.R. (4th) 161 (Ont. C.A.) per Labrosse, Abella and Laskin JJ.A.
[5] *Peixeiro* v. *Haberman*, 1997 CanLII 325 (S.C.C.), [1997] 3 S.C.R. 549; (1997), 151 D.L.R. (4th) 429; 46 C.C.L.I. (2d) 147; 12 C.P.C. (4th) 255; 30 M.V.R. (3d) 41 (S.C.C.), per Major J.
[6] *Cahoon* v. *Franks*, [1967] S.C.R. 455; (1967) 63 D.L.R. (2d) 274; 60 W.W.R. 684, per Hall J.
[7] *Winnipeg Condominium Corp. No. 36* v. *Bird Construction*, 1995 CanLII 146 (S.C.C.), [1995] 1 S.C.R. 85; (1995), 121 D.L.R. (4th) 193; [1995] 3 W.W.R. 85; 23 C.C.L.T. (2d) 1; 18 C.L.R. (2d) 1; 43 R.P.R. (2d) 1 (S.C.C.), per La Forest J.
[8] *Joint Documents Brief*, vol. 1, p.85.
[9] "DALE" refers to Mr. Dale McNichol, the author of the Letter.
[10] This copy of the Letter was found in Resort's files, so we know the handwritten response was received by Resorts.
[11] Koziebrocki Affidavit, *Exhibit* 4, para. 11.
[12] EIFS is an acronym that refers to the external panel system.
[13] I refer to the internal fire separation problem and the structural beams problem collectively as the "internal problems".
[14] *Ontario Building Code*, R.R.O. 1990, Reg. 61.
[15] See, for example, *Ostash* v. *Sonnenberg* (1968), 63 W.W.R. 257; 67 D.L.R. (2d) 311 (Alta. S.C. App. Div.), where negligent installation of natural gas appliances killed three children and injured the rest of the Ostash family through carbon monoxide poisoning.
[16] *Joint Documents Brief*, vol. 1, p. 90 and p. 104.
[17] Grace Affidavit, *Exhibit 3*, Exhibit B.
[18] Grace Affidavit, *Exhibit 3*, para. 21.
[19] GCC27's claims against all other defendants have been settled: *Joint Document brief*, vol. 1, pp 179, 181; Exhibits 7 and 8.
[20] *Grey Condominium Corp. No. 27* v. *Blue Mountain Resorts Ltd. et al.*, [2005] O.J. No. 793 ("*GCC27 #1*"). Note that the Quicklaw report of this case misnames it "Gray" rather than "Grey" in its summary index, and misattributes the judgment to O'Connell J. when it was rendered by O'Connor J. A copy of the decision of O'Connor J. is found at *Joint Document Brief*, vol. 1, p. 152.
[21] *Johanesson* v. Canadian *Pacific Railway*, [1922] 2 W.W.R. 341 at 344-45; affd [1922] 2 W.W.R. 761 (Man. C.A.); *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 S.C.R. 460; 201 D.L.R. (4th) 193; 10 C.C.E.L. (3d) 1; 7 C.P.C. (5th) 199, at para. 24, per Binnie J.
[22] *R.* v. *Sweetman*, [1939] O.R. 131 at 137 (Ont. C.A.).
[23] Neither party took this position before me.
[24] Justice O'Connor distinguished between the EIFS problem and internal fire safety issues (including both the internal fire separation problem and the structural beams problem).
[25] *GCC27 #1*, supra, at para. 25.
[26] In this passage Justice O'Connor describes the Town's position as linking the legal issue (whether the limitation period for all deficiencies commences with the discovery of the first deficiency) with the factual issue (whether investigation of the EIFS problem would have led to discovery of the internal problems). This is not how the Town argued these issues at trial – it argued that these are separate defences, each sufficient if made out.
[27] *Grey Condominium #1*, supra, at para. 15, *Joint Documents Brief*, vol. 1, p.157.
[28] *Limitations Act*, R.S.O. 1990 c. L.15, s.45(1)(g).
[29] Statement of Claim, *Trial Record*, p.2.
[30] *Aguonie* v. *Galion Solid Waste Management Inc.* 1998 CanLII 954 (ON C.A.), (1998) 38 O.R. (3d) 161; 156 D.L.R. (4th) 222; 17 C. P.C. (4th) 219 (Ont. C.A.), at para. 21, per Borins J. (*ad hoc*), as he then was.
[31] *Aguonie*, *supra*, at para. 24.
[32] See, for example, *Soper* v. *Southcott* 1998 CanLII 5359 (ON C.A.), (1998) 39 O.R. (3d) 737; 43 C.C.L.T. (2d) 90 (Ont. C.A.), per Dunnett J. (*ad hoc*); *Findlay* v. *Holmes* 1998 CanLII 5488 (ON C.A.), (1998) 111 O.A.C. 319 (Ont. C.A.), per Dunnett J. (*ad hoc*).
[33] *Soper* v. *Southcott*, *supra*, at para. 14.
[34] *Findlay* v. *Holmes*, *supra*, at paras. 25-26.
[35] *Berger* v. *Benchitrit*, [2002] O.J. No. 2857 at para. 20 (Ont. S.C.J.). I am aware that the test is framed as a double negative. It is warranted in this circumstance: where a plaintiff has no reason for concern, it may take no steps to investigate and show no lack of diligence. If there is nothing to be diligent about, then doing nothing may show neither lack of diligence nor diligence. What is important is that the plaintiff act reasonably and promptly in light of all of the circumstances of a particular case.
[36] *410727 B.C. Ltd.* v. *Dayhu Investments Ltd.* 2004 BCCA 379 (CanLII), (2004), 241 D.L.R. (4th) 467; 30 B.C.L.R. (4th) 157; 49 M.P. L.R. (3d) 39 (B.C. C.A.); leave to appeal denied 334 N.R. 194 (note); 219 B.C.A.C. 320 (note); 361 W.A.C. 320 (note), per Newbury J. A., at para. 22.
[37] *Peixeiro* v. *Haberman*, supra, at para. 18 [emphasis added].
[38] See, for example, *Nieuwesteeg* v. *Digenova* reflex, (1991) 7 O.R. (3d) 506; 37 M.V.R. (2d) 127 (Gen. Div.), per White J.; *Lys* v. *Da Sacco*, [1991] O.J. No. 3702, per J. Brockenshire J.
[39] See *Valley Agricultural Society* v. *Behlen Industries Inc.*, [2003] M.J. No. 115 (Man. Q.B.) and *Canadian Equipment Sales and*

