QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2008 SKQB 462**

Date: **2008 11 13**
Docket: Q.B.G. No. 2384/2001
Judicial Centre: Regina

BETWEEN:

THE OWNERS: CONDOMINIUM PLAN NO. 81R14133 AND 81R14134 OPERATING AS SIERRA VILLAGE CONDOMINIUM ASSOCIATION

PLAINTIFF

- and -

MUXLOW DEVELOPMENT CORPORATION, DESIGNS BY SQUIRE LTD., ARNIE FLEGEL AND THE CITY OF REGINA

DEFENDANTS

Counsel:

Murray W. Sawatzky and Sonia L. Eggerman — for the plaintiff
Christine L. Clifford — for the defendants

JUDGMENT — SANDOMIRSKY J.
November 13, 2008

THE CASE

[1] The plaintiff, The Owners: Condominium Plan No. 81R14133 and 81R14134 operating as Sierra Village Condominium Association, hereinafter referred to as the "Condominium Association" and one of the named defendants, the City of Regina, hereinafter referred to as "the City", ask the court to determine whether the Condominium

Association's claim against the City is statute barred. In its statement of defence, the City pleads s. 314(1)(a) of *The Urban Municipality Act, 1984*, S.S. 1983-84, c. U-11 as am. which reads:

> **314**(1) No action is to be brought against an urban municipality for the recovery of damages:
>
> (a) after the expiration of one year from the time when the damages were sustained, and no such action is to be continued unless service of the statement of claim is made within that one-year period;

(The above was repealed by *The Municipalities Act*, S.S. 2005, c.M-36.1, s. 408.)

[2] The parties have agreed to resolve this aspect of the trial separate from the action in negligence claimed against all of the named defendants.

[3] For the purposes of this trial the parties have filed a Joint Book of Documents and agreed that there would be no issue as to the veracity of the facts contained therein. The parties further agree, that for this aspect of the case, all of the allegations of fact recited in the statement of claim shall be taken as true and proven.

[4] The City argues that all of the material facts needed to establish the Condominium Association's cause of action were known to the Condominium Association as early as November 10, 1999, when the Association's Board received and reviewed an engineering report commissioned by the Board on behalf of the Association at its July 1, 1999 meeting. The purpose of retaining the engineers was to determine the nature and extent of the deterioration of wooden beams and the floor structure for three of the two storey wood frame buildings composing part of the Condominium Association.

Donovan Engineering Ltd. was provided with the blue prints or plans of the structures for the purpose of their examination.

[5] On November 10, 1999 Donovan Engineering Ltd. provided the first of two written reports. Therein Donovan described the nature and extent of the deterioration of 2" x 12" inch wooden beams which sit upon the concrete grade beams and themselves support the floor structure. This report went further to proffer the engineer's opinion as to the cause of the damage. The report states:

> CONCLUSION:
>
> The buildings have been constructed with the main floor elevation too low relative to the exterior grade for the details utilized. This has resulted in deterioration of the main floor wood frame construction. The deterioration may extend into the wood frame wall construction at some locations. Four conditions were noted that require immediate attention before the fundamental building elevation/site drainage problem is resolved and the damaged members replaced/reinforced.

[6] This engineering report then proceeded to specify what immediate and short term repairs were required:

> IMMEDIATE REPAIRS:
>
> 1. West building on Bennett street, north end of the second built up beam from the east has failed. Temporarily support the floor joist on either side of the deteriorated built up floor beam.
> 2. East building on the south side of Dalgliesh, the built up wood beam in the middle of the complex has twisted. Temporarily support the floor joist on either side of the twisted built up floor beam.
> 3. West building on the south side of Dalgliesh, steel telepost significantly out of vertical alignment. Temporarily support the floor joist on either side of the built up floor beam.

4. West building on the south side of Dalgliesh, install temporary block between the grade beam and ply sub floor to reinforce the deteriorated members at the north east corner.

