2014 ABQB 537
Alberta Court of Queen's Bench

Wood Buffalo Housing & Development Corp. v. Flett

2014 CarswellAlta 1532, 2014 ABQB 537, [2014] A.W.L.D. 4461, [2014] A.W.L.D. 4535, 245 A.C.W.S. (3d) 686, 58 C.P.C. (7th) 330, 596 A.R. 180

Wood Buffalo Housing & Development Corporation, Plaintiff and Joy Flett, Liam Construction Inc., Liam De Silva, William De Silva, Jacobsen Hage Engineering, Sven E. Hage, S.E. Hage Engineering Ltd., E.B. Jacobsen Engineering Ltd., Erik Bech Jacobsen, Frontline Engineering Concepts Corporation, Frontier Engineering Concepts Corporation, F & Y Engineering Concepts Ltd., The Estate of James S. Anderson, GMH Architects, David Hamilton Architect Ltd., David Hamilton, TWS Electrical Consultants, TWS Engineering Ltd., Terrance W. Smith, Alberta Permit Pro Inc., Daniel S.W. Kuhn, John Doe No. 1, John Doe No. 2, John Doe No. 3, John Doe No. 4, John Doe No. 5, John Doe No. 6, and ABC Corporation, Defendants and Joy Flett, Liam Construction Inc., Liam De Silva, William De Silva, Jacobsen Hage Engineering, Sven E. Hage, S.E. Hage Engineering Ltd., E.B. Jacobsen Engineering Ltd., Erik Bech Jacobsen, Frontline Engineering Concepts Corporation, Frontier Engineering Concepts Corporation, F & Y Engineering Concepts Ltd., The Estate of James S. Anderson, GMH Architects, David Hamilton Architect Ltd., David Hamilton, TWS Electrical Consultants, TWS Engineering Ltd., Terrance W. Smith, Third Party Defendants

J.H. Goss J.

Heard: June 10, 2014
Judgment: September 3, 2014
Docket: Fort McMurray 0913-11942

Counsel: J.W. Rose, Q.C., J. Fraese, for Liam Construction Ltd, Liam De Silva and Willaim De Silva
D.J. McGarvey, Q.C., for GMH Architects, David Hamilton Architect Ltd. and David Hamilton
G.A. Holan, for Wood Buffalo Housing & Development Corporation

Subject: Civil Practice and Procedure; Public; Torts
Related Abridgment Classifications
Civil practice and procedure
VII Limitation of actions
VII.1 Principles
VII.1.a Statutory limitation periods
VII.1.a.vi Miscellaneous
Statutes
III Retroactive and retrospective operation
III.6 Miscellaneous
Headnote
Civil practice and procedure --- Limitation of actions — Principles — Statutory limitation periods — General principles Invalidity of waiver — Property owner hired builder to design and construct apartment building — Contract provided that any claims for negligence or breach of contract against anyone involved in design or construction of building would be waived with certain exceptions — Relevant exception here was having given written notice of claim within two years

of date of substantial performance of work, which was June 13, 2002 — Fire occurred on April 17, 2007 — Owner first learned of significant deficiencies in design and construction on November 2, 2007 — Owner commenced action against builder and others on April 15, 2009 for damages for negligence — Builder brought application for summary judgement dismissing action on basis of contractual waiver — Application dismissed — Contractual waiver purported to shorten two-year limitation period in s. 3 of Limitations Act and so was invalid pursuant to s. 7(2) of Act — Sole question in applying s. 7(2) of Act was whether Act would allow owner to sue past date specified in waiver — Waiver in this case required notice of claim to be given by June 13, 2004 and action to be commenced within further two years in accordance with s. 3 of Act — Section 3 of Act would have otherwise allowed owner to commence action within two years of learning basis for claim on November 2, 2007 — Since waiver reduced limitation period, it was invalid pursuant to s. 7(2) of Act — Fact that s. 7(2) of Act came into force on April 1, 2006 did not preclude its application to existing contracts.