Service Co. Ltd. v. *Continental Insurance Co.* (1975), 9 O.R. (2d) 7 (Ont. C.A.). To the extent that *Valley Agricultural* stands for the proposition that a limitations period will start to run at the time of the negligence, rather than when the existence of the condition becomes known to the plaintiff actually or constructively, I respectfully disagree.

[40] *410727 B.C. Ltd. supra*, at paras 27, 33 and 38. See particularly para. 33, where the Court held: "I would not want to be taken as acceding to any suggestion that the negligent construction or inspection of a building can give rise to multiple claims arising from multiple defects".

[41] *Smith* v. *Toronto (City)* (2004), 8 M.P.L.R. (4th) 99 (Ont. Div. Ct.) at paras 9 and 24.

[42] *Carleton Condominium*, *supra* (Ont. C.A.) at para. 4.

[43] *Cahoon* is referenced at para. 180, and the point raised by *Cahoon* is considered in detail in paras. 180-195 of Aitken J.'s decision. *Peixeiro* is referenced at para. 209. *Winnipeg Condominium* is referenced at para. 163. *Carleton Condominium* cannot be said to have been decided *per incuriam*. Since it post-dates *Peixeiro*, *Cahoon* and *Winnipeg Condominium*, I would be bound to follow it, even if I could not reconcile it with the Supreme Court authority. Different considerations would apply if it could be argued that *Carleton Condominium* had been overruled by subsequent authority from the Supreme Court of Canada.

