NOVA SCOTIA COURT OF APPEAL

Citation: Ameron International Corporation v. Sable Offshore Energy Inc., 2007 NSCA 70

Date: 20070608
Docket: CA 275595
Registry: Halifax

Between:

Ameron International Corporation and Ameron B.V.

Appellants

v.

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., and Pengrowth Corporation; ExxonMobil Canada Properties as operator of the Sable Offshore Energy Project

Respondents

Judges:	Roscoe, Cromwell and Fichaud, JJ.A.
Appeal Heard:	May 29, 2007, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is dismissed with costs to the respondents in the amount of $5000 plus disbursements per reason for judgment of Roscoe, J.A.; Cromwell and Fichaud, JJ.A. concurring.
Counsel:	John P. Merrick, Q.C., and Darlene Jamieson, Q.C., for the appellants Harvey L Morrison, Q.C. and Robert G. Belliveau, Q.C., for the respondents

Reasons for judgment:

[1] This is an application for leave and, if granted, an appeal from Justice Suzanne M. Hood's interlocutory decision dismissing the appellants' application to strike portions of the respondents' statement of claim pursuant to **Civil Procedure Rule** 14.25. The decision under appeal is reported at 2006 NSSC 332; [2006] N.S.J. No. 442 (Q.L.).

[2] According to the statement of claim, the plaintiff, Sable Offshore Energy Inc., acted as operator and agent on behalf of the owners of the Sable Offshore Energy Project. I will refer to the plaintiffs/respondents as "Sable". The project, which cost 1.4 billion dollars, included four offshore platforms, three onshore gas plants and pipelines for the transmission of natural gas and natural gas liquids between the offshore gas fields and from the platforms to the onshore facilities and between the onshore plants. The defendant Ameron companies, ("Ameron") manufactured and supplied the paint and coatings which were applied by other contractors to the steel used in the project. There was no contract between Ameron and Sable. The plaintiffs claim that the paint system failed resulting in the corrosion of the steel, which in turn impaired the structural integrity of the facilities, making them unsafe. Sable has sued Ameron, alleging negligent misstatement and negligence. The plaintiffs also claim breach of contract against the paint applicators. The relief sought by the plaintiffs includes:

> a. General damages;
>
> b. Special damages;
>
> (i) all direct and indirect costs which will be incurred in replacement of the paint systems of facilities which are failing, full and complete particulars of which will be provided to the Defendants prior to trial;
>
> (ii) loss of profits which may be incurred in carrying out the replacement of the failing paint systems of the facilities, full and complete particulars of which will be provided to the Defendants prior to trial;

[3] Ameron brought an application in chambers to strike out parts of the statement of claim, arguing that Sable was seeking to recover pure economic loss

for non-dangerous goods. Ameron submitted that there is no cause of action that would allow Sable to recover repair costs and other economic losses for defects in the paint that did not result in a clear presence of a real and substantial danger.

[4] Justice Hood dismissed the application to strike. She determined that the claim for recovery of pure economic loss for non-dangerous goods is not obviously unsustainable, nor is it plain and obvious that the claim cannot succeed. This finding was based primarily on the decision of La Forest, J. in **Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.**, [1995] 1 S.C.R. 85, specifically ¶ 41 - 42. The chambers judge summarized her conclusion in that respect at ¶ 66:

> ¶ 66 In **Winnipeg Condominium**, in my view, La Forest, J. left open the possibility that a claim for economic loss, where there is not the sort of danger that was found in that case, might succeed. In **Winnipeg Condominium**, as quoted above, La Forest, J. said he did not need to consider that issue since it was not before the court. He noted the approaches taken in other jurisdictions to make contractors liable to subsequent purchasers for "reasonable fitness and habitability of a building" (para. 41). He concluded that he would want to have argument on that issue "before entertaining the possibility." (para. 41)

[5] After reviewing several cases where courts have considered the **Winnipeg Condominium** decision in the context of a tort claim for damages for non-dangerous defects, Justice Hood decided that the applicable law was evolving. She wrote:

