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The responsibility of the architect, engineer and builder

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THE RESPONSABILITY OF THE ARCHITECT, ENGINEER AND BUILDER

Hon. George S. Challies

Ordinary General Rule

Ordinarily, in a contract the acceptance of delivery by the purchaser without objection frees the seller from all responsibility for defects which are not hidden. The law takes the attitude that if the purchaser is not an expert he should have the object examined by an expert before accepting delivery and if he does not do so he has only himself to blame. One exception to this is hidden or latent defects about which the purchaser can complain and recover back the price paid if he acts promptly after he discovers the defect.

This rule applies to buildings, if the defect is not serious enough to imperil solidity. So in *Turcotte v. Lavoie*, (1) an owner recovered damages from a contractor who built him a house in marshy ground with a basement which was not watertight. In that case the susceptibility of the basement to flooding through the walls only became apparent some months after delivery during the autumn rains. An action in damages based on latent defect was maintained to the extent of \$1400.

If a building contract is executed in a defective manner an action in damages lies under 1065 CC independent of 1688 CC, particularly if the work has never been accepted by the owner. So in *Royal Montreal Golf Club v. Wiggs et al architects, Wiggs et al engineers and Atlas Construction, C.C.M. 491472*, a judgment of Csmith J. dated 18 October 1962, a joint and several condemnation in the amount of \$329,000. was obtained against all the defendants because a watering system on a new 45 hole golf course designed and manufactured to be installed with metal or Asbestos pipe was installed with polyethelene pipe which burst repeatedly at the place where the pipe joined the buried sprinkler heads. The judge held that the defendants had failed to carry out their contract to install a sprinkler system and were responsible for all damages directly resulting therefrom.

Building Contracts where there is Perishing

In order to protect both the individual and the public from the risks arising from serious defects in buildings where solidity is imperilled the law establishes a specially onerous responsibility. This is

(1) 1950 K.B. 161.

because the average person is quite unable to tell at the time of delivery that the building may collapse, and even experts may not be able to do so. Hence Article 1688 C.C. provides that if building perish in whole or in part within five years from defective construction or from the unfavourable nature of the ground the builder and architect are responsible in damages to the owner.

A number of problems arise in applying this responsibility and an attempt will be made to deal with them one by one.

a) What is a building or édifice?

This has been interpreted by jurisprudence as not limited to houses or office buildings but to comprise anything that is built. Included are a tile floor in an early store of Henry Birks and Sons (2); an automatic sprinkler system in a building (3); an aqueduct in the country (4); a brick chimney for a factory (5); a brick retaining wall for a lawn (6); a cofferdam (7). In one case (8) ice destroyed crib work in the spring.

There is one surprising judgment (9), which is believed to be erroneous, that the work of enlarging a garage by 18 sq. ft. is not a building.

b) *To whom does responsibility apply — and to what contracts?*

i. While Article 1688 speaks of architect and builder, "builder" has been held to include civil engineer (10).

ii. Article 1688 is found with a series of other articles in the Civil Code under the heading "Of work by estimate and contract". It has therefore been argued that it is not every building contract which is covered but only where there are plans and specifications (although the Supreme Court has held in this Hill Clark Francis case (11) that this is too great a limitation); or at least that it applies only where there is a contract of "entreprise" which would exclude cases where the builder is under the control of the owner. The point is not yet definitely decided. Mr. Walter Johnson in "Responsibility of Architects, Engineers and Builders" at p. 99 advances the view that

(2) *Reid v. Birks*, (1911) 39 S.C. 133, Guérin J.

(3) *McGuire v. Fraser*, (1908) 17 K.B. 149, affirmed (1907-08) 40 S.C.R. 577.

(4) *Roberge v. Talbot*, (1893) 4 S.C. 451, Routhier J.

(5) *Ward v. Walbank*; (1894) 5 S.C. 383, Davidson J.; *Marcotte v. Darveau*, 1956 S.C. 197, Marquis J.

(6) *Hendler v. Drabik*, 1958 S.C. 504, Smith J.

(7) *Fraser-Brace v. Canadian Light & Power Co.*, (1916) 49 S.C. 145 (Review); *Canadian Electric Light Co. vs Pringle*, (1920) 29 K.B. 26.

(8) *Canadian Electric Light Co. v. Pringle*, (1920) 29 K.B. 26.

(9) *Bergeron v. Laberge*, (1940) 78 S.C. 80, Prévost J.

(10) *Canadian Electric v. Pringle*, *supra*.

