CITATION: Humberplex Developments Inc. v. Soil Engineers, 2015 ONSC 6089
NEWMARKET COURT FILE NO.: CV-11-102431-00/A1
DATE: 20151005

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Humberplex Developments Inc. Plaintiff	Charles C. Chang, for the Plaintiff
-and-	
Soil Engineers Ltd. Defendant	Natalie M. Leon, for the Defendant
- and-	
CDC Contracting Ltd. and Condeland Engineering Ltd. Third Parties	Gary W. Gibbs, for the Third Parties
	HEARD: July 21, 2015

REASONS FOR DECISION

McKELVEY J.:

Introduction

[1] The plaintiff, Humberplex Developments Inc. ("Humberplex"), has brought this action to recover damages against Soil Engineers Ltd. ("SEL"), arising out of a construction project which involved the construction of a road and underground utilities in a new subdivision. The defendant, SEL, has brought a motion for summary judgment pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), seeking a dismissal of the plaintiff's action on the basis that it was commenced beyond the expiry of the limitation period.

Background

[2] Humberplex commenced this action on January 11, 2011. SEL is named as the sole defendant in the action. In turn, SEL commenced a third party claim against CDC Contracting Ltd. ("CDC"), as well as Condeland Engineering Ltd. ("Condeland").

[3] Humberplex is a real estate developer. In the spring of 2005, it was in the process of developing a one-hundred and seventy lot luxury home subdivision in the Town of Kleinberg. As part of the development, Humberplex contracted for the construction of a road as well as underground utilities in the subdivision. CDC was contracted to do the construction work. Condeland was the design engineer on the project. SEL was hired by Condeland to provide geotechnical inspection and material testing services on the project. The terms of engagement for SEL are set out in two letters, dated April 25, 2005 and May 10, 2005, as prepared by SEL. These letters are not specifically signed by Condeland. The parties have agreed, though, that these proposals formed the contractual documentation relating to SEL's involvement, although Humberplex asserts that SEL's responsibilities may have been broader than specifically provided for under the contractual documentation.

[4] During the course of the construction, SEL provided reports to Condeland relating to its involvement in the project. Their last report to Condeland is dated September 15, 2006.

[5] By June 2007, problems were identified in the project. Initially, a problem was detected with one of the sewers which failed. SEL conducted an inspection on January 14, 2008 and determined that the cause of the failure was settlement around the manholes, which was likely due to insufficient sand fill. Further deficiencies were identified in June of 2008, relating to the asphalt pavement which was used.

[6] On July 23, 2008, SEL provided a report to Condeland, which indicated that the number of pavement deficiencies was excessive and that the deficiencies which occurred were mainly due to poor workmanship by the contractor, CDC.

[7] CDC brought an action against Humberplex in 2008 arising out of fees, which they alleged were owed to them by Humberplex. In that action, Humberplex counterclaimed against CDC for damages relating to alleged defects in the work performed by CDC. SEL was not a party in this litigation. However, SEL provided a number of reports to Humberplex which were used to support Humberplex's claim that the work performed by CDC was defective.

[8] The litigation between Humberplex and CDC went to trial in March 2009. The trial lasted approximately nineteen days before a settlement was concluded between the parties. In January 2011, subsequent to the settlement, Humberplex commenced its claim against SEL, asserting that it was the conduct of SEL which resulted in the defects in the construction of the road and underground utilities. The sum of $1.5 million in general damages is claimed against SEL in this action.

Applicable Limitation Period

[9] The parties agree that the applicable limitation period is contained in sections 4 and 5 of the *Limitations Act*, 2002, S.O. 2002, c.24 (the "*LA*").

[10] Section 4 of the *LA* provides as follows:

> Unless this act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[11] Section 5 of the *LA* further provides:

> (1) A claim is discovered on the earlier of,
>
> (a) The day on which the person with the claim first knew,
>
> (i) That the injury, loss or damage had occurred,
>
> (ii) That the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) That the act or omission was that of the person against whom the claim is made, and
>
> (iv) That, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) The day on which a reasonable person with the abilities under the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[12] The position of SEL is that by July 31, 2008, Humberplex had all of the information it required to know of its potential claim against SEL. They argue that the limitation period expired by July 2010 and the action is therefore statute barred.