> ¶ 83 Some courts have concluded that claims for economic loss where no danger or safety concerns are alleged should not go to trial but should be struck; others have sent the matter on for trial. At trial, courts have dismissed claims for economic loss where there are no safety issues. The Supreme Court of Canada has left the issue open. La Forest, J. did not say in **Winnipeg Condominium**, *supra*, (nor did he need to) that no such claim could ever be successfully made. In the United Kingdom, **Anns** has been over-ruled and a claim like that in Winnipeg Condominium was disallowed (**Murphy**, *supra*). However, that is not the law in Canada.

[6] After assessment of the claim as instructed by **Anns v. Merton London Borough Council**, [1978] A.C. 728 (H.L.) and **Cooper v. Hobart**, [2001] 3 S.C.R. 537, the judge concluded:

> ¶ 107 I conclude the law with respect to recovery for economic loss is likewise "in a continuing state of evolution and development." For the same reasons as set out in para. 9, I conclude that the result should be determined after the full merits have been argued after evidence has been tendered on the subject at trial. There are competing arguments for and against this claim.
>
> ¶ 108 It is therefore not plain and obvious that the plaintiffs' claim would not succeed as a result of policy considerations negating a *prima facie* duty which may be found to arise from proximity between the plaintiff and the Ameron defendants. In the event that I am wrong, I will consider the alternative argument.

[7] The chambers judge went on to reject the alternative argument that the claim for dangerous defects was not adequately pleaded to fall within the cause of action approved in **Winnipeg Condominium**. The grounds of appeal that originally dealt with this finding have been abandoned.

[8] Justice Hood also considered and rejected the defendants' alternative arguments that parts of the statement of claim should be struck because the claim could not be considered to be one for physical damage to property, and that a claim based on **Junior Books Ltd. v. Veitchi Co. Ltd.**, [1982] 3 All E.R. 201 (H.L.) for pure economic loss could not succeed.

Issues:

[9] Ameron describes the issues on appeal as:

> Issue # 1: Did Justice Hood commit a reviewable error when she dismissed the Ameron application on the basis that it was not plain and obvious that the Sable claim would not succeed? This is the issue that is the main substance of the appeal.
>
> Issue # 2: Did Justice Hood commit a reviewable error when she dismissed the Ameron application on the additional and alternative basis that based on the wording of **Winnipeg Condo** it was not plain and obvious that the claim as presently worded could not succeed?
>
> Issue # 3: Did Justice Hood commit a reviewable error when she dismissed the Ameron application on the additional and alternative basis that it is not plain and obvious that this claim will not be characterized as a property damage claim?

> Issue #4: Did Justice Hood commit a reviewable error when she dismissed the Ameron application on the additional and alternative basis that she could not conclude that an argument based on **Junior Books** is obviously unsustainable?

Standard of Review:

[10] It is well established that on an appeal from an interlocutory order involving the exercise of discretion, such as a dismissal of an application to strike a pleading or a part thereof, this court will not interfere unless wrong principles of law have been applied or a failure to intervene would result in a patent injustice. (See for example: **National Bank Financial Ltd. v. Mahoney**, 2005 NSCA 139 at ¶ 9, **Austen v. Forbes Leasing Ltd.**, 2006 NSCA 25 at ¶ 3; **Nova Scotia (Attorney General) v. MacQueen**, 2007 NSCA 33 at ¶16.)

Analysis:

[11] In **N.S. v. MacQueen**, *supra*, Justice Hamilton reiterated the applicable test in an application pursuant to **Rule** 14.25:

> [8] All parties agree that a pleading should only be struck if it is "plain and obvious" that the claim does not disclose a cause of action; that the action is "obviously unsustainable". This test was recently approved by this Court in **Mabey v. Mabey**, (2005) 230 N.S.R. (2d) 272:
>
> > [13] It is well settled that the test pursuant to Rule 14.25(1)(a) is that the application will not be granted unless the action is " obviously unsustainable". In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: **Vladi Private Islands Ltd. v. Haase et al.** (1990), 96 N.S.R. (2d) 323; 253 A.P.R. 323 (C.A .). An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959; 117 N.R. 321.

