Citation: Valley Agricultural Society v.
Behlen Industries Inc. et al., 2004 MBCA 80

Date: 20040525
Docket: AI03-30-05607

IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott C.J.M., Twaddle and Steel JJ.A.

BETWEEN:

VALLEY AGRICULTURAL SOCIETY	
(Plaintiff) Appellant	***M. G. Finlayson*** *for the Appellant*
- and -	
BEHLEN INDUSTRIES INC. and FRANK DENISET	***T. E. Bock*** *for the Respondent Behlen Industries Inc.*
(Defendants) Respondents	
- and -	***R. S. Literovich*** *and* ***R. E. Shannon*** *for the Respondent F. Deniset*
NORCO INDUSTRIES LTD., CRANE STEEL STRUCTURES LTD. (formerly known as ARGYLE STEEL CONSTRUCTION LTD.)	
(Defendants)	*Appeal heard:* ***January 12, 2004***
- and -	
LESLIE FROVICH	*Judgment delivered:* ***May 25, 2004***
(Third Party)	

SCOTT C.J.M.

1 The plaintiff alleges that its building was negligently designed and constructed in 1987, and that this was the cause of the collapse of the roof of that building on December 24, 1996, almost nine years after it was built.

Appeal from (2003), 172 Man.R. (2d) 248, 2003 MBQB 51
See (2002), 164 Man.R. (2d) 156, 2002 MBQB 151

The defendants, Behlen Industries Inc. (Behlen) and Frank Deniset (Deniset), move for summary judgment on the basis that the proceedings had been commenced more than six years from the date the cause of action arose and hence was statute barred by virtue of sec. 2(1)(n) of *The Limitation of Actions Act*, C.C.S.M., c. L150.

2 The plaintiff's complex consists of two buildings, an exhibition hall and a curling club connected together. The buildings are separated at the connection point by a concrete block firewall. Behlen designed and supplied the components for (but did not construct) the buildings. Behlen's employee, Deniset, a professional engineer, certified the plans. When the structure was eventually completed, the firewall had been constructed to a greater height relative to the exhibition hall than had been contemplated by the plans. This discrepancy in the height created a greater potential for snow to drift against the firewall and to settle on top of the exhibition hall roof, and this is eventually what happened. The roof eventually collapsed (according to Deniset) as a result of the combined effect of the weight of the snow which had collected at the point where the exhibition hall roof is joined to the firewall, and the use of pin bolts – chosen by the contractor – that were unsuitable for the purpose. The plaintiff's claim is entirely in tort as neither Behlen nor Deniset entered into a contract with the plaintiff.

3 The plaintiff's cause of action is predicated on the decision of the Supreme Court of Canada in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (*Bird Construction No. 1*), in which the court established that there could be a duty of care in tort by a contractor to subsequent purchasers of a building for personal injury or

damage to other property, arising from negligent design or construction (described by the motions court judge as a "newly created cause of action") (at para. 17). La Forest J., writing for the court, summarized the principle as follows (at para. 43):

> I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.
>
> [emphasis added]

4 For the purposes of the summary judgment application, Behlen and Deniset concede the existence of a duty of care and breach. It is also common ground that there was no awareness of the defect until after the roof collapsed. The only evidence filed in support of the application was the affidavit of Deniset which in turn adopted, with approval, the opinion of T. Colin Gibbs, a consulting engineer, that:

> ... the total weight of snow grossly exceeded the amount allowed for in their original design. Another factor to consider is the density of the snow that accumulated on the roof.
>
> .....
>
> ... this building, as constructed, contained a serious defect that made the structure susceptible to failure under significant snow loads and as such posed a risk and danger to its occupants.

5 The senior Master, as she then was, found (at 164 Man.R. (2d) 156, paras. 20-21):

> There is no evidence that the defects in the Morris exhibition hall were manifest before the roof collapsed.
>
> The responding party has met its burden on this motion for summary judgment. There is a genuine issue for trial as to the date of accrual of the cause of action.

6 The motion for summary judgment was therefore dismissed. On appeal to the Court of Queen's Bench, Behlen and Deniset's appeal was allowed and the action dismissed.

7 The motions court judge disagreed with the conclusion of the senior Master that the words "manifest themselves" meant that damage had to become evident in some way. Rather (at 172 Man.R. (2d) 248, para. 18):

> ... I find that the risk manifested itself on completion of construction or earlier because the risk was more than minimal, indeed was significant if not gross. The evidence in this case reveals a risk of collapse that is more serious and significant than shown in the factual findings contained in the reports of the two *Winnipeg Condominium Corp.* cases. I find that Master Goldberg erred in finding that the omission did not manifest itself until the roof collapsed.

8 The determinative issue in considering whether Behlen and Deniset's application should succeed is when the defect "manifested itself" so that the cause of action asserted by the plaintiff arose.

9 The plaintiff argues that the word "manifest" is synonymous with

being evident or visible as opposed to being obscure or hidden, as was the defect in this case. The roof became a danger only when the snow load became excessive, which may not have occurred until the winter snowfall that ultimately led just a few months later to the collapse of the roof, or when the roof itself collapsed.