[13] Humberplex takes the position that it did not have all of the information needed to recognize a potential claim against SEL until the trial involving CDC. It is asserted that

the limitation period did not, therefore, start to run until March or April of 2009 and that the action is therefore brought within the time frame provided by section 5 of the *LA*.

[14] There is considerable caselaw on the issue of discoverability under section 5 of the *LA*. In *Kowal v. Shyak*, 2012 ONCA 512, the Ontario Court of Appeal noted that certainty of a defendant's responsibility for the act or omission that caused or contributed to the loss is not a requirement. It is enough to have *prima facie* grounds to infer that the acts or omissions were caused by the party or parties identified. In *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80, Justice Perell provides a helpful summary of other relevant criteria which apply to the issue of discoverability. He notes that a plaintiff is required to act with due diligence in acquiring facts in order to be fully apprised of the material facts on which a claim is based. Thus, a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence. The question is whether the prospective plaintiff knows enough facts to base a cause of action against the defendant and, if so, then the claim has been discovered and the limitation period begins to run. The discovery of a claim does not depend upon a plaintiff knowing that his or her claim is likely to succeed, nor does discovery depend upon awareness of the totality of a defendant's wrongdoing. Discovery occurs when a plaintiff knows or ought to know of an injury caused by an act or omission of a defendant and having regard to the nature of the injury, that legal proceedings would be an appropriate way to seek a remedy. For the limitation period to begin to run, it is enough that the plaintiff has *prima facie* grounds to infer that the defendant caused him or her harm. Certainty of a defendant's responsibility for the act or omission that caused or contributed to the loss is not a requirement.

[15] The onus is on the plaintiff to establish that the action was brought within the limitation period, including, if necessary, that the discoverability delayed the commencement of the running of the limitation by establishing, on evidence, the material facts giving rise to the action were not within his knowledge within the requisite time period from the date he issued the statement of claim. See *Barry v. Pye*, 2014 ONSC 1937. The court notes in that case that,

> The limitation begins to run when the plaintiff knew or ought to have known, on a *prima facie* basis, that she had (i) suffered injury, (ii) because of an act or omission, (iii) by the defendants, and (iv) that an action would be an appropriate remedy.

[16] The caselaw also makes it clear that limitations are not to be ignored. A plaintiff must act with due diligence in acquiring facts in order to be fully apprised of the material facts on which the claim can be based, including obtaining expert opinions, if these are required, so as not to delay the commencement of the limitation period.

Rule 20 – Summary Judgment

[17] This is a motion for summary judgment under Rule 20. In 2014, the Supreme Court of Canada released its decision in *Hryniak v. Mauldin*, 2015 SCC 7, which considered when

it is appropriate to grant summary judgment under Rule 20 of the *Rules*. Rule 20.04(2) provides that "the court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence". Rule 20.04(2.1) provides that,

> In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at trial:
>
> 1. Weighing the evidence
>
> 2. Evaluating the credibility of a deponent
>
> 3. Drawing any reasonable inference from the evidence

[18] In its decision in *Hyrniak*, the Supreme Court of Canada notes that there will be no genuine issue requiring trial when a judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result. The court notes as well that when a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. The question the court must consider is whether the judge has confidence that he or she can find the necessary facts and apply the relevant legal principles to fairly resolve the dispute.

[19] In the present case, I have concluded that the issue of the limitation period does not require a trial and that I can address the issue of the limitation period fairly on the record before me.

Analysis

[20] It is clear that three of the four criteria under section 5(1)(a) of the *LA* were satisfied by the end of July 2008. Humberplex was well aware of the damage which had occurred and was continuing to occur in the construction project. There is no issue about the fact that the initial defects were apparent by June 2007 and further serious problems were identified by June 2008, leading up to the report by SEL to Condeland on July 23, 2008.

[21] Similarly, it is clear that Humberplex was aware that the damage had been caused or contributed to by an act or omission. This is reflected in the report of SEL, dated July 23, 2008, which reported that the number of deficiencies was excessive and that they occurred mainly due to poor workmanship by the contractor.

[22] Finally, it is clear that having regard to the nature of the damage, Humberplex was well aware that a legal proceeding would be an appropriate means to seek redress. This is

reflected in the fact that they initiated a counterclaim for damages for defective workmanship in the action commenced by CDC for their fees which were outstanding.

