IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Flynn v. Superior Foundations Ltd.*, 2008 NSSC 296

Date: 20081009
Docket: SH 283821
Registry: Halifax

Between:

Trudy Flynn and Fabian Flynn

Appellants
(Respondents by Cross-Appeal)

and

Superior Foundation Limited

Respondent
(Appellant by Cross-Appeal)

Judge:	Justice M. Heather Robertson
Heard:	May 12, 2008, in Halifax, Nova Scotia
Written Decision:	October 9, 2008
Counsel:	James D. MacNeil and Kelly Peck, Articled Clerk, for the appellants B. William Piercey, Q.C. and Sean Rooney, for the respondent

Robertson, J.:

[1] The appellants Trudy Flynn and Fabian Flynn "the Flynns" had an "environmentally friendly" home designed and built at Seabright, Nova Scotia in 1997. They occupied their home and discovered within the next year that the concrete slab had failed causing considerable damage to the structure.

[2] Litigation has ensued for ten years, in the Supreme Court of Nova Scotia, the Nova Scotia Court of Appeal and the Small Claims Court.

[3] The respondent and appellant by cross-appeal Superior Foundation Limited "Superior" was a subcontractor of Applewood Enterprises Limited "Applewood" who actually constructed the slab on a standard four-foot frost wall.

[4] Superior was not given notice of, nor joined as a defendant in the litigation before the Supreme Court of Nova Scotia or the Nova Scotia Court of Appeal. They only became aware of the matter in 2005.

[5] The Flynns were successful in gaining judgment against Applewood and others before the Supreme Court of Nova Scotia, although their judgment was modified by the Nova Scotia Court of Appeal.

[6] Before the Flynns were able to collect any portion of their judgment against Applewood the latter went out of business.

[7] The details of each step in the litigation process were outlined thoroughly in Superior's brief to the Court. I will outline from it the details of the Small Claims Court proceedings from which this appeal arises and a brief statement of facts.

[8] On or about September 8, 2005, the appellants filed a Notice of Claim against the respondent in Small Claims Court claiming $15,000.00 (the then monetary jurisdictional limit of the Court) alleging that "Superior Foundation Ltd. installed a concrete slab at 16 Fernhollow Dr. Seabright in a negligent manner. The slab requires removal and reinstallation."

[9] The respondent filed a defence to the appellants' claim arguing, *inter alia*:

(a) that the Appellants' claim was statute barred by Section 2(1)(e) of the *Limitation of Actions Act*, R.S.N.S., 1989, c. 258;

(b) that the subject matter of the Appellants' claim was *res judicata* in that it was previously adjudicated in the Nova Scotia Supreme Court and the Court of Appeal.

(c) that the Respondent did not install the concrete slab in a negligent manner.

[10] At the Small Claims Court hearing of the appellants' claim held on November 28, 2005, the appellants attempted to introduce the decision of the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal as evidence in support of their negligence claim against the respondent. The respondent objected arguing that the matter was *res judicate* having been previously adjudicated in the Nova Scotia Supreme Court, and that the claim had been commenced out of time, contrary to the provisions of the *Limitation of Actions Act.*

[11] After adjourning the hearing to consider the respondent's preliminary objections, the adjudicator rendered a decision on December 6, 2005 in which he decided that although he found the respondent's arguments persuasive, he found that the better course was to give the appellants the opportunity of a full hearing on the merits of their claim and instructed counsel to re-schedule a date(s) for the hearing of the appellants' claim on its merits.

[12] On January 6, 2006, the respondent filed a Notice of Appeal (amended January 12, 2006) with the Supreme Court of Nova Scotia pursuant to Section 32(1) of the *Small Claims Court*, R.S.N.S. 1989, 430, on the grounds that the adjudicator had made a jurisdictional error, an error of law, and failed to allow the requirements of natural justice. The particulars of the grounds of appeal were as follows:

1. Jurisdictional Error: The adjudicator does not have jurisdiction to hear the merits of the respondents' claim based on the common law principles of *res judicata,* abuse of process estoppel and *stare decisis* given that both the cause of action and the subject matter that forms the basis of the respondents' claim have been previously litigated in the Supreme Court of Nova Scotia and were also appealed to the Nova Scotia Court of Appeal.