SHORT TERM REPAIRS:

5. Install additional piping to route the discharge from the eavetrough downspouts away from the building foundations.

6. Install additional ventilation in the crawlspace

7. Install additional wood joist to replace the deteriorated members

8. Reinforce the bearing condition at the top of the steel teleposts

9. Correct the alignment and bearing at the bottom of the steel teleposts.

[7] Mr. Peberdy, P. Eng., the author of the report testified that without immediate repairs the deterioration might have led to the failure of the beams, twisting and misalignment of the teleposts supporting the horizontal span of the beams, with the consequence of structural failure. He said, the building could fall down. Mr. Peberdy testified that the short term repairs would "get water away from the crawl space, keep air moving, vertically realign the teleposts and keep them from pushing up into the wood beams and then reiterated other repairs required.

[8] The Board of the Condominium Association met on November 10th, 1999 to review the engineering report of that same date. A motion was passed at that meeting which reads:

> Motion: To contact Mr. B. Peberdy of Donavan (sic) Engineering and have him provide the Board with preliminary estimates. Marwood Properties Ltd. to contact Dr. M. Haque once this is received to see if an additional meeting of the Board is required. Appell/Selby — Carried.

[9] There is no evidence in the minutes of this meeting that the Board contemplated the need for a special meeting of the Condominium Association members.

[10] Mr. Peberdy testified that a further letter from his engineering firm dated November 23, 1999 reiterated the contents of the November 10th report. Donovan Engineering Ltd. detailed in that letter the list of engineering services and associated cost for the Board's review.

[11] The minutes of the meeting of the Board of the Association conducted January 24, 2000 include a review of old business and a motion flowing therefrom. The minutes read:

> Old Business.
>
> Review of Engineer's Report on Phase I (South Side of Dalgliesh Drive) — Report from Donavan (sic) Engineering Ltd. (Mr. Bruce Peberdy P. Eng.) Stage I has been completed and all immediate repairs have been completed as per Mr. Peberdy's letter of November 10. 1999.
>
> Motion: To engage Donavan Engineering (sic) (Mr. B. Peberdy) and have him proceed with Stage 2 as outlined in his letter of November 23, 1999. Included in this stage is a visual inspection of the remaining 4 buildings accompanied with a report and discussion regarding this site review.
>
> Selby/Appell — Carried.

[12] A second report from Donovan Engineering Ltd. is dated April 6, 2000. In this later report the engineers outline similar damage to the buildings as contained in the November 10, 1999 report and proffered the same opinion as to the cause of the damage. On this latter occasion the engineers also provided their opinion as to the possible magnitude of damages being in the order of a couple hundred thousand dollars.

[13] The second of the Donovan Engineering reports was reviewed by the Condominium Association Board at a meeting held April 18, 2000. Under the caption "Old Business" the minutes read:

> Old Business.
>
> Review of Engineer's Report on remainder of Phase I (South Side of Dalgliesh Drive) as well as Phase II (North Side Dalgliesh Drive).
>
> Motion: To engage a second Engineering firm to do a site review at Sierra Village. (This includes Phase I as well as Phase II). (To get a second opinion to the original site review prepared by Donavan (sic) Engineering Ltd.) Appell/Quickfall — Carried.

[14] An annual meeting of the Condominium Association was held on May 10th, 2000. In the minutes of this annual meeting is recorded the Chairman's report. The minutes refer to repair work unrelated to the foundation problem except for one sentence which reads:

> 5. We have engaged Donavan (sic) Engineering Ltd. to do a site review at Sierra Village (Phase I & II).

This quote speaks to the engagement of Donovan Engineering when in point of fact and time the Board had already had both of the November 10th, 1999 and April 6th, 2000 reports in hand. The Board had also commissioned the immediate repairs recommended by the engineers in each report. For some reason, never explained at trial, the Board appears to have withheld the engineering reports and information as to the failing foundations from the general membership though the gravity of the failing foundation was quite immense and in terms of dollars may have been in the order of a couple hundred thousand dollars. The absence of disclosure in the circumstances is in striking contrast to the evidence of Mr. Lyle Fluter, one of the unit owners. He has been a unit

owner since April 1, 1998 and when testifying at trial he opined that the Board had full authority to make any budgeted expenditures or minor changes of budgeted dollar expenditures, but, if an extraordinary expenditure say in the order of $10,000.00 or $15,000.00 was involved, the Board would customarily call an extraordinary meeting.

