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Case Comment – *The Owners, Strata Plan NW 3341 v. Delta (Corporation) (“Riverwest”)*, 2002 BCCA 526

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This decision is the appeal of one of the first lawsuits to be tried in the British Columbia “leaky condo” crisis. It involves significant issues of municipal liability, particularly statutory limitations and contribution by the strata corporation. But the major issue at trial, whether a municipality should be subject to liability for a deliberate decision not to inspect, was not raised or considered in the appeal.

At trial (2001 BCSC 1214, reported at [2001] 10 W.W.R. 214, 93 B.C.L.R. (3d) 136, 7 C.C.L.T. (3d) 111, 10 C.L.R. (3d) 293, 22 M.P.L.R. (3d) 173), Grist J. of the Supreme Court of British Columbia ruled that the municipality’s adoption of the British Columbia Building Code constituted a policy decision, and that the municipality’s deliberate decision not to inspect in certain instances or require a certificate of compliance from consultants constituted an operational decision that was unreasonable in the circumstances and that founded liability for negligence. The municipality’s portion of liability was set at 20%, but its liability was joint and several. Since it was the only defendant to participate in the trial, it seems likely that the practical result of the judgment was that the municipality would pay the entire judgment, which was approximately \$3 million.

The municipality appealed on two specific issues: was the action commenced out of time; and was there contributory negligence on the part of the strata corporation. The municipality did not appeal either liability or quantum.

The Court of Appeal rejected the municipality’s argument on limitations. The Court applied its recent decision in *Gringmuth v. North Vancouver (District)* (2002), 98 B.C.L.R. (3d) 116 to hold that the six-month limitation in Section 285 of the *Local Government Act* is inapplicable to such claims. The Court also rejected the submission that a two-year limitation applied under the British Columbia *Limitation Act*.

The municipality had argued that the loss suffered by the municipality constituted “injury to property”, which under the *Limitation Act* would engage a two-year limitation. In rejecting that argument, the Court applied the long-standing rule that



“injury to property” under the *Limitation Act* requires damage to be caused by an identifiable external event. The claim was based on defects that manifested themselves early, but whose true magnitude only became clear with the passage of time and increased damages. There was no identifiable single event causing the damage. Accordingly, only the six-year general limitation under the *Limitation Act* applied, and the strata corporation had commenced the action within that period.

The issue of the strata corporation’s contribution was important because such a finding would have negated the automatic joint and several liability under the British Columbia *Negligence Act*. The municipality argued that the strata corporation was not duly diligent in protecting its own interests by failing to follow certain advice of its own expert at an early stage. The Court of Appeal declined to disturb the trial judge’s finding that, despite the failure to follow the advice, there was no negligence on the part of the Strata Corporation. Accordingly, the appeal was dismissed. In doing so the Court applied the recent decision of the Supreme Court of Canada in *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577 relating to the standard of review in determinations of the appropriate standard of care in negligence cases.

In light of the dismissal, the trial decision in *Riverwest* will remain as authority for the proposition that a municipality that institutes bylaws requiring construction inspections, and that fails to conduct those inspections in practice, may face exposure for loss arising from defects that the inspections would have revealed. Where a municipality is the only deep-pockets defendant, that liability can be costly indeed.