2. Error of Law:

a. The adjudicator in his decision wrongly determined that the defence of *res judicata* was limited in scope to only issue estoppel *res judicata.*

b. The adjudicator incorrectly determined that a sub-contractor is not a privy of a contractor in this case.

3. Failure to Follow the Requirements of Natural Justice:

a. The adjudicator failed to follow the requirements of natural justice by deciding to permit the respondents the opportunity to make their argument at a full hearing on the merits of their case notwithstanding that the Supreme Court of Nova Scotia has made a determination of "full responsibility".

b. Further, the adjudicator failed to follow the requirements of natural justice by deciding to permit the respondents the opportunity to make their argument at a full hearing on the merits of their case despite the adjudicator's acknowledgment that the respondents realized that the problems for which they are now claiming for against the appellant started in 1998 which the adjudicator states in his decision "is evident from the decision of the Supreme Court of Nova Scotia at trial". To allow the respondents to proceed with their claim is a failure of natural justice since the respondents claim is statute barred under the provisions of the Statute of Limitations.

c. Further, that the adjudicator failed to follow the requirements of natural justice by deciding to permit the respondents the opportunity to make their argument at a full hearing on the merits of their case despite the fact that the respondents have had a full and fair opportunity at trial to litigate the issues that are now set out in the Notice of Claim against the appellant. The appellant had no notice of the respondents' action commenced in the Supreme Court nor the Court of Appeal and thus no opportunity to participate in discoveries, the trial or the subsequent appeal, thus creating a situation that is patently unfair to the appellant and which is an abuse of process.

d. Finally, the adjudicator's failure to make a determination on the appellant's preliminary motions of *res judicata, stare decisis* and the Statute of Limitations at the small claims hearing on November 28, 2005

> was a failure of natural justice. There was sufficient material before the court at that time to allow the adjudicator to deal with these preliminary motions. Failure to decide on these motions forces the appellant to incur further expense and inconvenience where it is clearly unnecessary and unfair. Also, the adjudicator's failure to decide on the appellant's objection to the respondents use as evidence the prior Supreme Court and Court of Appeal decisions, as well as evidence used at trial, in the respondents' submissions at the claim hearing on October 20, 2005, is a further failure to follow the requirements of natural justice ...

[13] On October 24, 2006, Pickup, J. of the Nova Scotia Supreme Court, in an unwritten decision ruled that the adjudicator had not rendered a decision accordingly that there was nothing to appeal and he directed that the matter be referred back to the adjudicator for a hearing on the merits of the appellants' claim.

[14] On January 26, 2007, the appellants filed an amended Notice of Claim in Small Claims Court claiming Twenty-five Thousand Dollar ($25,000.00) in damages against the respondent to reflect the newly increased monetary jurisdiction of the Court to $25,000.00 which had been proclaimed into law a little more than a year previously on January, 2006.

[15] The hearing of the appellants' claim on its merits commenced on May 22, 2007 following the adjudicator's refusal to rule on the respondent's preliminary motions which were raised a second time by respondent's counsel (the first time being the Small Claims Court hearing held on November 28, 2005), including the respondent's request for a preliminary ruling on the issue of whether the appellants were entitled to amend their Notice of Claim increasing their claim to $25,000.00, following the increase in the limit of the Court's monetary jurisdiction.