[15] No evidence was tendered that such an extraordinary meeting was convened to address the failing foundation. Minutes of a Board meeting held on October 17th, 2000 disclose under the caption "Old Business" the following paragraph and motion:

> Old Business.
>
> Site review/second opinion — Morwood Properties Ltd. reported that they were having difficulties finding an engineering firm to produce a second site review. It appeared that there were concerns about the liability that may exist by preparing this report (future litigation with respect to errors or omissions). It was suggested that one or all of the building perimeters be excavated before a second opinion be offered. There also seemed to be a lack of interest because of the small nature of the project as well as some concern of not receiving future engineering work. After some discussion it was decided to move ahead by having Donavon (sic) Engineering Ltd. proceed to the next stage in an effort to provide the board with more detailed information.
>
> Motion: To engage Donavon (sic) Engineering Ltd. to proceed to the next stage of the site review (Immediate Repairs) in combination with preliminary engineering and budget costing to address repair alternatives. Appell/Selby — Carried.

[16] The minutes of the Board's meeting of April 18, 2001 are also included in the Joint Book of Documents, Exhibit P1 at trial. Again, under the caption of "Old Business" reads the following paragraph:

> Bruce Peberdy of Donavon (sic) Engineering was present to discuss the preliminary engineering and address repair alternatives. He brought a number of photographs to illustrate the problems that were observed during

> his inspection of all the building's crawl spaces. A discussion followed with the following issues identified.
>
> 1. Responsibility/Liability — Developer, Engineer, City of Regina
> 2. Legal recourse.
> 3. Repair alternatives.
> 4. Repair costs.
> 5. Repair timetable.
> 6. Financing.
>
> Discussion ended with the Board deciding to present the site review to the unit holders for their consideration and input regarding the issues that have been identified. Further investigation by Mark from Morwood Properties and Bruce Peberdy of Donavon (sic) Engineering will be undertaken as there is still a number of questions that need to be answered in order for a course of action to be set.

[17] The minutes of the Board's meeting of April 18, 2001 contain the first written record that the Board had turned its mind to the liability issue arising from the deteriorated wooden foundation and of those possibly responsible, including the City. It is to be observed that only at this point in time did the Board feel the disclosure of the engineering reports ought to be made to the unit owners — though the Board had the first engineering report in hand for over 17 months.

[18] The City is considered as being potentially liable because the drawings and specifications for the proposed condominium project must be filed with the City of Regina and inspected to determine if they are compliant with the City's building bylaw and the building codes. If the City believes the plans and specifications are compliant it issues a building permit. The City building inspectors would further examine the project as it proceeded through its construction phases and once completed. The Condominium

Association alleges the City failed to meet its duty of care for the reasons cited by the engineering reports.

[19] The Condominium Association convened a further annual general meeting on May 6, 2001. The minutes thereof are also contained in the Joint Book of Documents exhibited at trial. Under the caption "Business arising from the minutes" is the following:

> Motion: To have the McDougall Gauley law firm prepare a legal opinion based on the findings of this site review. They will gather additional information and determine if Sierra Village should consider litigation. The cost of this opinion is not to exceed $8,000.00
>
> Fluter/Phillips — Carried.
>
> Motion: To have a extraordinary general meeting on Sunday, June 24, 2001 to further discuss the Site Review that was prepared by Donavon (sic) Engineering Ltd. as well as discuss the McDougall Gauley legal opinion if it is available.
>
> Goughnour/Zerff — Carried.

[20] A further extraordinary general meeting of the members of the Condominium Association was held on June 24, 2001. The minutes of that meeting contain a historical recital of matters which have already been detailed earlier in this judgment. This extraordinary meeting appeared to have concluded with a motion being passed to institute legal proceedings based upon the lawyer's legal opinion to the Condominium Association and its Board of Directors dated June 20, 2001. The actual legal opinion is not part of the evidence in this trial.

[21] The statement of claim was issued October 9, 2001 and was served upon the defendant City on October 10, 2001.

[22] The City therefore says that by November 10th, 1999, and certainly by April 6th, 2000, the Condominium Association knew of the damages sustained, albeit perhaps not necessarily the full extent thereof, and also knew the cause of the damage. The City says that all of the material facts necessary for the plaintiff to found its cause of action against the defendants, including the City, were known by each of the dates November 10th, 1999 and April 6th, 2000 and therefore the limitation clock began to run at one of those two dates. The City therefore argues that the limitation period provided in s. 314(1)(a) had long since expired before the statement of claim issued on October 9th, 2001.