[23] The only issue remaining is whether Humberplex was aware of a potential claim against SEL.

[24] Mr. Tony DeCicco is a director and officer of Humberplex. An affidavit of Mr. DeCicco was filed on the motion before me. In this affidavit, Mr. DeCicco made the following statement at paragraph 19,

> The competing opinions relating to the applicable deficiencies (including those that I later found out were attributable to the defendant herein) finally played out in court during the trial of the CDC action in March and April 2009. During that trial and having the benefit of hearing the evidence presented, I discovered that a number of the deficiencies that Humberplex had claimed against CDC in the CDC action were actually attributable to the defendant herein, Soil Engineers Ltd., while others were attributable, as claimed, against CDC.

[25] Mr. DeCicco does not elaborate in the affidavit as to what specific evidence was called during the trial that he had not previously been aware of. No trial transcripts were filed on the motion, nor did Mr. DeCicco make specific reference to any particular piece of evidence at trial that he was not previously aware of.

[26] Mr. DeCicco was cross-examined on his affidavit and was questioned as to what information he received during the trial, which led him to conclude that SEL was responsible for the defects which occurred. His answers were not particularly enlightening. He commented that he had been excluded from the court room for a number of witnesses who gave evidence. He did make comments about a number of issues, including the following:

(a) He referred to evidence given by Robert DeAngelis, who was the consulting engineer for the project;

(b) He referred to an expert report from Trow Associates Inc. ("Trow") dated February 5, 2009. In this report, it states,

> In Trow's engineering opinion, SEL repeatedly holding CDC Contractors solely responsible for all pavement deficiencies at the subject site alone, is not justified. SEL was employed as the QA on the subject site and were supposed to monitor/test, document and address any non compliant construction work during the construction period. So that any short comings or deficiencies encountered during the initial construction period would be rectified during the construction period. SEL in presenting assessments of all these pavement deficiencies clearly indicates that SEL failed to exercise a proper role as an independent soil

consultant during the initial construction period and did not perform there task as a QA company in an appropriate manner.

(c) That a report prepared by SEL for trial was incorrect;

(d) That SEL did not design the subdivision correctly and did not, in particular, design the crown of the road appropriately.

[27] The evidence of Mr. DeCicco does not persuade me that there was any critical evidence adduced at the trial that would materially change the information he already had in his possession. For example, there is good reason to doubt Mr. DiCicco's assertion that SEL was involved in the design of a project. This is reflected in the evidence of Robert DeAngelis, who was examined on behalf of Condeland prior to the motion. His evidence was that Condeland designed the services and the road construction first, and then administered the construction of those services. SEL does not appear to have been involved in the design of the plans for the construction.

[28] Mr. DeAngelis also gave evidence on the pending motion about a discussion that took place after the CDC trial in his office, which Mr. DeCicco attended. There was discussion about a discrepancy contained in a report prepared by SEL where they made an error in the range of compaction values. This appears to relate to a report prepared by SEL in preparation for litigation which is dated January 26, 2009. In this report, SEL makes reference to required degree of compaction as being ninety-eight per cent. It was agreed this was an error and the required degree of compaction was ninety-five per cent. However, while the error in the report may have led to some confusion at trial, it is not an error that relates to the work performed by SEL during the course of the construction. This is reflected in the evidence of Mr. DeAngelis on his examination where he states, beginning at question 162:

> Q. Well, explain the import of this letter or document?
>
> A. It was – it was a confusing letter because it talked about what the required compaction results were to be versus what they were and what they were being approved at. That was the complication.
>
> Q. Okay. And what did that mean in terms of this whole issue with the deficiencies? I mean, did it change the fact that the contractor had improperly compacted the material?
>
> A. No, it didn't – it didn't change the fact that they did – improperly compact, but it would have provided a better indication to the contractor as to how to provide a more – a larger effort in terms of what they should be doing. That type – that type of acknowledgment would have been there.

[29] In the evidence of Mr. DeAngelis, he goes on to state at question 185 that the confusion with respect to the percentages was the only issue that came out of trial that he was aware of that caused some concern about SEL's work.