[16] The adjudicator rendered his decision on July 16, 2007. He found that the respondent was negligent in the manner in which it laid the concrete slab. However, he dismissed the appellant's Small Claims Court claim against the respondent on the basis that the claim was statute barred by reason of the provisions of section 2(e) of the *Limitation of Actions Act* and on the ground that the appellants' claim was *res judicate.*

[17] The adjudicator dismissed the appellants' Small Claims Court against the respondent since it had been commenced 7 ½ years after the defect in the concrete slab was first discovered (ie. 1 ½ years beyond the statutory period of 6 years

permitted under the *Limitation of Actions Act.* He decided that the appellants' reasons for the delay in initiating its claim against the respondent were not adequate to allow the action to proceed, notwithstanding that the period for commencing an action had elapsed, within the meaning of section 3(2) of the *Act*. Given the history of the litigation of the appellants' claim in Nova Scotia Supreme Court and the Court of Appeal, the adjudicator reasoned that it would not have been equitable to allow the appellants claim against the respondent to proceed having regard to the degree in which it would have prejudiced the respondent.

[18] On the issue of whether the appellants' claim was *res judicata*, the adjudicator found that the issue in the Small Claims Court proceeding and the issue in the Supreme Court proceeding (ie. was the concrete slab constructed in a negligent manner), was the same, the evidence was the same in both proceedings, and the only thing different was the identity of the defendant. He therefore found on the facts of the case (1) that there was a sufficient degree of identification between Applewood (the general contractor) and the respondent (the subcontractor); (2) that they both had the same interest as against the appellants; and (3) that the respondent was "privy" of Applewood. Therefore, the Adjudicator ruled that the appellants were estopped under the doctrine of *res judicata* from claiming against the respondent having obtained a previous judgment against Applewood, the general contractor, in the previous proceeding in the Nova Scotia Supreme Court.

[19] On July 26, 2007, the appellants filed a Notice of Appeal of the adjudicator's decision.

[20] On August 14, 2007, the Respondent filed a Notice of Cross-Appeal of the Adjudicator's decision, the grounds of appeal which are as follows:

1. The Learned Adjudicator erred in law in failing to properly consider and apply the Nova Scotia *Limitation of Actions Act.*

2. The Learned Adjudicator erred in law in failing to consider and properly apply Sections 2 and 3 of the Nova Scotia *Limitation of Actions Act.*

3. The Learned Adjudicator erred in law in finding that the Defendant/Respondent was a privy of the general contractor.

4. The Learned Adjudicator erred in law in his application of the principle of *res judicata*.

[21] The grounds of the Cross-Appeal, as stated in the Notice of the Cross-Appeal are as follows:

1. The Learned Adjudicator made a jurisdictional error in deciding to adjudicate the Respondents' action against the Appellant when the Respondents' action was statute barred pursuant to the provisions of the Nova Scotia *Limitation of Actions Act.*

2. The Learned Adjudicator erred in law in failing to find that the monetary jurisdiction of the Small Claims Court is to be determined as of the date of the commencement of the action in Small Claims Court.

3. The Learned Adjudicator failed to follow the requirements of natural justice in that he refused to rule on the Appellant's preliminary motions, namely;

   (a) that the Respondents' action in the Small Claims Court was statute barred pursuant to the provisions of the Nova Scotia *Limitation of Actions Act*, and

   (b) that the Respondents were estopped from making a claim against the Appellant under the doctrine of *res judicata*, until after he had adjudicated the Respondents' claim against the Appellant.

The Statement of Facts as set out in Superior's brief:

1. In 1997 the Appellants engaged the services of Shawna Henderson ("Henderson"), a home designer who specialized in the design of "environmentally friendly" homes with passive solar heating to design a new home for the Appellants which they were planning to construct on their newly purchased property at 16 Fernhollow Drive in Seabright, Nova Scotia. The design called for the home to be built on a monolithic concrete slab.

2. After the design had been approved by an engineer, the Appellants, after obtaining quotes from several general contractors, contracted with James Joseph Dunleavy ("Dunleavy") and his company, Applewood Enterprises Limited ("Applewood") to build their home in accordance with Henderson's design. However, during the course of the construction, Dunleavy recommended to the

Appellants, and they agreed, the house be built on a standard four foot frost wall with a slab sitting on it, instead of a monolithic slab as called for in the design.