[23] The plaintiff Condominium Association says that the discoverability principle which determines when the limitation period begins to run requires a third component in addition to the identification or discovery of the damage sustained and causation. It argues, that given the nature of each of the parties, that a reasonable prospect of its success must be established or known to the plaintiff before the limitation clock begins to run. I will review the legal basis for this argument later. To sustain the plaintiff's contention the plaintiff states, as the agreed facts establish, that after receiving the second of the Donovan Engineering reports, the Association chose to obtain a second opinion from another engineering firm before proceeding with its decision to take legal action. The resolution to obtain the second engineering opinion was passed on April 18th, 2000. After six months of searching for another engineering firm to provide the Condominium Association with a second opinion that quest was abandoned. Donovan Engineering Ltd. was instructed to proceed with the next stage of the site review and costing. It would be a further year before legal action was commenced.

[24] The Condominium Corporation argues that the limitation period began to run October 17th, 2000 and that their legal action was commenced and the statement of claim served upon the City one week shy of the limitation period expiring. Therefore, the Condominium Corporation says that the City's limitation defence must fail.

THE LAW

[25] The law which determines when a statutory limitation period commences is reasonably well propounded. It is often referred to as "the discoverability principle".

[26] The unique wording of s. 314(1)(a) of *The Urban Municipality Act, 1984* provides that the limitation period commences when "the damages are sustained". This phrase was interpreted by the Saskatchewan Court of Appeal in the decision *Desormeau v. Holy Family Hosp., Prince Albert*, [1989] 5 W.W.R. 186 (Sask. C.A.). At p. 191 Sherstobitoff J.A. states:

> In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224, ..., the Supreme Court (Le Dain J.) said:
>
> > I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for 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, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*, R.S.N.S. 1967, c. 168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence ...
>
> There is no principled reason why the same discoverability rule should not apply to the limitation period in this case, notwithstanding that the

> legislation in the cases above cited termed the starting date for calculation of the limitation period to be the date the cause of action arose, while the legislation in this case termed the starting date to be the date on which the damages were sustained. Exactly the same reasoning applies: the absurdity and injustice of an action being barred by a limitation period before the right of action is known to, or capable of being discovered with reasonable diligence by, the person suffering the loss requires the courts to apply the discoverability rule.

[27] In the context of the test as articulated by the Court of Appeal, the City says that the material facts necessary to support the Condominium Association's cause of action were first, an understanding and knowledge of the damage to its property, and, second, the probable cause of the said damage.

[28] The same law was considered last year by Popescul J. of this Court in the decision *United Enterprises Ltd. v. North Battleford (City)*, 2007 SKQB 335; (2008), 301 Sask. R. 134 (Sask. Q.B.). At paras. 11-13, inclusive, and 17 Popescul J. states the following:

> [11] The key phrase in s. 314(10(a) is when, "... the damages were sustained". This phrase was considered by this Court in the context of the *Hospital Standards Act*, R.S.S. 1978, c.H-10, in *Young v. Palliser Regional Care Centre*, [1995] 5 W.W.R. 14; 129 Sask. R. 129 (Q.B.). In that case Baynton, J. considered an almost identical limitation provision. He followed the reasoning of our Court of Appeal in *Desormeau v. Holy Family Hospital, Prince Albert* (1989), 76 Sask. R. 241 (Sask. C.A.), which followed the decision of the Supreme Court of Canada in *Central Trust Co. v. Rafuse and Cordon*, [1986] 2 S.C.R. 147 69 N.R. 321; 75 N.S.R. (2d) 109; 186 A.P.R. 109, where it was determined that the "discoverability principle" applies to the calculation of a limitation period that speaks in terms of when, "the damages were sustained". At page 224 in *Central Trust Co.*, Le Dain J. made the following pronouncement:
>
> > I am thus of the view that the judgment of the majority in *Kamloops* [[1984], 2 S.C.R. 2] laid down a general rule that a cause of action arises for 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, ...
>
> [12] Both our Court of Appeal in *Desormeau* and this Court in *Young* held that there was no principled reason why the "discoverability principle" ought not apply to limitation periods that spoke in terms of "when damages were sustained" even though the legislation in other cases dealt with wording that calculated the start date of limitation periods from the date that the "cause of action arose".
>
> [13] Therefore, based upon the reasoning contained in the above mentioned decisions, I conclude that in these circumstances it is not material for the purposes of s. 314 (1)(a) when the damages were actually "sustained" rather, what matters is when the material facts on which the plaintiff's claim is based were discovered or ought to have been discovered by the exercise of reasonable diligence.
>
> ...
>
> [17] I disagree with United's assertion that the triggering event from which the limitation period runs ought to be March 28, 2002, which is the date that the Commission released its report. The reason for this is that there is a considerable difference between having knowledge of the material facts upon which a claim can be based and having the benefit of a detailed analysis from a commission of inquiry. The underlying principle for the "judge made" discoverabiltiy principle is to avoid the injustice that would arise by barring actions from being commenced even before its existence is known to the persons who suffered the loss. The principle does not, in my view, operate to suspend time to permit a potential plaintiff to await for conclusive proof of negligence or wrongdoing nor is it intended to permit a potential plaintiff to sit back and take no action without adverse consequences flowing in respect to limitation periods. Therefore, while it may have been desirable, from United's perspective, to await the issuance of the Commission's report prior to commencing its claim, the fact that a commission of inquiry was mandated to issue a report does not in these circumstances affect the triggering of the limitation period.