[12] When a statement of claim reveals a "difficult and important point of law", it is generally desirable to allow the case to proceed to trial so that "the common law ... will continue to evolve to meet the legal challenges that arise in our modern industrial society.": **Hunt v. Carey Canada Inc**., *supra* at 990-991. As Wilson J. put it in **Hunt** at 977: "The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action."

[13] The burden on a party seeking to strike a claim is very high. The Supreme Court of Canada has used the term "plain and obvious" that the claim cannot succeed; the House of Lords has described the standard as "unarguable" or "obviously and almost incontestably bad": see, e.g. **Lonrho Plc. v. Fayed**, [1992] 1 A.C. 448 at 469. The burden is not on the plaintiff to show that the pleaded cause of action exists or will be accepted in the future; the burden is on the defendant to convince the court that the claim is "certain to fail": **Hunt** at 980.

[14] Mr Merrick, counsel for the appellants, conceded that there is no authority binding on Justice Hood or on this court which holds that the claim cannot succeed.

[15] Justice Hood applied the proper test in this case. See: ¶ 15 - 19.

[16] Ameron submits that Justice Hood erred in the application of the test by concluding that the law involved was unclear. It says the law is clear because a claim in tort for a non-dangerous product defect has never been recognized in Canada.

[17] Ameron concedes that the majority of the statement of claim is acceptable and makes no argument suggesting that the clauses alleging negligent mis-statement and dangerous defects and damages therefor should be struck. The specific clauses the appellants impugn are ¶ 62, 73(c) - (f), 75 and the reference to negligence in ¶ 78:

> 62. Based on the foregoing, the Defendant Ameron B.V. and the Defendant Amercoat Canada, as well as the other Defendant Ameron Suppliers, owed a duty of care to the Sable Owners, to:

a. ensure the Amercoat 132 / PSX 700 System was suitable for the intended use on the Sable Project;

b. ensure the Amercoat 132 had sufficient zinc content to allow for preferential corrosion; and

c. ensure proper and consistent manufacturing with appropriate quality assurance and quality control of the Amercoat 132 and the PSX 700 topcoat.

...

73. The Amercoat 132 / PSX 700 System was not suitable for use on the Sable Project, and the Ameron Suppliers and Barrier, or either of them, breached their duty of care and were negligent in making the Advice and Representation that it was, particulars of which include:

...

c. failing to make a proper assessment of the suitability of the Amercoat 132 / PSX 700 System for the Sable Project;

d. failing to take any or any reasonable steps to ascertain the paint requirements for the Sable Project;

e. failing to foresee that the Amercoat 132 / PSX 700 System would be unlikely to meet the conditions at the Sable Project;

f. failing to ascertain that the Amercoat 132 / PSX 700 System was not properly tested according to NORSOK requirements; and

...

Negligence of the Ameron Suppliers

75. The Ameron Paint Failures on the Sable Project were caused by the negligence of the Ameron Suppliers, particulars of which are:

a. providing the Amercoat 132 / PSX 700 System as a product suitable for use on the Sable Project;

b. failing to properly instruct and advise the Alliance and the Applicators on the proper storage, mixing, and thinning of the Amercoat 132 / PSX 700 System;

c. failing to warn the Alliance that the Amercoat 132 / PSX 700 was unsuitable for conditions on the Sable Project;

d. failing to warn the Alliance and the Applicators that the Amercoat 132 / PSX 700 System would not provide the same cathodic protection as the Amercoat 68HS / PSX 700 Systems or the traditional 3 or 4-Coat Systems that had been originally specified for use on the Sable Project;

e. failing to warn the Alliance and the Applicators that the Amercoat 132 / PSX 700 System had to be applied with greater care and attention to achieve specified dried film thickness than the traditional 3 or 4-Coat Systems originally specified, and as a result was more vulnerable to application errors than the traditional 3 or 4-Coat Systems;

