IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Carleton Homes Ltd. v. Graham, 2004 NSSC 134

Date: 20040630
Docket: SH 205443A
Registry: Halifax

Between:

Carleton Homes Limited and Anahid Investments Limited

Appellant

v.

Scott D. J. Graham

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	February 17, 2004, in Halifax, Nova Scotia
Written Decision:	June 30, 2004
Counsel:	Mr. R. Barry Ward, for the appellant Scott D. J. Graham, self-represented/respondent

Robertson, J.:

[1] This is an appeal from the decision of a Small Claims Court Adjudicator, which allowed the claim of the respondent Scott D.J. Graham against the appellant Carleton Homes Limited in the amount of $6538.50 for the replacement of siding on his residential property, located at 300 Southampton Drive in Dartmouth.

[2] The home was originally constructed by C & L Construction and Design Limited ('C&L') in 1999. C&L went into bankruptcy. Armco Capital Limited ('Armco') bought the property at a sheriffs' sale in March 2001. Armco had originally owned this lot. The appellant Carlton Homes Limited ('Carlton') was contracted to complete this property and others in the subdivision on behalf of Armco. 300 Southampton Drive had stood empty and unfinished for some time. Some of its siding was missing and damaged. Carlton then hired Dynamo Siding to effect the repair to the siding.

[3] Armco then sold the property to Paul Tonet and Heather Melcher by warranty deed dated July 3, 2001. No claims for faulty installation of siding arose while they owned the home. They sold it to the respondents by warranty deed dated September 23, 2002.

[4] In a Small Claims Court action dated February 17, 2003, the respondents claimed in paragraphs 6 and 7:

> 6. On November 23 and 24, 2002, there were wind guts of up to 80 km/h. There was visible shaking in the house during the winds (eg. lamps visibly moving) and subsequent damage to plaster joints on the third floor.
>
> 7. On November 25, 2002, two "bubbles" in the vinyl siding were noticed. One bubble was just above the peak of the garage (extending 3 to 4 vertical feet) and one on the opposite side of the house (extending 3 to 4 vertical feet).

[5] They claimed damage to property and poor quality work. Although the property had originally been registered with the Provincial New Home Warranty Program, the new home warranties had expired by July 2002.

[6] The respondents did not sue the predecessors in the title Tonet and Melcher, apparently due to the operation of the doctrine of *caveat emptor*, where the

purchaser’s right to complain about defects will merge in the delivery of the deed and in light of the purchaser’s implied obligation to inspect the property.

[7] The learned adjudicator made no mention of case law however, seemed to impose upon Carleton, liability in tort.

[8] In paragraph 32 of his decision he stated:

> In my view, the duty of care arises because when siding comes away from a building, it can create not only structural damage (by permitting the entry of water into the interior of the building) but it can also pose a risk of personal injury to people on the street who may be hurt by the flying siding. (One of the photographs entered of a neighbour's house clearly demonstrates the possibility of personal injury to persons on the street).

[9] The adjudicator recognized that the problem arose from faulty installation and also recognized that Carleton's role was restricted to effecting a siding repair. The adjudicator found "that in fact, there were a number of failures on the part of the installers (whoever they were) to employ proper installation techniques." paragraph 29. The adjudicator also noted that "there is no evidence that the improper siding technique was discovered by the Claimant in his investigations" paragraph 30. The adjudicator found that Carleton ought to have discovered the

improper installation technique when it effected a limited repair and therefore owed a duty of care to the claimant's subsequent purchase.

[10] There is no suggestion that Carleton knew of the installation deficiency nor that Carleton was hired by Armco to do anything more than effect a repair where some siding was missing on the side of the building.

[11] Carleton submits that the adjudicator made two reversible errors, one of law and one of jurisdiction, namely:

> (i) the Adjudicator erred in that he failed to apply, or properly apply, the doctrine of caveat emptor;
>
> (ii) the Adjudicator breached the Act and awarded general damages in excess of $100.

[12] I am in agreement with the appellant with respect to the adjudicator's oversight of the application of the doctrine of *caveat emptor*.

[13] In the circumstances of this case, I do not find that any exception to that doctrine should apply.

[14] This doctrine of *caveat emptor* apples in Nova Scotia to the purchase and sale of land. *Edwards and Edwards v. Boulderwood Development Co. Ltd. et al,* (1984) 64 N.S.R. (2d) 395 (N.S.C.A.). In paragraph 32 quoting *Redican v. Nesbitt* [1924] S.C.R. 135, Justice Pace states:

> The principle appears to be that, save in exceptional cases to which reference will be made, the maxim caveat emptor applies, and that the purchaser, if he wishes to protect himself in respect of the absence of title or defect in the title or in the quantity or quality of the estate, must do so by covenants in the conveyance.

[15] A limited exception arises to the doctrine of *caveat emptor* in circumstances such as those that arose in the case of *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd* [1995] 1 S.C.R. 85 (S.C.C.) where the original contractor of an apartment building, later converted to condominiums, was held liable to the condo corporation for the failure of the exterior masonry cladding. In that case, a storey high section of brick cladding fell from the ninth storey level of the building. The Supreme Court of Canada overturned the Manitoba Court of Appeal who had found that the costs of repairs claimed by the appellant were not

recoverable economic loss under the law or tort in Canada. However, in extending the law of tort in this regard the court found that a duty in tort will only arise where there is foreseeable risk resulting from the contractor's defects which must pose substantial danger to the health and safety of the occupants. Recovery was limited to the reasonable cost of repairing the defects and putting the building back in a non-dangerous state.

[16] Justice LaForest noted at paragraph XLII:

> ...I note that the present case is distinguishable on a policy level from cases where the workmanship is merely shoddy and substandard but not dangerously defective. In the latter class of cases, tort law serves to encourage the repair of dangerous defects and thereby to prevent the bodily integrity of inhabitants of buildings. By contrast, the former class of cases brings 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.

[17] Essentially, the adjudicator found that the siding had been installed in a shoddy fashion and speculated as to possible risk of this plastic siding flying through the air causing injury. This is not a situation as grave, or as dangerous or foreseeable as the facts of the *Winnipeg* situation.

[18] Carleton was not the original contractor, nor was Carleton hired to inspect all of the siding installation. Their contract was to effect a repair. They were a sub-contractor to a subsequent title holder of the original owner/builder.

[19] I am uncertain if the adjudicator ever intended to apply the *Winnipeg* case as no mention is made of it in his decision, although the respondent relies on this case as authority that supports the adjudicator's findings.

[20] This would in my view abrogate the doctrine of *caveat emptor* and stretch the exceptions to the doctrine too far in circumstances where the defects do not amount to a substantial danger to the health and safety of the occupants. It is not necessary for me to consider the issue of jurisdictional error relating to the calculation characterization of the amount of the award.

[21] The appeal is allowed and the cause of action dismissed.

Justice M. Heather Robertson