[29] To paraphrase Justice Popescul, in this case the Condominium Corporation having had the benefit of both the Donovan Engineering reports of November 10th, 1999 and April 6th, 2000 had knowledge of the material facts (the damages and the causation) upon which a claim could be based. Waiting for the benefit of a second engineering opinion or a subsequent legal opinion would not operate to suspend time to permit the

plaintiff to obtain conclusive proof of negligence or wrongdoing nor is it intended to permit the plaintiff to sit back and take no action without adverse consequences flowing in respect to limitation periods. The triggering of the limitation period was the knowledge base the Condominium Association had on November 10th, 1999 and repeated on April 6th, 2000 by Donovan Engineering Ltd. With the use of reasonable diligence, the Condominium Corporation should have known that each of the named defendants, including the City, were potentially liable in negligence. The identity of three of the defendants was to be found upon the building plans themselves — being the designer, the engineer and the City's filing stamp. Simple deduction would readily establish the City owed a duty of care to the Condominium Corporation to ensure that the plans and specifications which it had stamped were compliant with the City's building bylaw and the applicable building codes. The excessive delay occasioned by the Condominium Corporation in its pursuit of a second opinion and legal advice so as to have a further degree of certainty was and is fatal.

[30] The Condominium Corporation argues that the discoverability principle includes a third component that being "a reasonable prospect of success". In support of its argument, the Condominium Corporation relies on the decision *Strata Plan No. VR1720 v. Bart Developments Ltd.*, 38 C.L.R. (2d) 276.

[31] In the *Strata* case, a condominium was constructed in the years 1985-86. The B.C. Supreme Court had to consider s. 6(4) of the B.C. *Limitation Act*, R.S.B.C. 1996, c. 266.

[32] The Strata Condominium discovered that it had a leaky structure and observed serious water damage in two suites. At an extraordinary general meeting of the

Condominium Association a consulting engineer was present. He indicated to the members that he was prepared to complete an independent building survey of the leaky structure. He was asked if the document "would stand up in court". His answer is not recorded in the reasons for judgment. However, his firm was retained. The engineering report identified a seriously inadequate roof and deficient stucco. This report was given to the Condominium Association in July 1989. The Condominium Association had a representative of that engineering firm explain the report at an extraordinary meeting of the Condominium Association held the following August. The Association decided to seek a second opinion from another consulting engineer. When that report was in hand the second engineer agreed with the first. Then, after the passage of yet another year, the Association sought legal representation and had a letter threatening legal action sent to the proposed defendants in September 1990. Another five years was to pass and eventually a writ was issued on November 7, 1995 followed by a statement of claim in May of 1996.

[33] The *Limitation Act* of British Columbia is very different than the limitation section, 314(1)(a) found in the Saskatchewan *Urban Municipalities Act, 1984*. The third element which the plaintiff argues is applicable, being a reasonable prospect of success, arises from the unique language of ss. 6(3) and 6(4) of the B.C. Act. They read:

> 6(3). The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4);
>
> ...
>
> (b) for damage to property;
>
> (c) for professional negligence
>
> ...