10 Behlen and Deniset, for their part, submit that damage was suffered by the plaintiff (so as to complete the cause of action) when construction of the building was completed because that is when the latent danger – the susceptibility to suffering damage – arose. Thus, the damage existed whether or not the plaintiff had knowledge of it, the existence of the inherently dangerous condition of the building being the determining factor.

11 As we have seen, the motions court judge accepted Behlen and Deniset's position concluding that the cause of action was complete on construction of the building in 1987. In the result, the cause of action was statute barred three years prior to the collapse of the roof.

Decision

12 In my opinion, this is not an appropriate case for summary judgment based on affidavit evidence alone. This is because there is a lack of evidence to establish the essential factual background to enable the court to decide the complex and unresolved point of law that this case raises.

13 Concerning the law, there have been no Canadian cases since *Bird Construction No. 1* that have dealt specifically with the interpretation or clarification of the meaning of the phrase "manifests itself." Insofar as I can

ascertain, the specific issue has not been addressed at the appellate level by any court in Canada. This case is therefore one of first impression.

14 Jurisprudence in other jurisdictions is not necessarily helpful given the uniqueness of the decision in *Bird Construction No. 1*, although it can safely be said with respect to economic loss that in New Zealand and Australia the cause of action arises when the defects become known or apparent. See *Mount Albert Borough Council v. Johnson*, [1979] 2 N.Z.L.R. 234 (C.A.), *Askin v. Knox*, [1989] 1 N.Z.L.R. 248 (C.A.), *Invercargill City Council v. Hamlin*, [1996] 1 All E.R. 756 (P.C.), *Council of the Shire of Sutherland v. Heyman et al.* (1985), 157 C.L.R. 424 (H.C. of A.), and *Hawkins v. Clayton et al.* (1988), 164 C.L.R. 539 (H.C. of A.).

15 Some Canadian authorities have accepted the proposition that for the principles of *Bird Construction No. 1* to apply the danger or loss must be imminent. See *Blacklaws v. 470433 Alberta Ltd.; Blacklaws v. Morrow* (2000), 187 D.L.R. (4th) 614, 2000 ABCA 175, and *Sentinel Self-Storage Corporation v. Dyregrov et al.* (2003), 180 Man.R. (2d) 85, 2003 MBCA 136 (at para. 70):

> If this action is categorized as one of economic loss due to defective structure, the damage is not inflicted until the building is found to contain defects which pose a real and substantial danger to the occupants of the building or other property. It is only when a defect poses a real and substantial danger or there is an imminent possibility of such danger that the cause of action is complete.

16 For a contrary view of the law see *Roy v. Thiessen* (2003), 26 C.L.R. (3d) 227, 2003 SKQB 249.

17 Behlen and Deniset argue that the plaintiff, having tendered no evidence to dispute the affidavit evidence filed on behalf of the defendants, is thereby bound by it when the court, on a summary judgment application, engages in a "hard look at the merits of an action" (*Podkriznik v. Schwede* (1990), 64 Man.R. (2d) 199 at para. 16 (C.A.), *per* Twaddle J.A. quoting with approval *Vaughan v. Warner Communications, Inc. et al.* (1986), 56 O.R. (2d) 242 at 247 (H.C.J.)).

18 But the difficulty for us on this appeal is that there is simply no evidence respecting the condition of the building following completion of construction, or any external factors such as the weather, snow conditions, and other relevant circumstances bearing on the question of when the danger "manifested itself." Other than the engineering opinion already referred to, we know little more than when construction was completed and when the roof collapsed.

19 The Gibbs Engineering report, which forms the basis of Behlen and Deniset's application, does not say when the defect "posed a risk and danger." The report simply states:

> Therefore, it is our opinion that this building, as constructed, contained a serious defect that made the structure susceptible to failure under significant snow loads and as such posed a risk and danger to its occupants.

20 As we have seen, to be actionable the defect must pose a "substantial danger" to the health and safety of the occupants of the building. This raises the question whether a structure that is "susceptible to failure" from the very

beginning, as Behlen and Deniset argue, can be considered a substantial danger. The Gibbs report does not deal with this question. Clearly, additional evidence is needed.

21 In conclusion, I can do no better than to adopt the words of Huband J.A. in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. et al.* (1999), 131 Man.R. (2d) 283 (C.A.), when he declined to grant summary judgment to dismiss the plaintiff's action as being statute barred (at para. 14):

> I would not be prepared to subscribe to the position taken by Bird at this time, on the evidence before us. There is virtue in deciding when the cause of action arose based on the trial evidence. At this stage, we do not know the nature of the flaws in the wall or who was responsible for them. We do not know who knew what when.

22 I make one final comment. This case has been argued throughout (and dealt with by the Master and the motions court judge) on the express assumption that the entire damage claim was for economic loss, and on the implicit assumption that the plaintiff in this case, although the original owner of the building in question, was entitled to pursue the cause of action enunciated by the Supreme Court of Canada in *Bird Construction No. 1*. I simply point out that neither premise is necessarily correct and counsel should be prepared to deal with these issues when the matter proceeds to trial.

23 The appeal is accordingly allowed, with costs.

_____ C.J.M.

I Agree:

_____ J.A.

I Agree:

_____ J.A.