Statutes --- Retroactive and retrospective operation — Miscellaneous

Property owner hired builder to design and construct apartment building — Contract provided that any claims for negligence or breach of contract against anyone involved in design or construction of building would be waived with certain exceptions — Relevant exception here was having given written notice of claim within two years of date of substantial performance of work, which was June 13, 2002 — Fire occurred on April 17, 2007 — Owner first learned of significant deficiencies in design and construction on November 2, 2007 — Owner commenced action against builder and others on April 15, 2009 for damages for negligence — Builder brought application for summary judgement dismissing action on basis of contractual waiver — Application dismissed — Contractual waiver purported to shorten two-year limitation period in s. 3 of Limitations Act and so was invalid pursuant to s. 7(2) of Act — Fact that s. 7(2) of Act came into force on April 1, 2006 did not preclude its application to existing contracts — Act was intended to have retrospective or retroactive effect — Explicit provision dealing with retroactivity of s. 7(2) of Act was not required — Statute of immediate effect can modify future effects of pre-existing fact without affecting prior legal situation of that fact — Section 7(2) of Act, like rest of Act, was remedial and should apply to all proceedings commenced after it came into force — It was open to legislature to expressly indicate s. 7(2) of Act was not intended to apply retrospectively or retroactively.

Table of Authorities

Cases considered by *J.H. Goss J.*:

Bank of British Columbia v. Turbo Resources Ltd. (1983), 148 D.L.R. (3d) 598, 1983 CarswellAlta 112, 27 Alta. L.R. (2d) 17, 46 A.R. 22, 23 B.L.R. 152 (Alta. C.A.) — referred to

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Central & Eastern Trust Co. v. Rafuse (1986), 37 C.C.L.T. 117, *(*sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, *(*sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only), *(*sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, *(*sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, *(*sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, *(*sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109 (S.C.C.) — referred to

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Gayton v. Lacasse (2010), 490 W.A.C. 179, 482 A.R. 179, 2010 CarswellAlta 655, 2010 ABCA 123, 26 Alta. L.R. (5th) 182 (Alta. C.A.) — referred to

Greentree v. Martin (2004), 2004 ABQB 365, 2004 CarswellAlta 643, 369 A.R. 263 (Alta. Q.B.) — considered

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Statutes considered:

Limitation Act, R.S.B.C. 1996, c. 266

s. 6 — considered

Limitations Act, R.S.A. 2000, c. L-12

Generally — referred to

s. 1(a) "claim" — considered

s. 2(1) — considered

s. 2(2) — considered

s. 3 — considered

s. 3(1)(a) — considered

s. 5.1(16) [en. 2002, c. 17, s. 4(3)] — considered

s. 7 — considered

s. 7(1) — considered

s. 7(2) [en. 2002, c. 17, s. 4] — referred to

Real Property Limitations Act, R.S.O. 1990, c. L.15

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 7.3 — considered

R. 7.3(1)(b) — considered

APPLICATION by defendant builder for summary judgment to dismiss action.

***J.H. Goss J.*:**

I Introduction

1 On April 17, 2007, a fire occurred at Edgewater Court in Fort McMurray, Alberta causing extensive damage to a multi-residential building. Wood Buffalo Housing & Development Corporation (WBH) alleges that the fire resulted in the whole or in part from the defendants' negligence and breaches of the duty of care in the design and construction of Edgewater Court.

2 The defendants apply for summary judgment on the basis that WBH's claim is barred by a contractual waiver, and pursuant to the *Limitations Act*, RSA 2000, c L-12. The defendants, TWS Engineering Ltd., TWS Electrical Consultants and Terrance W. Smith, did not take part in the application. Their counsel, Mr. R. Wachowich, communicated through counsel present at the hearing of this application that those parties withdrew their application, but reserved the right to bring it in the future.