> (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> > (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
> >
> > (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

[34] By contrast s. 314(1)(a) of *The Urban Municipality Act, 1984* reads:

> **314**(1) No action is to brought against an urban municipality for recovery of damages:
>
> > (a) after the expiration of one year from the time when the damage was sustained, and no such action is to be continued unless service of the statement of claim is made within that one year period;

[35] The *Strata* decision is therefore clearly distinguishable. The constituent element of a "reasonable prospect of success" is peculiar to the British Columbia *Limitation Act*. There is no case authority in common law which stands for the proposition that a reasonable prospect of success is part of the discoverability principle as it has been interpreted and applied by Saskatchewan courts all of which follow *Central Trust v. Rafuse, supra*.

[36] The delay in commencing the limitation period in order to determine the full extent of damage suffered is not required by law. The Supreme Court of Canada states in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at para. 18 the following:

> 18 It was conceded that at common law ignorance of or mistake as to the extent of damages does not 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 (see *Cartledge v. E. Jopling & Sons Ltd.*,[1963] A.C. 758 (H.L.), at p. 772 per Lord Reid, and *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), 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.

[37] The Supreme Court also discusses the principles underlying limitation statutes and their applicability. At para. 34 the court says:

> 34 Short limitation periods indicate that the legislature put a premium on their function as a statute of repose. This is one of the three rationales which serve society and the courts' continued interest in maintaining the respect of these statutes. Whatever interest a defendant may have in the universal application of a limitation period must be balanced against the concerns of fairness to the plaintiff who was unaware that his injuries met the conditions precedent to commencing an action: *Murphy v. Welsh, supra*; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. All the rationales were set out in *M.(K.) v. M.(H.)*, where this Court considered the *Limitations Act*, R.S.O. 1980, c. 240 (now R.S.O. 1990, c.L.15) in order to determine the time of accrual of the cause of action in a manner consistent with its purposes (at pp. 29-30):
>
> There are three, and they may be described as the certainty, evidentiary, and diligence rationales ...
>
> > Statutes of limitation have long been said to be statutes of repose ... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations ...
> >
> > The second rationale is evidentiary and concerns the desire to foreclose claims based upon stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim ...

> Finally, plaintiffs are expected to act diligently and not "sleep on their rights", statues of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

[38] In the case at bar the damage sustained materialized over a period of time as the water eroded the wooden support beams. It is common in the construction industry that the damages being sustained are latent and appear over time. The discoverability principle in such instances was discussed by the Ontario Court of Appeal in *Grey Condominium Corp. No. 27 v. Blue Mountain Resorts Ltd.* 2008 ONCA 384:

> [70] ... Key issues to be litigated in latent deficiency cases are the existence of the deficiency, its proximate cause and the resultant damage. Evidence relating to these issues tend to develop, rather than disappear, over time. The diligence factor does not enter into the equation at all since diligence obligations cannot reasonably be imposed on a plaintiff who is blamelessly ignorant due to the inherently undiscoverable nature of the injury.
>
> [71] In my view therefore, given the inherent latent nature of construction defects, and given that they will often be discovered over a period of time, it is neither logical nor fair to deny innocent victims an opportunity to seek redress for the wrongs done to them, based solely on the single cause of action paradigm.

[39] The Condominium Association and the City accept the *Peixeiro* decision for the purpose of this aspect of the trial. They acknowledge that the nature and sufficiency of the damage sustained and the probable cause thereof was known to the Condominium Corporation as early as November 10, 1999, the date the Board received and reviewed the first engineering report.

[40] In this case the damages developed over a 19 year period from the date of construction, *circa* 1980, to the date in 1997 when the Condominium Association retained Murphy Engineering to examine patios and landing concrete slabs adjacent to the exterior

wall of some of its condominium buildings. At that time the Murphy engineers observed that some of the wooden members which were exposed at the exterior wall displayed blackening or deterioration. The minutes of the Condominium Association Board meeting July 21, 1999 note under the heading "Business Arising from the minutes" such deterioration and the following motion was passed:

> Motion: To have an Engineer do an inspection of the crawl space under the Bennett Building (7302-7346 Bennett Drive) and prepare a written report for the Board.

