

BCBEC

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BUILDING ENVELOPE LITIGATION

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DEVELOPMENTS IN LEAKY BUILDING LITIGATION

- *Jefferson* decision and aftermath
- Mediation and trials
- Low rise & high rise buildings
- BC Housing lawsuits
- Leaky school lawsuits
- Class actions

JEFFERSON & AFTER

- Lawsuit authorization: CA vs. SPA
- *Jefferson* decision (2003)
- SPA amendments
 - December, 2003: votes
 - October, 2004: written consent

MEDIATION

- Most cases settling at 1st mediation
- “50 Cents” Rule
 - Usual recovery is 50 cents on the repair dollar
 - Why?
 - Incomplete insurance coverage
 - Missing defendants
 - New for old construction
 - Settlement discount

MEDIATIONS cont'd

- More second mediations
 - Defendants staying below 50 cents on 1st mediation
 - Litigation costs skyrocket
 - Second mediation usually = 50 cents or more

TRIALS

- So far, only *Riverwest/Delta*
- Some close calls since then
- Not much luck with summary trials

LOW RISES & HIGH RISES

- Residential Low Rises
 - “Classic” leaky condo lawsuit
 - Lawsuit numbers in decline
 - New claims may have time limit problems
- High Rise Buildings
 - In the news
 - Not much litigation (yet)

HIGH RISES cont'd.

- Why now for high rises?
 - Slower deterioration
 - Bigger repair cost = delayed action

BC HOUSING CLAIMS

- Newer wave of lawsuits
- New dynamics
 - Powerful opponents seeking/fearing precedents
 - Opportunity for comprehensive settlements
 - One major insurer has settled all claims involving all of its construction insureds in all BC Housing lawsuits.

LEAKY SCHOOL CLAIMS

- Newer wave of lawsuits
- Similar dynamic to BC Housing lawsuits
- Interesting difference is one wrap up insurer for many projects

CLASS ACTIONS

- The *Kimpton* case (2002)
 - Federal Government and the NBC
 - Provincial Government and the BCBC
 - CMHC and loan conditions

TEAM MEMBER LIABILITY

- Contractual vs. tort liability
- Developers
- Design professionals
- Contractors
- Manufacturers & suppliers
- Municipalities
- Lenders

CONTRACT VS. TORT

- Contract
 - Liability between contracting parties
 - Sales agreements (developer/buyer)
 - Consultant, contractor, and supplier agreements
- Tort
 - Liability to foreseeable victims
 - Pure economic loss vs. dangerous defects

DEVELOPERS

- Disclosure statement representations
 - Personal liability of signatories
 - Potential liability for statements concerning:
 - Repair & maintenance budgets
 - Building quality or building code compliance
- Contractual Liability
 - Sales agreement representations
 - Express & implied warranties

DEVELOPERS cont'd.

- Tort liability
 - Control over budget
 - Control over professional involvement
 - Failure to repair known defects

DESIGN PROFESSIONALS

- Agreeing to limited role
- Design problems
 - Errors
 - Lack of detail
- Inspection problems
 - Missing systemic errors
 - Missing error at key detail
 - Failure to ensure correction of known errors

DESIGN PROFESSIONALS cont'd.

- Certified Professionals
 - Municipalities offloading responsibility for enforcing the entire Building Code
 - But Certified Professionals claim responsibility only for ensuring compliance with Part 3
 - 1990 CP Manual gives mixed messages
 - 1993 CP Manual focuses more on Part 3 but leaves some exposure

DESIGN PROFESSIONALS cont'd.

- Certified professional reviewing work of registered professionals:

Schedule CP-1 “Confirmation of Commitment by Owner”:

“... CP to provide overall responsibility and authority for “code coordination””

DESIGN PROFESSIONALS cont'd.

- Code Coordination means all activities necessary to ascertain that the Registered Professionals have,
 - reasonably interpreted the code requirements
 - incorporated the code into their designs
 - interfaced the code requirements of their design with that of other disciplines
 - fulfilled the CP checklist code requirements

DESIGN PROFESSIONALS cont'd.