II Facts

3 On November 14, 2001, the Regional Municipality of Wood Buffalo entered into an Agreement Between Owner and Design-Builder (the Contract) with the defendant Liam Construction Ltd (Liam) for the construction of a multi-unit apartment building in Fort McMurray known as Edgewater Court. Four days later, the Contract was assigned to the plaintiff, Wood Buffalo Housing & Development Corporation (WBH) as the Owner of the project.

4 Liam is described in the Contract as the Design-Builder. Pursuant to the terms of the Contract, Liam was to perform design services and carry out construction of the housing project. Liam was also required to retain a Consultant to provide certain design services as defined in the Contract and to coordinate the design services of all other consultants employed by Liam on the project. The defendant GMH Architects (GMH) was retained as the Consultant and its professional services were carried out by David Hamilton through David Hamilton Architects Ltd (collectively referred to as the Hamilton Defendants).

5 General Clause (GC) 12.2 of the Contract provides in part:

> **GC 12.2.1 Waiver of Claims by Owner**
>
> As of the date of the final certificate for payment, the *Owner* expressly waives and releases the *Design-Builder*, the *Consultant*, all other consultants, all *Subcontractors*, all *Suppliers*, and their agents and employees from all claims against them including without limitation those that might arise from the negligence or breach of contract by the *Design-Builder*, the *Consultant*, all other consultants, all *Subcontractors*, and their agents and employees except one or more of the following:
>
> .1 those made in writing prior to the date of the final certificate for payment and still unsettled;
>
> .2 those arising from the provisions of GC 12.1 - INDEMNIFICATION or GC 12.3 - WARRANTY;
>
> .3 those arising from the provisions of paragraph 9.3.5 of GC 9.3 - TOXIC AND HAZARDOUS SUBSTANCES AND MATERIALS...
>
> In the Common Law provinces, GC 12.2.1.4 shall read as follows:
>
> .4 those made in writing within a period of 2 years from the date of *Substantial Performance of the Work* or within such shorter period of time as may be prescribed by any limitation statute of the province or territory of the *Place of the Work* and arising from any liability of the *Design-Builder* for damages resulting from the*Design-Builder's* performance of the *Contract* with respect to substantial defects or deficiencies in the Work for which

> the *Design-Builder* is proven responsible. As used herein, "substantial defects and deficiencies" means those defects or deficiencies in the *Construction* which affect the *Work* to such an extent or in such a manner that a significant part or the whole of the*Construction* is unfit for the purpose specified in the *Contract Documents*.
>
> [Emphasis in original]

6 Under GC 2.1.1 of the Contract, the Consultant was responsible for determining the date of Substantial Performance of the Work and for the issuance of the Final Certificate for Payment.

7 Following inspection on June 12, 2002, the Consultant GMH, through David Hamilton, determined that the Building was substantially complete and issued a Certificate of Substantial Completion on June 13, 2002. A Final Certificate of Payment was issued on July 2, 2002.

8 No claim in writing was made by WBH against Liam or the Hamilton Defendants prior to the date of the Final Certificate of Payment, nor was any claim in writing made by WBH within a period of 2 years from the date of Substantial Performance of the Work.

9 After the fire on April 17, 2007, WBH's insurers retained an adjuster to assess the damage to the building and to determine whether or not the building could be reconstructed. As a result, WBH first became aware on November 2, 2007 of alleged significant deficiencies in the design and construction of the building which caused the fire to spread more quickly, thereby resulting in considerably more damage to the building than would have otherwise been the case. WBH was advised that the deficiencies had to be remedied before any reconstruction of the building could occur. WBH had no knowledge of these alleged deficiencies before November 2, 2007.

10 On April 15, 2009, WBH filed a Statement of Claim outlining alleged deficiencies in the design and construction of the building.