[30] The evidence of Mr. DeCicco does not persuade me that there was any material information relating to the involvement of SEL which emerged at trial and which Mr. DeCicco was not previously aware. Regardless, however, I have concluded that Mr. DeCicco was well aware well prior to the trial of the issues relating to SEL's potential involvement in contributing to the defects which occurred during the course of construction.

[31] In his evidence on cross-examination, Mr. DeCicco agreed that from the commencement of SEL's responsibilities he had an understanding as to what SEL was responsible for on the project. He also acknowledged that it was always his view that SEL was responsible for inspecting and supervising CDC from the start of the project. Mr. DeCicco was aware of all of the defects which had emerged from the construction project some time in 2008 as reflected by the decision to bring the counterclaim against Humberplex in the action which was commenced by CDC. Given Mr. DeCicco's understanding that there were serious defects which had occurred during the construction and given his understanding that SEL was responsible for inspecting and supervising CDC from the start of the project, I conclude that Mr. DeCicco was in possession of the relevant facts on which the claim against SEL is based. This conclusion is supported by the analysis of the Court of Appeal in *Kowal v. Shyiak, supra*. That case dealt with a situation where the plaintiffs observed water leakage around certain windows and doors in their new home. In allowing an appeal and finding that the limitation period had expired, the court stated,

> By August 31, 2007, and certainly by November 1, 2007, the respondents were familiar with all the material facts. They knew that they had contracted with both Giant Builders and Overall Plastering. They were aware who had done the work on their home. They knew they had suffered a loss and that the acts or omissions were caused by either the appellants, or the third parties, or both. This was confirmed by the motions judge. There was ample evidence on which to base a claim against the appellants without the necessity of obtaining any expert opinions. In our view, the motions judge erred in concluding the respondents needed to obtain expert opinions before determining that they had a cause of action against the appellants. Indeed, cumulatively, the three reports were inconclusive. In any event, an element of the claim is that, as a general contractor, Giant Builders had a duty to oversee the third party's work and Giant Builders is alleged to have breached that duty. No expert report was required in order to advance this claim.

[32] Similarly, in this case, Humberplex had sufficient information and was, in fact, satisfied that there were defects in the construction of the project. Being fully aware that SEL was

responsible for the supervision of the project, they also, in my view, had sufficient information to identify SEL as a potential defendant.

[33] It is significant to note that in the statement of claim the allegations of breach of duty against SEL focus, to a very large extent, on the alleged failure by SEL to supervise the construction project. The allegations against SEL include the following:

(a) The defendant failed to carry out its inspections of the work of the servicing contractor on the subdivision on a full time basis, as contracted;

(b) The defendant failed to coordinate and supervise properly, the servicing contractor and all other relevant consultants in a proper, careful, diligent, responsible and professional matter;

(c) The defendant failed to recognize errors and deficiencies in the work that it was responsible for; and,

(d) The defendant failed to inspect, test and supervise the testing and analyses properly, or at all, during relevant time periods.

[34] All of this leads me to conclude that Humberplex should have been aware about the potential liability of SEL within a short time following the discovery of the defects which were identified prior to June of 2008 and which resulted in the decision to commence litigation against CDC.

[35] Any doubt about this conclusion is further minimized by the additional information provided to Humberplex during the course of the lawsuit with CDC. On December 10, 2008, counsel for CDC delivered an amended reply and defence to the amended amended statement of defence and counterclaim. At paragraph 29 of this pleading, CDC stated,

> If the defendant suffered the damages which are the subject matter of its amended amended counterclaim, the sole cause of same was the negligence, acts and/or omissions of the defendant or its agents, Condeland Engineering Ltd. and Soil Engineers Ltd.

[36] This pleading clearly points the finger of blame at SEL.

[37] The amendment to the pleading was predated by the delivery of two expert reports from Trow by counsel for CDC. In a report from Trow, dated October 10, 2008, they included the following comments pertaining to SEL,

> Soil Engineers Ltd., held the CDC Contractors responsible due to the poor workmanship for all the pavement deficiency noted during the pavement survey of June 2008. No mention has been made to the issue of proof roll on the prepared subgrade layer for the pavements that was not performed on these roads. Soil Engineers Ltd. was employed as QA on the subject site and were supposed to address this proof roll issue in timely fashion during

> the construction period, and should have resolved any soft spot related concerns prior to the granular placement.
>
> In Trow's engineering opinion this was the responsibility of both Condeland Engineering Ltd. and Soil Engineers Ltd. to review the final road subgrade condition, confirm whether the subgrade is properly crowned and sloped towards the road side for proper subgrade drainage to road side drains.