f. failing to provide proper instruction to the Alliance and the Applicators on application techniques of the Amercoat 132 / PSX 700 System;

g. providing a product for use on the Sable Project that had poor edge retention;

h. providing a product for use on the Sable Project that was brittle;

i. providing a product for use on the Sable Project that had low-impact resistance;

j. providing a product for use on the Sable Project that had poor abrasion resistance;

k. failing to ensure Amercoat 132 had sufficient zinc content to function as a zinc rich primer and provide cathodic protection;

l. manufacturing the Amercoat 132 / PSX 700 System in a manner which made it unsuitable for use on the Sable Project;

> m. manufacturing the Amercoat 132 with large foreign bodies present that prevented the Amercoat 132 from preferentially corroding;
>
> n. failing to take any or adequate measures to ensure correct manufacture of the Amercoat 132 / PSX 700, and their ingredients;
>
> o. failing to design Amercoat 132 with sufficient zinc content to provide cathodic protection; and
>
> p. such other breaches of contract or negligence as may appear.
>
> ...
>
> 78. As a result of the negligent misrepresentations, negligence, and breach of contract of the Defendants, as stated in the foregoing paragraphs, the Plaintiffs have suffered damages and will continue to suffer damages, and claim against the Defendants, and each of them, as follows: [the damages as quoted in ¶ 2 above]

[18] The section of the statement of claim that precedes ¶ 62 sets out the particulars of the representations and reassurances made by the defendants, that the plaintiffs allege were negligent misstatements, as well as the particulars of the reliance on the advice by the plaintiffs and identifies the specific defendants who performed the painting and those from whom the paint was purchased by the painting contractors.

[19] Ameron asserts that it is plain and obvious that the law in Canada is clear: there is no recovery for pure economic loss arising from defective products in the absence of dangerousness. Those parts of the statement of claim which assert such a cause of action must be struck out.

[20] If the law in this area is not clear, the application to strike out the pleadings should fail: **CGU Insurance Co. of Canada v. Noble**, 2003 NSCA 102; **Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)** (1999), 179 N.S.R. (2d) 213; 1999 N.S.J. No. 258 (Q.L.) (C.A.).

[21] Justice Hood was of the view that the law was unclear based on the decision in **Winnipeg Condominium** which left open the question of whether there can be

recovery for non-dangerous product defects. Her conclusion was based on the following statements by LaForest, J. in that case:

> ¶ 41 Given the clear presence of a real and substantial danger in this case, I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings. It was not raised by the parties. I note that appellate courts in New Zealand (in **Bowen**, *supra*), Australia (**Bryan v. Moloney**, Sup. Ct. Tasmania, No. A77/1993, October 6, 1993) and in numerous American states (e.g., **Lempke v. Dagenais**, 547 A.2d 290 (N.H. Sup. Ct. 1988); **Richards v. Powercraft Homes, Inc**., 678 P.2d 427 (Ariz. Sup. Ct. 1984) (*en banc*); **Terlinde**, *supra*) have all recognized some form of general duty of builders and contractors to subsequent purchasers with regard to the reasonable fitness and habitability of a building. In Quebec, it is also now well-established that contractors, subcontractors, engineers and architects owe a duty to successors in title in immovable property for economic loss suffered as a result of faulty construction, design and workmanship (see arts. 1442, 2118-2120 of the **Civil Code of Quebec**, S.Q. 1991, c. 64; **Pierre-Gabriel Jobin, La vente dans le Code civil du Québec** (1993), at pp. 79 and 142). However, it is right to note that from the tone of Dickson J.'s reasons in **Fraser-Reid v. Droumtsekas**, [1980] 1 S.C.R. 720, at pp. 729-31, he would appear to be cool to the idea, though he found it unnecessary to canvass the point. For my part, I would require argument more squarely focused on the issue before entertaining this possibility.
>
> 42 Without entering into this question, I note that the present case is distinguishable on a policy level from cases where the workmanship is merely shoddy or substandard but not dangerously defective. In the latter class of cases, tort law serves to encourage the repair of dangerous defects and thereby to protect the bodily integrity of inhabitants of buildings. By contrast, the former class of cases bring into play the questions of quality of workmanship and fitness for purpose. These questions do not arise here. Accordingly, it is sufficient for present purposes to say that, if Bird is found negligent at trial, the Condominium Corporation would be entitled on this reasoning to recover the reasonable cost of putting the building into a non-dangerous state, but not the cost of any repairs that would serve merely to improve the quality, and not the safety, of the building.