The correction of the concrete problems is not relevant to this case other than to identify how the condition of the wooden foundation members resting upon the grade beams came to the Condominium Association's knowledge. The steps taken thereafter to retain the engineers' reports of November 10th, 1999 and April 6th, 2000 are admitted facts. Those reports provide two essential components of the discoverability principle — knowledge of the damage sustained and causation.

ANALYSIS

[41] I adopt and apply *Desormeau v. Holy Family Hosp., Prince Albert, supra* which in turn follows *Central Trust Co. v. Rafuse*, *supra*.

[42] I find that on November 10th, 1999 the Condominium Corporation received and reviewed the first engineering report and in so doing acquired sufficient knowledge of the existence of the nature of damages sustained to its buildings. I also find that the Condominium Corporation had knowledge of the probable cause of the said damage, sufficient to qualify within the meaning of the discoverability principle. The identity of

the parties potentially at fault was known to the Condominium Corporation or ought to have been known using reasonable diligence. Clearly the designer, Squire, and the consulting engineer, Flegel, are identified on the plans. The identity of the contractor, the defendant Muxlow, was also known to the Condominium Corporation. Employing reasonable diligence and deduction the Condominium Corporation ought to have identified the City as a potential defendant when speculating as to who was at fault for the damages sustained.

[43] A reasonable prospect of success is a conclusion or opinion, not a fact in itself. The reasonable prospect of success is based upon the material facts which support the cause of action. For this further reason, I reject the Condominium Corporation's argument that a reasonable prospect of success is a constituent element of the discoverabiltiy principle as enunciated in *Desormeau v. Holy Family Hosp., Prince Albert, supra*.

[44] The delay which arose while the Condominium Corporation sought a second engineering opinion, or the delay occasioned by obtaining a legal opinion thereafter, do not justify an extension of the discoverability principle in this case. Upon receipt of the two engineering reports from Donovan Engineering the material facts of the nature of the damages suffered and probable causation were known to the plaintiff as early as November 10th, 1999 thus triggering the commencement of the one year limitation period. If those two constituent elements were not actually known or uppermost in the mind of the Condominium Corporation, the application of reasonable diligence should have elevated those constituent elements to the knowledge of the Condominium Corporation.

[45] Ignorance of the limitation period is no excuse.

[46] If the guiding mind of the Condominium Corporation, being its Board of Directors, was labouring under the belief that the limitation period would not commence until they had obtained a reasonable assurance of success — that is, a second engineering opinion as well as a legal opinion, they erred. I further reject the argument that the Board of Directors could not authorize a legal action without the express approval of the Association members obtained at an annual general meeting or extraordinary meeting of the Association members.

[47] Section 34(4)(a) of *The Condominium Property Act, 1993,* S.S. 1993, c. C-26.1 as am. states:

> **34**(4) A corporation may:
>
> (a) sue with respect to any damage or injury to the common property or losses to the corporation or any damage, injury or losses that affect unit owners jointly caused by any person, whether an owner or not, and ...

[48] Section 39 of the same Act prescribes the duties of the Board at ss. 39(1) which states:

> **39** Subject to any restrictions imposed or direction given at a general meeting, a board shall exercise the powers and perform the duties of the corporation.

[49] No evidence was provided or argument made that the general duty and power of this Condominium Corporation Board was so constrained. Mr. Fluter did not testify that the Board was in any way subject to any restrictions or directions as to their power to authorize the commencement of a lawsuit. Mr. Fluter did testify, under cross-examination, that the Board had authority to engage the engineering firm without

approval of the members of the Association. In the absence of evidence to the contrary, the Board of this Condominium Association did have the authority to authorize the law suit. However, had there been such a restriction on the Board's authority, envisioned by s. 39(1), it would not have postponed the commencement of the limitation period in any event. The Board would have to move to obtain the required approval of the Association members and institute its action within the stipulated limitation period.

CONCLUSION

[50] The action against the City is statute barred. The limitation period expired on November 10th, 2000. The Condominium Association had the requisite knowledge of all material facts upon which to found its cause of action against all of the named defendants, including the City, upon receiving and reviewing the engineering report dated November 10th, 1999.

COSTS

[51] The City is entitled to its taxable costs of this aspect of the case as against the plaintiff.

J.
N. S. Sandomirsky