[38] In the same report dealing with their conclusions, Trow includes the following comments,

> In Trow's engineering opinion it was the responsibility of both Condeland Engineering Ltd. and Soil Engineers Ltd. to review the final road subgrade condition, confirm whether the subgrade is properly crown (sic) and sloped towards the road side for proper subgrade drainage to road side drains etc. prior to granular placement.
>
> Being an independent soil consultant it was the duty of Soil Engineers Ltd. to obtain representative samples of road construction materials from the source and site as per project requirements and up to their satisfaction.

[39] In a subsequent report of Trow, dated November 17, 2008, they made the following further comments,

> Despite SEL's claim of only being part-time inspectors it is obvious that they carried out a representative in-situ density testing program during the construction period as indicated from the field inspection and material testing records. During the full course of their construction review and material testing, SEL did not observe any low in-situ density results either on trench backfill material or for road granular materials. Similarly, all the material testing carried out met specifications as indicated from their field and laboratory reports. SEL comments relating present construction deficiencies to the poor workmanship of CDC Contracting (CDC) at the subject site, without any documentary evidence is contrary to the available inspection testing reports and summaries. In our opinion these deficiencies by SEL raise very serious concerns for the project from an inspection testing perspective.

[40] Mr. DeCicco was questioned about his understanding of the conclusions set out in Trow's report of October 10, 2008, as referred to above. He stated, "that somebody thought the responsibility of Condeland Engineering and Soil Engineers Ltd. to review the final subgrade condition confirmed the subgrade of the property crown".

[41] The comments in the Trow report of February 5, 2009 should therefore not have come to a surprise to Humberplex as they are consistent with earlier reports delivered in the

action, which raised concerns about SEL's involvement in the project. Further, that report to a large extent simply reiterated what Humberplex already knew, that SEL was employed as the QA on the site and was supposed to monitor and identify any deficiencies during the construction period. No expert opinion was required to understand the nature of their claim against SEL.

[42] All of this leads me to conclude that Humberplex knew or ought to have known of a potential claim against SEL by November of 2008.

[43] Humberplex takes the position that despite the opinions expressed by Trow in their reports in October and November of 2008, they were misled by actions by SEL who asserted that CDC was solely responsible for the deficiencies in the construction project. The defence correctly refers to a series of reports prepared by SEL as part of the litigation with CDC which expressed the opinion that full responsibility for the defects lay with CDC. For example, SEL prepared a responding report to the Trow report of October 10, 2008. In that report, SEL states,

> ...the contributing factor for the more than normal deficiencies is the poor workmanship including improper grading of the subgrade and non-uniform compaction of the trench backfill, which led to ponding, softening and excess frost action of the subgrade and settlement of the pavement.

[44] In a report, dated November 3, 2008, SEL gives the opinion,

> Based on the above-noted deficiencies, we consider that the failure of the sewer pipe and significant road settlement is the direct result of poor workmanship of the contractor.

[45] A similar opinion was expressed in a report of SEL, dated December 2, 2008, where they stated, "All of the above are related to the poor workmanship of the contractor".

[46] In addition, Mr. DeCicco, in his evidence on cross examination, asserted when he spoke to SEL about the Trow reports, "they kept saying it was CDC's fault". Humberplex takes the position that it was misled by the comments of SEL and that this should have the effect of deferring commencement of the limitation period.

[47] In support of its position, Humberplex refers to the Ontario Court of Appeal decision in *Ferrara et al v. Lorenzetti*, 2012 ONCA 851. In this case, the defendant, who was a lawyer, asserted a limitation period defence. The court found it significant that the lawyer had continued to act for the plaintiff and that he at no time advised the plaintiff that he might have been wrong. The court concluded that the defendant's conduct meant that the claim against the defendant was not discoverable. In delaying the start of the limitation period, the court stated,

> Respectfully, it ill lies for Schwartz to take this position. I doubt any lawyer would have been justified taking this position against his own client, but certainly not a lawyer who had acted for his

> client for over 20 years and no doubt gained the complete trust and confidence of the client during that long relationship.