- CP supervision of registered professionals cont'd.
 - Schedule CP-1 also mandates CP to review reports of other testing and inspection agencies and disciplines where necessary, comment on their acceptability, determine the corrective action to take if unacceptable . . .

DESIGN PROFESSIONALS cont'd.

- CP's involvement with building envelope issues could land them in trouble regardless of their official responsibilities.

CONTRACTORS

- General contractors have “whole project” responsibilities for,
 - Sequencing
 - Construction methods
 - Requesting design guidance

CONTRACTORS cont'd.

- Subcontractor's have similar responsibilities on, under and around their own work.
 - Good workmanship on own work
 - Acceptance of substrate and adjoining work
 - Request for design guidance when needed

CONTRACTORS cont'd.

- The “Golden Rule”: If you know its wrong, don't do it. Following directions, plans, specifications, budget, contract, etc. will not keep you out of trouble.
- Doing it under protest will not protect you if a third party suffers loss.

SUPPLIERS / MANUFACTURERS

- Liable for deficient,
 - Products
 - Instructions
 - Not always required (e.g. screws and nails)
 - Learned intermediary exception
 - Application
 - Where experience indicates risk
 - Where specific knowledge obtained by inspection

MUNICIPALITIES

- Plan review
- Inspections and occupancy permits
 - Vancouver has statutory protection if architect or engineer signs off
 - For every other municipality, the statutory protection is less clear
- What the *Riverwest/Delta* case says

LENDERS

- Some lenders may insist on building standards or carry out inspections.
- CMHC has been added to lawsuits.
- However, the *Kimpton* class action case said CMHC's insistence on Building Code compliance was only to protect its loan. It did not create a duty of care to the borrower to ensure the building was well constructed.

TIME LIMITS

- External force damage = 2 years
- Internal defects & damage = 6 years
- Postponement
 - Discovery of cause of action (expert reports)
 - Identification of defendant
 - Addition to ongoing lawsuit
- Ultimate limitation = 30 years

LIABILITY PROTECTION

- Choice of business vehicle
- Waiver & indemnity
- Insurance
- Document retention

BUSINESS VEHICLE

- Business vehicle can affect liability
 - Employers vicariously liable for employees
 - Sole proprietorship does not protect owner
 - Partnership makes all partners liable for each other and employees
 - Incorporation protects owners from vicarious liability but not for personal fault.

WAIVERS & INDEMNITIES

- Useful but have limits
- Waiver only protects you from the provider, not from third parties.
- Indemnity only as good as the provider. If provider has no resources, you are exposed.

INSURANCE

- Liability Insurance
 - Professionals have “claims made” policies. The policy that counts is the one in place when the claim is made.
 - Everybody else has “occurrence” policies. The policy or policies in effect when the loss occurred are the ones that must respond. With leaking buildings, many policies over the years can be brought into play.

INSURANCE

- Covenants to Insure
 - Did you promise to get insurance for others?
 - Did others promise to get insurance for you?
 - Get copies of insurance certificates and confirm you are actually insured.
 - Get a copy of the policy and find out what coverage is actually provided.

INSURANCE cont'd.

- Wrap up insurance
 - Covers most parties on site
 - Usually obtained by general contractor or developer
 - Designed to prevent lawsuits between parties on site
 - Also servers to protect insureds from third party claims

CAPTIVE INSURANCE

- Create your own coverage!
 - BC roofers had difficult getting liability insurance at a reasonable price or any price.
 - Roofers recently formed their own insurance pool.

DOCUMENT RETENTION

- Keep,
 - names & addresses of employees and trades for each project
 - project documents
 - insurance policies
- How long depends on risk tolerance. The ultimate limitation takes 30 years.

These materials are necessarily of a general nature and cannot be regarded as legal advice. Clark, Wilson will be pleased to provide additional details on request. Inquiries or comments concerning these materials should be directed to R Glen Boswall.

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