[22] Earlier in **Canadian National Railway Co. v. Norsk Pacific Steamship Co.**, [1992] 1 S.C.R. 1021, the court renewed its rejection of a broad rule excluding recovery of economic loss. McLachlin, J., as she then was, for the majority, after explaining the differences in approach to this question between the United Kingdom and Canada, said at page 1148:

The approach adopted by this Court in **Kamloops** is quite different. No attempt was made to formulate an all-inclusive rule governing when damages in negligence for pure economic loss can be recovered. The Court began from the proposition that recovery of pure economic loss was available in some but not all cases. This much had been established in **Rivtow**. But it went on to state that the case before it was not like **Rivtow**. It then embarked on a consideration of whether in the category of cases before it (negligence by public authorities causing financial loss to third parties) recovery should be allowed. On the one hand, the Court, *per* Wilson J., determined that the circumstances imposed a duty of care on the defendants toward the plaintiff and that allowing recovery would accomplish "a number of worthy objectives." On the other, the Court satisfied itself that allowing recovery in this case would not open the floodgates of indeterminate liability. Accordingly, recovery was allowed. ...

It is my view that the incremental approach of **Kamloops** is to be preferred to the insistence on logical precision of **Murphy**. It is more consistent with the incremental character of the common law. It permits relief to be granted in new situations where it is merited. Finally, it is sensitive to danger of unlimited liability.

But where, one may ask, are future courts to find guidance? The answer is that as the courts recognize new categories of cases where economic recovery is available, rules will emerge. This is what happened in the case of **Hedley Byrne**. Up to that time, it was accepted that there could be no recovery for negligent misstatement causing economic loss. The court held that there could be, and formulated conditions (reliance) which would limit claims and avoid the spectre of open floodgates. This decision was transmuted to a rule of general application which has functioned without difficulty and to the betterment of justice ever since.

Other categories of exceptions have been established in Canada: economic loss is recoverable in the absence of physical damage where there is a duty to warn (**Rivtow**), and where a duty lies on public officials to pursue their statutory duty (**Kamloops**). It is not suggested that either has led to difficulty of application. In the United States, it is recognized that pure economic loss can be recovered in certain 'joint venture' situations and in the case of environmental damage adversely affecting one's livelihood. Again, these extensions are arguably capable of application without undue difficulty.

If this approach is followed, as it has been to date in Canada, new categories of cases will from time to time arise. It will not be certain whether economic loss can be recovered in these categories until the courts have pronounced on them. During this period, the law in a small area of negligence

> may be uncertain. Such uncertainty however is inherent in the common law generally. It is the price the common law pays for flexibility, for the ability to adapt to a changing world. If past experience serves, it is a price we should willingly pay, provided the limits of uncertainty are kept within reasonable bounds.
>
> The foregoing suggests that the incremental approach to the problem of determining the limits for the recovery of pure economic loss which was adopted by this Court in **Kamloops** should be confirmed. Where new categories of claim arise, the court should consider the matter first from the doctrinal point of view of duty and proximity, as well as the pragmatic perspective of the purposes served and the dangers associated with the extension sought. [emphasis added]

[23] In **Norsk**, Justice LaForest, although dissenting in the result, agreed with the majority that there is no general exclusionary rule with respect to recovery for pure economic loss. He said at page 1054:

> In the second type, which can be termed non-relational economic loss, the plaintiff claims for pure economic loss unrelated to any personal injury or property damage suffered by either the plaintiff or any third party. The law in this area is developing. In view of my analysis of the issues in this case, it is not necessary for me to say much about these cases. I doubt, however, that this group can be analyzed in terms of a single rule. The extract from Professor Feldthusen above contends that this group can be further broken down into four distinct categories. It is sufficient to say that I fully support this Court's rejection of the broad bar on recovery of pure economic loss in **Rivtow** and **Kamloops**. I would stress again the need to take into account the specific characteristics of each case. I agree with McLachlin J. that **Murphy v. Brentwood District Council**, [1991] 1 A.C. 398, does not represent the law in Canada. [emphasis added]

[24] The appellants cite several appellate level cases which they say support their argument that, despite the issue being left open by **Winnipeg Condominium**, the law clearly does not allow recovery in tort for defective products unless there is a concern that the defect causes a substantial danger, for example: **Privest Properties Ltd. v. Foundation Co. of Canada**, [1997] B.C.J. No. 427 (C.A.); **Hughes v. Sunbeam Corp. (Canada) Ltd.**, [2002] O.J. No. 3457 (C.A.); **M. Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.**, 2002 BCCA 324; **Brett-Young Seeds Ltd v. Assié Industries Ltd.**, 2002 MBCA 74; **Mariani v Lemstra** (2004), 246 D.L.R. (4th) 489 (Ont. C.A.); **North Sydney Associates**

(Receiver of) v. United Dominion Industries Ltd.; 2006 NSCA 58 and **Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.**, [2004] A.J. No. 1098 (C.A.).

[25] Each of these cases is based on its own unique facts, some dealing with the issue after trial, some on a preliminary motion to strike or add a defendant, some deal with goods alleged to be dangerous but found not to be, some concern negligent misrepresentation while others do not, and in some the plaintiffs based their claim as damage to property. None squarely faced the issue, on a motion to strike, of whether the law is sufficiently settled so as to find that an action in tort for recovery of pure economic loss, for the supply of non-dangerous products, is absolutely unsustainable. In many of them, as in **North Sydney Associates (Receiver of) v. United Dominion Industries Ltd.**, *supra*, there was no attempt to recover pure economic loss in the absence of a dangerous defect. It was simply assumed by the parties that if the plaintiff failed to prove dangerousness, the claim would not succeed. There was no analysis of the possibility of a novel claim for pure economic loss for non-dangerous defect.

[26] The view that **Winnipeg Condominium** left the question open was affirmed by McLachlin, C.J.C. extra-judicially in "The Evolution of the Law of Private Obligation: The Influence of Justice La Forest" in Johnson and McEvoy eds. *Gérard V. La Forest at the Supreme Court of Canada 1985-1997* (2000) 21, at p. 41:

> However, some have drawn from this decision that, absent danger of personal injury, the pure economic loss would not have been recoverable, thus concluding that **Winnipeg Condo** is inconsistent with the universalist approach of **Anns**. Construed at its narrowest, though, it may be argued that this case stands only for the proposition that pure economic loss is recoverable where danger of bodily injury is established, not that this is the only circumstance where recovery of economic loss is possible. The emphasis on a risk of personal injury has been advanced at least since Justice Laskin's (as he then was) dissenting judgment in **Rivtow Marine Ltd. v. Washington Ironworks Engineering**. If this is so, then **Winnipeg Condo** simply left other situations to be resolved another day. Whichever view one takes, **Winnipeg Condo** most assuredly did not conclusively settle whether **Anns** stood for a universal rule of tort recovery or one limited to physical loss, subject to certain tightly-controlled broader exceptions. The analysis in the case does illustrate, however, the difficulties inherent in defining practical limits in an ostensibly universal process.

> This uncertainly persisted in the cases that followed. [emphasis added]

[27] This view is shared by the authors of Canadian Tort Law, (Eighth Edition), 2006, Butterworths, Allen Linden and Bruce Feldthusen, who state at page 472:

> There is no category of economic loss claim where there exists greater diversity between and among the various common law jurisdictions as to whether economic loss may be recovered in negligence. The rule in Canada is that one may recover economic loss related to correcting dangerous defects in the product or structure. [citing **Winnipeg Condominium**] The question of recovery for non-dangerous defects was left open by the Supreme Court. ...