3. Applewood then contracted with the Respondent (Superior) to construct the foundation wall and pour the concrete slab which was completed in or around August 1997. The Respondent poured the concrete slab in accordance with instructions and specifications of Applewood. When the Respondent completed the installation of the slab, Applewood paid the Respondent for its services and the latter had no further involvement in the construction of the home or in any subsequent dealings with Applewood or the Appellants.

4. In September 1997 after the home was completed but before any occupancy permit was issued, the Appellants moved into the home. During the winter of 1997-1998 defects were observed in the construction of the concrete slab. Cracks appeared in the slab along the length of the south foundation wall and in other areas of the slab. In February 1998 Applegate attempted to resolve the problems with the concrete slab without success. The Respondent was never notified by anyone of the problems the Appellants were experiencing with the slab.

5. On January 29, 1999, the Appellants filed a Notice of Intended Action in the Nova Scotia Supreme Court naming Halifax Regional Municipality ("HRM"), its building inspector, Donald Williams ("Williams"), Dunleavy, Applewood, the Respondent and Atlantic Home Warranty Corporation as intended Defendants. The Respondent was never served with the Notice of Intended Action.

6. On March 18, 1999, the Appellants commenced an action in the Nova Scotia Supreme Court against the aforementioned Intended Defendants, with the exception of the Respondent.

7. In their Statement of Claim the Appellants alleged:-

> (a) that HRM and Williams breached their duty of care to the Appellants in failing to exercise all reasonable care and skill in carrying out the building inspection at all stages of construction and/or failing to ensure that the home was built in accordance with the provisions of the National Building Code of Canada. The Appellants also alleged that HRM was vicariously liable to the Appellants for the negligent acts of its employee, Williams;
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> (b) that Dunleavy breached his duty of care to the Appellants for failing to adequately supervise his subcontractors, and that he failed to supervise the construction of the home and negatively misrepresented to the Appellants

> that he and Applewood had the necessary skill and expertise to construct the Appellants home in a good and workmanlike manner and in accordance with the National Building Code of Canada and Henderson's design;
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> (c) that Applewood fundamentally breached its contract with the Appellants by failing to construct a home in a good workmanlike manner in accordance with the National Building Code of Canada national and the Appellants plans and specifications;
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> (d) that Atlantic Home Warranty Corporation breached its contract with the Appellants by failing to honour the Appellants claims made pursuant to its warranty.

8. One year later on March 23, 2000, the Appellants filed an Amended Originating Notice (Action) Amended Statement of Claim in which they joined Henderson as Defendant alleging that she had breached her contract with the Appellants and was negligent in designing and preparing the house design.

9. The Respondent was never joined as a party to the Appellants' lawsuit, either as a co-Defendant or as a Third Party. Nor was the Respondent ever called to attend a discovery examination during the leading up to the trial or as a witness during the trial. The Respondent was at no time made aware that the Appellants had commenced their action. Nor was the Respondent ever made aware of the Appellants' subsequent appeal of the trial judge's decision in the Nova Scotia Court of Appeal or involve in the appeal in any manner.

10. Henderson and the Atlantic Home Warranty Corporation settled with the Appellants prior to the commencement of the trial.

11. At trial, LeBlanc, J. found that the concrete slab was not constructed in a good and workmanship manner and that its installation constituted a major structural defect. Applewood was found liable for breach of contract in that it failed to perform the work in a good and workmanlike manner. Applewood and Dunleavy were found jointly and severally liable in negligence for the construction of the slab. Applewood, Dunleavy, HRM and Williams were found jointly and severally liable in negligence for the defects on the south wall. LeBlanc, J. also found the Dunleavey's failure to supervise Applewood's subcontractors was negligence.