III Parties' Positions

A Defendants

11 The defendants submit that there are no genuine issues to be tried and WBH's claim is doomed to fail. WBH's claim is contractually barred pursuant to the Waiver of Claims (Waiver). The first notice of a claim was the Statement of Claim filed on April 15, 2009. No other claim in writing was submitted prior to the date of the Final Certificate of Payment or by July 2, 2004, being 2 years from the date of Substantial Performance of the Work, as required by GC 12.2. As WBH has failed to bring itself within any of the enumerated exceptions outlined in GC 12.2.1, the Waiver bars the claim.

12 The defendants maintain that GC 12.2 is an allocation of risk as between the Owner and the Design-Builder, the Consultant, all other consultants, all Subcontractors, all Suppliers, and their agents and employees. The parties were sophisticated and there was no inequality in bargaining power. The Owner was a municipality in the Province of Alberta. The Waiver of Claims provision appears in a standard form construction industry contract. The parties were free to negotiate the terms of the Contract, including the Waiver, and to allocate risk and arrange their affairs in any way that they saw fit. The provisions of GC 12.2.1 are clear, unambiguous, and readily understandable. The Contract reflects the common intent of the parties to limit the risk of liability for tort and breach of contract as between themselves and to grant a release of liability to the other party as of a certain date in time.

13 The defendants also argue that the Waiver does not import discoverability as a component of the wording, nor should such terms be read into the clause. The time period contained in GC 12.2.1 is fixed from an event which occurs without regard to any party's knowledge, namely 2 years from the date of Substantial Performance of the Work.

14 The defendants also argue that WBH is barred pursuant to the *Limitations Act* for failing to file this action within the limitation period prescribed by the *Limitations Act*.

15 The defendants submit that s. 7(2) of the *Limitations Act* does not apply to a waiver and release of claims. The Waiver does not purport to reduce a limitation period provided by the *Limitations Act*. If timely notice had been given, then the applicable limitation period would have been triggered.

16 Further, the defendants argue that s. 7(2) does not apply retroactively. They acknowledge that s. 2(1) provides that the *Limitations Act* applies to claims arising both before and after March 1, 1999, thereby negating the strong common law presumption against retrospective or retroactive effect: *Stuffco v. Stuffco*, 2006 ABCA 317, 397 A.R. 111 (Alta. C.A.). However, they argue that not every amendment to the new Act is intended to have retroactive effect, and s. 7(2) in particular was not intended to have retroactive effect.

17 The defendants note that s. 7(2) was introduced in the *Judicial Statutes Amendment Act of 2002*, SA 2002, c 17, s 4. Section 4(5) of the 2002 Act expressly stated that amendment was to come into force "on proclamation" which did not follow until March 31, 2006. Unlike s. 5.1(16), there is no explicit provision dealing with retroactivity in s. 7. Therefore, s. 7(2) came into force on April 1, 2006, well after the Contract dated November 14, 2001. Section 7(2) applies to any agreements entered into after March 31, 2006, but should not apply to contracts made before that date. Statutes of limitation are substantive in nature and should not be applied retroactively so as to interfere with vested rights: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110 (S.C.C.).

B WBH

18 For the purposes of this application, WBH concedes that the Design-Builder and the Consultant are one team, and any benefit of GC 12.2.1 likely extends to the Hamilton Defendants as a result of the combined effect of GC 2.1.5 and GC 12.2.1.

19 The thrust of WBH's argument is that the interpretation and intention of GC 12.2.1 is not at all clear or straightforward and will require not only an analysis of the words but also an examination of the surrounding circumstances, including the intent of the parties at the time the Contract was made, thereby requiring the full consideration of evidence at trial. WBH submits that there is an obvious disparity in the level of sophistication between a design-builder or architect and an owner when it comes to the use of such standard form construction contracts prepared by design builders and architects.