[44] *Carleton Condominium*, *supra* (Court of Appeal).

[45] *Carleton Condominium*, supra (Ont. S.C.J.) at paras. 184-213, per Aitken J.

[46] The Town also argued that I should distinguish *Carleton Condominium* on the basis that it was a case about *res judicata*, a characterization placed on it by the British Columbia Court of Appeal in *410727 B.C. Ltd.*, supra, at para. 32, quoted in full below at para. 40 and n. 51. I do not accept that characterization. *Res judicata* was one issue in *Carleton Condominium*. The limitations period was another. Both issues were essential for the disposition of the case and both form part of the case's *ratio decidendi*.

[47] *Murphy* v. *Brentwood Council*, [1990] 2 All E.R. 908 (C.A.), overruling *Anns* v. *Merton London Borough*, [1977] 2 All E.R. 492 (C.A.).

[48] 1984 CanLII 21 (S.C.C.), [1984] 2 S.C.R. 2.

[49] See *Ryan* v. *Victoria*, 1999 CanLII 706 (S.C.C.), [1999] 1 S.C.R. 201.

[50] *410727 B.C. Ltd.*, supra, at paras. 1-3 and 39.

[51] See above, para. 36 and n. 46.

[52] *410727 B.C. Ltd., supra*, at para. 32 (emphasis added).

[53] See *Central Trust Co.* v. *Rafuse*, 1986 CanLII 29 (S.C.C.), [1986] 2 S,C.R. 147; *Nielsen* v. *Kamloops (City)*, 1984 CanLII 21 (S.C.C.), [1984] 2 S.C.R. 2; *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] S.C.R. 1189; *Canadian National Railway* v. *Norsk Pacific Steamship Co.*, 1992 CanLII 105 (S.C.C.), [1992] 1 S.C.R. 1021. The "debate" on these issues also includes key English authorities: *Murphy* v. *Brentwood District Council*, [1991] 1 A.C. 398, [1990] 2 All E.R. 908 (H.L.); *Anns* v. *Merton London Borough Council*, [1978] A.C. 728, [1977] All E.R. 492 (H.L.); *D & F Estates* v. *Church Commissioners for England*, [1988] 2 All E.R. 992 (H.L.); *Dutton* v. *Bognor Regis Urban District Council*, [1972] 1 Q.B. 373, [1972] 1 All E.R. 462 (C.A.); *Hedley Byrne & Co.* v. *Heller & Partners Ltd.* (1963), [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

[54] per La Forest J. in *Winnipeg Condominium, supra*, at para. 33, quoting from *Norsk, supra*, at p.1065.

[55] *Winnipeg Condominium*, supra, para. 50.

[56] *Winnipeg Condominium*, supra, at para. 15.

[57] *R.* v. *Sellars*, [1980] 1 S.C.R. 527, per Chouinard J.

[58] *Peixeiro*, supra, at para. 33.

[59] *Peixeiro*, supra, at para. 36.

[60] *Peixeiro*, supra, at para. 37 [emphasis added].

[61] *Peixeiro*, supra, at para. 39.

[62] [1967] S.C.R. 455, per Hall J.

[63] supra.

[64] 2003 CanLII 52163 (ON C.A.), (2003), 66 O.R. (3d) 321 (Ont. C.A.), per Armstrong J.A.

[65] supra.

[66] supra.

[67] supra.

[68] *Municipal Act*, R.S.O. 1990, s.284.

[69] *410727 B.C. Ltd.*, supra, at para. 39.

[70] Grace Affidavit, *Exhibit 3*, para. 4.

[71] *Documents Brief*, vol. 1, p.18.

[72] *Documents Brief*, vol. 1, p.40.