12. The Appellants appealed the decision of LeBlanc, J. arguing that a broader finding of negligence should have been made against Applewood and HRM and the amount of damages awarded to the Appellants were too low. They also

> argued that Williams was negligent in issuing an occupancy permit when there were still outstanding deficiencies. Dunleavy cross-appealed the finding of personal liability against him. Applewood cross-appealed the finding of negligence and breach of contract against it.
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> 13. Bateman, J.A. on behalf of the Court of Appeal, found that Dunleavy was not personally liable for damages for the negligent installation of the slab; that HRM owned a duty of care in carrying out inspections according to a HRM's policy in a reasonable and prudent manner. HRM and Williams were negligent in the inspection of the south wall. The Court of Appeal overturned the trial judge's finding that Dunleavy's failure to supervise Applewood's subcontractors was negligence.
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> 14. As a result of the Court of Appeal's decision, the total amount of damages for which Applewood was liable to the Appellants was 44,437.00 (after applying the settlements pro rata among the other Defendants).
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> 15. Before the Appellants were able to collect any portion of their judgment against Applewood, the latter went out of business.

[22] The *Limitation of Actions Act* is the first issue before the Court.

[23] Section 2(e) of the *Limitation of Actions Act* requires that the plaintiff must commence an action in negligence within six years from the time when the claimant knew or ought to have known that the damage for which he is making a claim in negligence had occurred.

[24] The section provides:

> 2(1)(e) all actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of any such action arose;

[25] Section 3(2) of the *Act* gives the court discretion where a plaintiff applies to the court for equitable relief having file the claim beyond the six year limit. Section 3(4) sets out the factors the court must consider.

[26] The section reads as follows:

> (4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to
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> (a) the length of and the reasons for the delay on the part of the plaintiff;
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> (b) any information or notice given by the defendant to the plaintiff respecting the time limitation;
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> (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;
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> (d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
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> (f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
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> (g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

[27] In addressing this issue the learned adjudicator found commencing at para. 8 of his decision:

> [8] I consider 4 (a), (c) and (f). The delay is about seven and a half years from the cracking of the floor and six and a half years after Superior was names in a notice of intended action. While not extreme, the delay is sufficiently longer than the statutory period of six years to be more than just a technicality. The reason for the delay is the business failure of Applewood and the time of the litigation leading up to the Appeal Court's decision on May 10, 2005.
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> [9] I am not persuaded that the Claimants acted promptly and reasonably once they knew the laying on the floor slab might be capable of giving rise to an action for damages. The Flynns knew the floor had failed in the winter of 1997-98. They, or their solicitor, contemplated suing Superior by, at

the latest, January 1999. I cannot accept that it was only upon the report of their expert Mr. McBride that they realized the party who poured the slab, Foundation, might be liable. It seems to me that the potential liability of the firm who actually did the work is self-evident.

[10] Furthermore, the suit against Superior is an attempt to nail another party having failed through a long judicial process to obtain satisfaction from a first. In my view, the exemption provision was not intended to indulge a plaintiff seeking satisfaction in series from a defendant whose potential liability must be said to have been known early on.

[11] I accept that Superior in the person of its principal, Gregory Giles, was not engaged in the proceeding until September of 2005, seven years after he had completed his work. He was not contacted by any of the parties at all. He had no idea of potential liability. Superior is a firm of twenty years standing and has laid thousands of floors over the past ten years. I accept that Mr. Giles does not have any particular recollection of the Flynn job and can only speak in a somewhat speculative way about his usual business practices in rebutting the claim against him. Mr. Giles cannot say after eight years what happened between his firm and Applewood. Although on the crucial point he does not contradict what is said about the joining of the slab to the foundation wall, his evidence is less cogent than it would have been had Superior been joined in the original proceeding.

[12] I am also concerned that Superior was never a part of the first proceeding. Superior did not have the opportunity to have its argument dealt with in context. The question of a division of liability or contribution between tortfeasors cannot be addressed in this proceeding. Superior is faced with an action that is just a slice of a much larger whole. It seems to me that its opportunity to make a full answer and defence has been compromised and cannot be restored in a hearing of that slice years later.