[48] In reviewing the *Ferrara* decision, I find it significant that the defendant in the action was a lawyer who was responsible for providing legal advice about the plaintiff's remedies. The failure of the lawyer to inform his client about his legal remedy would go directly to the issue as to whether the plaintiff knew about the act or omission in question and whether a legal proceeding would be the appropriate means to remedy it. This conclusion is supported by another case referred to by the defendant, *Sheeraz v. Kayani* (2009), 99 O.R. (3d) 450. This was another case involving a lawyer who provided advice to the plaintiff. In the decision, the court states,

> The recognition that an ongoing solicitor and client relationship may impede or impair a client's knowledge that a legal proceeding against his lawyer is an appropriate means of seeking a remedy is also co-existent with a view courts have expressed in the context of the limitation period applying to the assessment of solicitor and client accounts.

[49] As a general rule, it would not appear that the failure by a defendant to volunteer that there is a potential claim against them is a material factor. See: *Slack v. Bednar*, 2014 ONSC 3672 at para 62 and *Johnson v. Studley*, 2014 ONSC 1732 at para 83. There may be circumstances, however, where it is a factor which a court may consider. The *Sheeraz* and *Ferrara* cases noted above are certainly examples where this has been taken into account by a court. I do not believe it is a relevant consideration in this particular case. SEL was not providing legal advice to Humberplex. Humberplex and its legal counsel at the time were well aware of the issues raised by CDC in the litigation and were in a position to make informed decisions about whether they wished to pursue a claim against SEL.

[50] Further, it is significant to note that SEL was not the only geotechnical expert retained by Humberplex for purposes of the litigation with CDC. They also retained another geotechnical expert, Soil Probe Limited, to provide advice to them in connection with the CDC litigation.

[51] Thus, this was not a situation where Humberplex was relying solely on advice it received from SEL. Further, it is significant that with respect to its potential remedies, Humberplex had the benefit of its own independent legal counsel. Given that the allegations made against SEL were coming from CDC in the context of expert opinions which were going to be relied upon at an upcoming trial, it would not be reasonable for Humberplex to ignore the allegations and rely upon an oral conversation with a representative from SEL that there was no merit to the allegations. Humberplex and its legal counsel would be well aware that this would be an issue at trial and would require a response through evidence which was independent of SEL, which was the subject of the criticism.

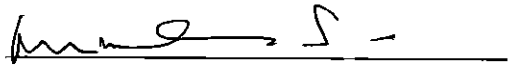
[52] A denial of liability by SEL should, therefore, not delay the commencement of the limitation period on this case. There was no relationship between the plaintiff and SEL which would justify the apparent failure by the plaintiff to investigate the obvious concerns relating to SEL's conduct.

[53] As in all cases, the determination of the commencement of the limitation period will depend on the particular facts. In the present case, I have concluded that Humberplex knew or ought to have known about the potential for a claim against SEL no later than November 2008. By that point, they were well aware of the deficiencies which occurred in the construction process. They had identified a claim of improper workmanship against CDC. They were aware of the fact that SEL was responsible for supervision and quality assurance on the project. They had been specifically informed of concerns regarding SEL through the reports of Trow, which had been retained by CDC to provide expert opinions in the action. They had a second geotechnical expert available to consult with regarding the allegations against SEL. Finally, they were aware that the CDC allegations against SEL would be a live issue at trial and would require a response independent of SEL. The pleading delivered by CDC on December 10, 2008, which made allegations against SEL, reflects the opinions and concerns previously voiced by Trow in its expert reports. A reasonable person in the position of SEL would clearly understand prior to January 11, 2009 that there was good reason to believe it had a *prima facie* claim against SEL. The commencement of the claim against SEL in January of 2011 is outside of the two year limitation period. I therefore conclude the plaintiff's action against SEL is statute barred.

Conclusion

[54] For the above reasons, I grant the defendant's motion and dismiss the plaintiff's action.

[55] If the parties are not able to agree on costs, they may speak with the trial coordinator within thirty days of the release of these reasons to take out an appointment to address the issue of costs. In such event, the parties will deliver concise briefs at least two days before their attendance. If no arrangements are made within thirty days for an appointment to speak to costs, there will be no order for costs.



Mr. Justice M.K. McKelvey

Released: October 5, 2015