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DOES IT MATTER IF A DEFECT IS DANGEROUS?

Negligence Claims for Defects in Construction

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When a purchaser of a building or residence suffers a loss due to defective construction a claim for breach of contract is often illusory as the developer has no assets or is out of business. The problem is compounded by the fact that the purchaser has no contract with the general contractor, subcontractor or design professional who caused the defect to satisfy its claim. The only claim that can be made in these circumstances is one of negligence against the general contractor, subcontractor or design professional involved in the actual construction.

However, in pursuing such a claim the purchaser is faced with the law of negligence in Canada as set-out in the 1995 Supreme Court of Canada case of *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* ("Winnipeg Condominium"). This seminal case sets out that a purchaser in such circumstances must prove that the construction defect or design is dangerous to health and safety before a claim will succeed for the cost to repair that defect.

Of course, not all defects are dangerous. In these circumstances the courts appear more willing than in the past to reject the notion that while a construction defect itself may not be dangerous a claim in negligence should succeed if the defect weakens the structure as a whole to make it unsafe. However, there is a distinction to be made where a defect positively malfunctions causing actual damage to other property. For example, where a defective central heating boiler explodes, causing damage to other property of the building such as setting the building on fire, the purchaser could claim in negligence against the general contractor or sub-contractors for the damage from the fire.

In the recent case, *Rychter v. Isle of Mann Construction Ltd.* Mr. Justice Truscott of the BC Supreme Court heard an application to dismiss a claim before trial on the grounds that it disclosed no cause of action because the construction defect claimed by the purchaser against the general contractor and subcontractor

was not a dangerous defect and as such no duty of care in negligence existed. The counsel to the general contractor relied on the *Winnipeg Condominium* case to support his application taking the position that the purchaser could only sue in contract against the developer which was out of business and from which there was likely no recovery. Counsel to the purchasers admitted that the plumbing defect itself was not dangerous. However, counsel to the purchaser took the position that it was not claiming for costs to repair the plumbing defect itself but rather the resulting water damage to the building caused by the plumbing defect and that therefore a duty of care existed.

Based on this claim the court held that it was prepared to allow the purchaser to proceed to trial to prove its claim in negligence for water damages to the building on the basis that, without deciding the matter, a duty of care existed in the circumstance.

The effect of this case remains to be seen as leave to appeal Mr. Justice Truscott's decision was refused and the court held that the case should proceed to trial. Unfortunately, the subsequent Summary Trial application of the purchaser was dismissed simply in oral reasons on the basis that there was no evidence of negligence. No reference to the decision of Mr. Justice Truscott was made or to whether a duty of care existed in the circumstance where the alleged defect of the defendant was not itself dangerous. As a result, the decision of Mr. Justice Truscott still stands until overruled by the Court of Appeal and will have to be clarified or distinguished on subsequent cases until that is done.

The decision of Mr. Justice Truscott will remain of concern to general contractors, sub-contractors and suppliers as it may be argued that they owe a duty of care in negligence and are liable to unknown purchasers for the consequential damage to buildings in which they have installed or constructed defective parts causing actual damage to other property in the building even though the defect is itself not dangerous.

Further, it is important to point out that there is case law which indicates that what is dangerous does not necessarily mean "imminent" danger as the intent of the law following Winnipeg Condominium is to be preventative. (see *Vargo v. Town of Canmore*, 2011 ABQB 649 and *Sable Offshore Energy Inc. v. Ameron International Corporation*, 2006 NSSC 3521).

It is not clear how expansive the law will develop concerning potential liability of general contractors, subcontractors and suppliers in negligence to unknown purchasers. There are strong policy arguments for limiting this liability for pure economic loss outside of contractual arrangements. However, it is clear that simply taking the position that a defect itself is not dangerous and that there is no imminent danger with respect to the building structure may not always be sufficient.