[13] I feel constrained to agree with the Court's opinions in the first proceeding. It is a peculiar situation to be in where one in an inferior court has had decisions made on important issues by superior courts in a separate proceeding. In the event, for reasons that follow, I do agree with the Court's findings about the negligent construction of the floor slab, but I wonder in justice whether the deck is not stacked against Superior before it ever entered the court room in this proceeding, and whether it would be have been that way had it participated from the beginning. It would be difficult for me in an inferior court to disagree with the Courts' opinions that the floor was negligently laid and the proper remedy is to tear it out.

> [14] Superior says in its defence that the soil beneath the slab had not been properly compacted. Superior blames the excavation contractor. Superior might have joined the excavator if it had been sued.
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> [15] The Flynns, by their argument, might yet be entitled to sue the excavation contractor. There has to be a limit.

and finally at para. 29:

> [29] In any event, although I am satisfied that Superior was negligent in laying the floor slab, I find that the action is barred under the *Limitations of Actions Act*, that it is not equitable to allow it to proceed, and that the Flynns are estopped under the doctrine of *res judicata* from claiming against a sub-contractor having obtained a judgment against the contractor in a separate proceeding.

[28] It is clear to me that the learned adjudicator turned his mind to the application of the *Limitations of Actions Act* and gave cogent reasons why he should not grant the relief sought, considering sections 3(4) a) c) and d) of the *Act.*

[29] It is also clear that the Small Claims Court is a court by definition of its own legislation s. 2 and s. 3 of the *Small Claim Court Act* R.S.N.S, 1989, c. 430 and also within the meaning of s. 3 of the *Limitations of Actions Act.*

[30] The respondent correctly relies on *Cote v. Scott* [2005] N.S.J. No. 618 (N.S. Sm. Cl. C.). The defendant raised a defence based on the limitation provisions of the *Act.* The Small Claims Court Adjudicator first considered whether the Court had the jurisdiction to make an order under the *Act* based on a motion put forward by the claimant. Adjudicator Parker stated the following at para. 14 of his decision:

> 14 With respect to the motion before me the first question that I must answer deals with whether this Court can entertain an application or motion pursuant to section 3 of the Limitations of Actions Act.
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> 15 This issue involves two considerations: The first is whether or not it is a remedy, which this Court has jurisdiction to provide an Applicant. The Small Claims Court only has power given to it under the Small Claims Court Act and its subsidiary legislations. The remedy if that is what it is, is not one that has to be applied, like the remedy of specific performance or some prerogative remedy

> such as an injunction, which are equitable remedies. It is only a determination on whether to allow an action to proceed notwithstanding it is statute barred. While the application under section 3 deals with the whether or not it is equitable to allow the matter to precede it is not in my view an equitable remedy.
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> 16 The second consideration is whether this is a Court as contemplated by the Limitation of Actions Act. The answer is in the affirmative.

[31] I have considered *Butler v. Southam Inc.* [2001] N.S.J. No. 332 (NSCA), *Brown v. Marwieh* [1993] N.S.J. No. 227 (NSSC) and *McGuire v. Fermini* (1984), 62 N.S.R. (2d) 104 (T.D.).

[32] Although there are circumstances in which the *Act* should be accorded a broad interpretation, this is not such a case.

[33] I agree with the adjudicator's reasons why he ought not to have exercised his discretion to waive the obvious breach of the limitation period in these circumstances.

[34] As the adjudicator commented Superior was not a party to the proceedings until September 2005, seven years after the work had been completed. Knowledge of the part they played and their potential liability must have been obvious to the appellants long before the McBride report.

[35] Superior is at extreme prejudice having not had the opportunity to participate in earlier court proceedings.

[36] Their opportunity to make a fair and full answer and defence has long passed. This is due to the choices made by the appellants and their counsel in their conduct of the litigation.

[37] In my view, the adjudicator properly exercised his discretion in finding that the action before the Small Claims Court was statute barred pursuant to s. 2(e) of the *Act.*

[38] It is therefore unnecessary to address the additional grounds of appeal and cross-appeal that are before me.

Justice M. Heather Robertson