(11) 1941 S.C.R. 437.

all building contracts are covered. Practically speaking the great majority of such contracts will be in fact covered.

iii. It does not apply where a contractor builds for himself and sells to a third party a house which collapses in whole or in part (12).

c) *What does "perish" mean ?*

Johnson suggests at p. 29 that the word "perish" indicates some actual collapse or weakening of the structure in whole or in part by sinking, falling, bending, leaning, etc. One does not have to wait for actual collapse to sue to invoke responsibility. So where a brick chimney was condemned by the building inspector (13) the owner successfully sued the builder. A foundation so badly built that it was necessary to rebuild justified an action although the building had not fallen down (14).

However it has been held not to apply to defective pointing of the brickwork of a porch (15) nor to defective and warped door and window frames which in no way imperilled the solidity of the building (16).

d) *Duration of responsibility*

It should be noted that there is a distinction between the effect of the passage of time on responsibility and on the time within which an action must be taken, if there is responsibility.

i. Perishing must commence within five years of delivery for there to be responsibility. If there is no perishing within that time there can be no responsibility under 1688 C.C. This limitation is imposed because of the severity of the responsibility.

ii. If perishing begins within five years (and this does not mean total loss must occur within that time) the action must be instituted within a varying time limit. If damage occurs all at once within five years the action must be taken within five years of loss. However, if loss only reveals itself gradually the action may be taken at any time within ten years of delivery.

As an example there is the case of *Laverdière v. Dorval* (17), where a frame building was erected in 1946 and in 1950-51 it was found that the house was so cold in winter that the cost of heating was

(12) *Cohen v. Industries Brandon*, 1959 S.C. 63, Deslauriers J.; *Kwiat v. Beauchemin*, 1958 S.C. 322, Chailles J.; *Mignault*, vol. 7, p. 411; *Faribault*, vol. 12, p. 442, *Contra Johnson*, "Responsibility of Builder", p. 169.

(13) *Royal Electric v. Wand*, (1896) 9 S.C. 117, Tait A.C.J.

(14) *Audet v. Guérard*, (1912) 42 S.C. 14, Lemieux A.C.J.

(15) *Lapointe v. Perkins*, (1927) 43 K.B. 168.

(16) *Warren v. Warren*, (1928) 66 S.C. 61, Roy J.

(17) 1955 Q.B. 367.

twice that of previous year; the next winter the situation was even worse; in 1952 water gathered on interior of the walls of the second storey and there was a very bad odour; and finally in 1953 after part of one wall collapsed an expert examination revealed that a part of the building was rotten and that the whole was threatened with ruin. It was held that gradual collapse gave a delay of ten years from 1946 to take action because ruin first manifested itself within five years of delivery.

It should be emphasised that ordinarily in other types of action there is no limitation on an action except the obligation to institute action within a certain time from the occurrence of the damage. In case of construction contracts there is added the additional requirement that damage have occurred or at least started to occur within a limited period - namely five years of delivery.

Another example of the ten year rule applying is *Hill Clark Francis Ltd. v. Northland Grocers (Quebec) Ltd.* (18). The building, which was a grocery warehouse erected according to plans and specifications at Noranda, was completed in 1928 and occupied. In 1929 a crack was noticed in one wall. From 1929 to 1931 the basement floor got more and more out of plumb. In 1932 it was 19 inches out and 23 inches out in 1933. In 1933 Northland wrote a claim letter to HCF and finally in 1936 after negotiations proved fruitless action was started. The courts held that perishing was gradual beginning within five years of delivery and that there was ten years from delivery in 1928 within which to start action.

e) *For what work is one responsible ?*

i. An architect, engineer or builder is of course responsible for his own work.

ii. He is also responsible for the work of another which he has accepted and built upon or completed. The classic case (19) on this involved the construction of Christ Church Cathedral in the last century. The foundation was built by one person. Later a builder Wardle agreed to build a church thereon following plans prepared by an architect, and specifically assumed the foundation already built. When completed the tower sank several inches due to the unfavourable nature of the ground, and insufficiency of the foundations, injuring the rest of the building. It was necessary to pull down and rebuild the tower at a cost \$30,000. The church wardens refused to pay the balance of the builder's account and he sued and they cross-claimed. The Privy Council held that Wardle was responsible for the damages because he assumed the foundation of the earlier builder and that he should have examined the plans, the foundations and the soil before building. They did not decide what would have

(18) 1941 S.C.R. 437 affirming (1940) 69 K.B. 280.

(19) *Wardle v. Bethune.* (1872) 16 L.C.J. 85 (P.C.)

been the case if the damage had been due to a hidden defect in the earlier construction which the builder could not by any available tests have discovered.

It was also held that it is no defence for the builder to say he relied on the architect. In this case, the Privy Council said that the somewhat harsh responsibility was justified on two grounds: a. the owner who is normally unskilled in building has a right to expect that a builder will provide a foundation such that a building stand.

b. there is a motive of public policy that justifies obliging the builder to take extreme care.