[28] After discussing the law in the United States, the United Kingdom, Australia and New Zealand, the authors continue at page 475:

> It is, however, more of an open question whether the Canadian courts will extend recovery in negligence to non-dangerous defects. ... The Canadian decisions following **Winnipeg Condominium** dealing with non-dangerous defects seem to fall into three categories. Some refuse to strike a claim for non-dangerous defects on a preliminary motion, and hold that this is a viable issue to be determined at trial. Others seem to misinterpret **Winnipeg Condominium** and allow recovery. Finally, there are those where recovery has been denied either because the loss has been allocated by a contract between the parties or because the loss is held to unrecoverable for other reasons. The recent trend is simply towards disallowing recovery for non-dangerous defects as a matter of law. If the Canadian courts ever did decide to extend negligence law to purely non-dangerous defects, it is most likely they would do so for defective residential housing as has happened in Australia and New Zealand.

[29] The cases cited by the appellant here are cited as authority of the recent trend.

[30] However, the test on a motion to strike pursuant to **Rule** 14.25 is not whether the recent trend in the law seems to disallow the cause of action, but whether the action is absolutely unsustainable or certain to fail. In my view that cannot be said of the Sable claim against Ameron, and the chambers judge did not err in coming to that conclusion.

[31] The appellants submitted that even if we concluded that Hood J. did not err in finding that the law was unclear, this court should assess the policy issues as

proposed in the second step of an **Anns** analysis and determine at this stage of the proceedings that the law ought not be expanded to include recovery for non-dangerous product defects in tort. They submit that it is not necessary to have a trial or the ensuing factual underpinning in order to decide the legal issue.

[32] In effect the appellants seek a ruling from this court that the statement of claim should not be interpreted by the trial judge so as to allow recovery for repair of non-dangerous defects. We do not give advance rulings or opinions on the state of the law in private litigation. (See: **R. v. Marshall (No. 3)**, [1999] 3 S.C.R. 533,¶ 31, and **Reference re Secession of Quebec**, [1998] 2 S.C.R. 217, ¶ 15. The relief sought by the appellants in the Notice of Appeal includes: "A decision that there is no cause of action for economic loss resulting from non dangerous product defect." However, the Chambers application before Justice Hood was pursuant to **Rule** 14.25, seeking to strike portions of the statement of claim. It was not an application under **Rule** 25 for a preliminary determination of a question of law which would have required an agreed statement of facts.

[33] In declining the appellant's request in this respect, I endorse the statements of Lord Bridge of Harwich in **Lonrho**, *supra*, p.470 indicating that it was rarely appropriate to answer a difficult question of law on hypothetical or disputed facts stated in general terms. He continued by quoting Lord Wilberforce in **Allen v. Gulf Oil Refining Ltd.**, [1981] A.C. 1001:

> ...The fact is that the result of the case must depend upon the impact of detailed and complex findings of fact upon principles of law which are themselves flexible. There are too many variables to admit of a clear-cut solution in advance.

[34] In this case the facts are undoubtably complex and at this point mainly disputed. There are nineteen defendants and five parties joined as third parties. There is a contractual matrix among the parties which will bear importance in discerning proximity and the appropriate policy issues. The evidence of these contracts was not on the record for this application but, presumably will be before the trial judge. It is therefore not advisable to determine at this point whether a cause of action as asserted by the plaintiffs should be recognized.

[35] It is not necessary to deal with the remaining grounds of appeal as they deal with alternative arguments made by the respondents in the event the court accepted the appellant's argument on pure economic loss.

[36] I would allow leave to appeal but dismiss the appeal with costs to the respondents in the amount of $5000 plus disbursements.

Roscoe, J.A.

Concurred in:

Cromwell, J.A.

Fichaud, J.A.