[73] *Joint Documents Brief*, vol. 1, p.52.

[74] *Joint Documents Brief*, vol. 1, p.55.

[75] The Halsall Report is at *Documents Brief*, vol. 2, tab 4. It is stated to be "preliminary", but no other report was delivered.

[76] *Joint Documents Brief*, vol. 1, p.64.

[77] Grace Affidavit, *Exhibit 3*, para. 5.

[78] *Documents Brief*, vol. 1, p.77; Grace Affidavit, *Exhibit 3*, para. 6.

[79] Koziebrocki Affidavit, *Exhibit 4*, para. 5.

[80] Grace Affidavit, *Exhibit 3*, para. 7; Joint Documents Brief, vol. 1, p.81.

[81] Joint Documents Brief, vol. 1, p.85.
[82] Affidavit of Michael Grace sworn April 12, 2004, *Exhibit 3*; Affidavit of Irwin Koziebrocki sworn April 14, 2004, *Exhibit 4*.
[83] Grace Affidavit, *Exhibit 3*, para.9.
[84] Koziebrocki Affidavit, *Exhibit 4*, para. 8.
[85] Koziebrocki Affidavit, *Exhibit 4*, paras. 9-10.
[86] Koziebrocki Affidavit, *Exhibit 4*, para. 7(a).
[87] At any rate, this is what Mr. Grace says happened. I do not have other evidence that fireplace inspections were conducted. If they were, I do not know who conducted them, when they were conducted, what was done, or what the resulting advice may have been. If the inspections were not done, I have no explanation for that either.
[88] Koziebrocki Affidavit, *Exhibit 4*, para. 11.
[89] Koziebrocki Affidavit, *Exhibit 4*, para. 11.
[90] GCC27 first learned of actual fireplace deficiencies in a letter from C.C. Tatham and Associates dated February 11, 1996 (the "Tatham Letter"). By this time, some unitholders had already converted to gas fireplaces for unrelated reasons. Ultimately all of the fireplaces were converted to gas, which had the incidental effect of rectifying the fireplace deficiencies, and no claim was ever pursued in respect to them. See Grace Affidavit, *Exhibit 3*, paras. 10-12.
[91] *GCC27 #1*, supra, at para. 22.
[92] Grace Affidavit,*Exhibit 3*, para. 14.
[93] Koziebrocki Affidavit, *Exhibit 4*, para. 7.
[94] *Joint Documents Brief*, vol. 1, p. 90.
[95] Grace Affidavit, *Exhibit 3*, para. 17.
[96] *Joint Documents Brief*, vol. 1, p.104.
[97] *Joint Documents Brief*, vol. 1, pp. 110.
[98] *Joint Documents Brief*, Vol. 1, p.123.
[99] As an aside, it is surely obvious that a letter of concern, such as the Letter, would do no more than create an obligation to investigate. GCC27 would have been foolish, indeed, to commence an action on the strength of the Letter. And thus the limitation period would not arise immediately upon receipt of the Letter. However, reasonable investigation of the concerns raised in the Letter would not have taken two years. Thus I do not have to concern myself with determining the reasonable period of investigation prior to discovery of the cause of action. If the Letter gave rise to a duty to investigate, then this action is out of time. If the Letter did not give rise to that duty, then the obligation to investigate arose no earlier than February 22, 1996, and the action is in time.
[100] Grace Affidavit, *Exhibit 3*, paras. 18-20.
[101] See paras. 106-107, below.
[102] Mr. Woods has been engaged in the profession of architecture for almost fifty years. *Documents Brief*, vol. 1, p.170.
[103] *Joint Documents Brief*, vol. 1, p.168.
[104] *Joint Documents Brief*, vol. 1, p.168.
[105] *Joint Documents Brief*, vol. 1, p.192.
[106] *Joint Documents Brief*, vol. 1, pp 183-184.
[107] *Joint Documents Brief*, vol. 1, pp 123-132.