Other examples are where a contractor agreed to build a brick chimney on an existing foundation. One month after completion the chimney fell and an action against the builder was maintained ⁽²⁰⁾. In another case ⁽²¹⁾ a contractor put a new roof on existing walls. The timbers in walls supporting the roof were defective and the roof was in danger of collapse. The contractor was held liable for the cost of reconstruction although his own work had been satisfactory.

A sprinkler system was soldered to an existing water pipe. The joint failed and the plumber who installed the sprinkler was held responsible on the analogy of a builder building on an insufficient foundation ⁽²²⁾.

This responsibility applies whether collapse is due to defective workmanship or to the unfavourable nature of the ground.

f) *Extent of liability*

i. It is impossible to contract out of responsibility — this would be void as against public order.

ii. Following orders of the owner, no matter how express, is no defence. A contractor tried to explain a defect in the construction of an aqueduct as due to having followed orders of the owner. The Court held that he should have refused to obey such orders ⁽²³⁾.

iii. If there are several independent contractors, each is responsible for his own work.

iv. If there is a main contract and several sub-contracts the principal contractor would be liable to the owner for the entire job. The principal contractor would have recourse against a sub-contractor whose defective work caused ruin, but the owner has no recourse against a sub-contractor unless he has contracted with him.

(20) *McMeekin v. Daoust*, (1947) S.C. 216, Duranleau J.

(21) *Martel v. Syndics de St-Georges*, (1887) 11 L.N. 82, Loranger J.

(22) *McGuire v. Fraser*, (1908) 17 K.B. 149; affirmed (1907-08) 40 S.C.R. 577.

(23) *Roberge v. Talbot*, *supra*.

v. An architect who merely supplies plans but does not supervise work is liable only for loss arising from defects in his plans or from the unfavourable nature of the ground.

vi. A supervising architect is jointly and severally responsible with the builder for all loss under 1688 CC and each can be sued (or both can be sued together) for the full amount. In a recent case ⁽²⁴⁾, the owner of an allegedly defective building sued builder, architect and engineer for \$573,500.

vii. If one architect supplies plans and another accepts them and supervises work, the second architect is alone responsible with the builder for ruin not due to plans ⁽²⁵⁾.

viii. The builder cannot say that he merely followed the plans of the architect. He is still liable to the owner. So the approval and direction of a competent architect or his neglect to ascertain the nature of the soil by known tests does not exonerate the builder of a dam from the consequences of following such direction or of building on an insufficient foundation ⁽²⁶⁾.

It may well be that one of two persons sued by the owner can recover by separate action part of his condemnation from the other.

ix. The owner of the building at the time of the loss has an action against the builder and the architect even though he may not have contracted with them, for in buying the building from the person who did contract with them he acquires the unexpired portion of the rights of original owner. In the McGuire case ⁽²⁷⁾ M installed sprinkler for N in 1901 who sold the building to F in 1903. During the same year there was a flood due to break in sprinkler pipe and F sued M for water damage to goods.

g) *What must be proved in action by owner*

Since judgment of Supreme Court of Canada in *Hill-Clark Francis* case, it would seem that all the owner has to do is to prove:

- i. contract to build
- ii. loss amounting to partial or total ruin within delay
- iii. loss due to defective construction or unfavourable nature of ground.

h) *How, if at all, can builder or architect avoid liability*

i. If damage is due entirely to an act of a third party. So in the *Hill-Clark Francis* case there was an unsuccessful attempt to prove that

(24) *Roth v. St. Michel Realities*, 1957 Q.B. 576.

(25) *Scott v. Christ Church Cathedral*, (1866) 1 L.C.L.J. 63, Monk J.

(26) *Cdn Consolidated Rubber v. Pringle*, (1936) S.C.R. 477.

(27) *McGuire v. Fraser, Supra; Marcotte v. Darveau, Supra.*

the collapse of the basement floor was due to underground mining operations by Noranda Mines subsequent to construction. This failed but would have been a good defence if proven.

ii. Act of owner himself being entirely responsible for ruin. This is an improbable eventuality, but would be a good defence.

iii. Force majeure, like earthquake, windstorm of hitherto unrecorded violence, war, riot.

So in *Curtis Reid Aircraft Co. v. Deakin*.⁽²⁸⁾ wind blew the roof off of a hangar. The owner sued the builder. It was proved that the wind was so violent that it uprooted trees two inches in diameter and that the owner's employees had left doors open. For those two reasons the action was dismissed.

(28) (1933) 71 S.C. 90, de Lorimier J.