20 WBH maintains that the Contract clearly contemplates that as at the date of Substantial Performance, or Final Payment, there may be deficiencies and that all matters might not actually be complete. An Owner must have knowledge of a claim (or deficiencies) before it can provide written notice as contemplated in GC 12.2.1. Specifically, GC 12.2.1 and 12.2.4 both reference "claims made in Writing" prior to the expiration of certain events (either Final Payment or Substantive Completion) thereby invoking the discoverability principle. GC 12.2.1 provides nothing more than a requirement to give notice in writing of any defects or deficiencies of which the Owner is aware within 2 years from the date of Substantial Performance, and does not prevent an owner's right to pursue an action in negligence or breach of contract for defects or deficiencies that are not known within that 2 year period.

21 WBH points to the indemnity provision in GC 12.1.1 whereby the Design-Builder indemnifies and holds harmless the Owner from "claims, demands, losses, costs, damages, actions, suits, or proceedings" by third parties. The Waiver in GC 12.2.1 is only against "claims" which term is not further defined in that section. It does not specifically include "actions, suits, or proceedings".

22 As well, in GC 2.1.5 the Owner waives any "right of action" against the Consultant except to the extent that the Owner may be entitled to "make a claim" against the Design-Builder under the Contract. The Contract, itself, makes a distinction between a "right of action" and a "claim".

23 Further, GC 12.3 sets out the warranty provisions. Under GC 12.3.4 the Owner is to give the Design-Builder notice in writing of "observed" defects and deficiencies occurring during the warranty period. The Design-Builder is then

obligated to correct or pay for damage resulting from those deficiencies. WBH submits that the provisions of GC 12.2.1 merely give some time for that process to occur, and the "claims" referred to therein are claims for observed defects and deficiencies under the warranty provisions of the Contract.

24 WBH also argues that negligent misrepresentation takes these defects outside the parameters of the limitation clause, especially since the alleged structural defects would present a real and substantial danger to occupants.

25 Further, WBH notes that the law is not settled as to whether the law imports the discoverability principle into contractual limitation periods. WBH distinguishes cases where the contractual limitation provisions provided that claims would "absolutely cease to exist" after the ultimate limitation period and the owner would have no claim whatsoever after that period. Such clauses bar all claims irrespective of knowledge/discovery of the claim, as they involve no consideration of whether the owner is aware of a claim, or situations where the owner advises the architect of a claim within the time period but fails to bring an action within that period.

26 WBH characterizes GC 12.2.1 as a contractual limitation clause as it states that a release of claims is subject to "[t]hose made in writing within a period of 2 years from the date of Substantial Performance of the Work or within such shorter period as may be prescribed by any limitation statute of the province or territory of the Place of the Work..." The fact that GC 12.2.1.4 itself refers to the statutory limitation period supports the contention that it imposes a contractual limitation period, which affects the limitation period otherwise imposed by statute. In fact, the Canadian Design-Build Institute recognizes that Clause 12.2.1 is a contractual limitation period and has provided seminars which explain that the clause represents not a warranty, but a contractual limitation period which overrides the applicable statutory limitation periods.

27 WBH argues that a contractual limitation period such as this which purports to reduce or limit a statutory limitation period is prohibited by s. 7(2) of the *Limitations Act*. Under s. 7(1), an agreement must "expressly provide" for an extension of the limitation period. Under s. 7(2), any agreement which "purports to provide" a reduced limitation period is not valid. Thus the wording or characterization of a clause in an agreement as a waiver of claim or an allocation of risk or a limitation period is less important than whether the wording purports or attempts to reduce a limitation period otherwise provided by the *Limitations Act*. This prohibition does not exist in other provinces and therefore case law from outside of Alberta is of limited value with respect to the purported reduction of limitation periods by agreement.

28 WBH recognizes that the Contract was executed on November 14, 2001, prior to s. 7(2) coming into force on April 1, 2006. However, it argues that the action is not based upon the Contract but rather upon the injury, being the fire which occurred on April 17, 2007, well after s. 7(2) came into force. The injury creates the right of action. The impact of the Contract is interpreted at the time the cause of action arose (or the loss occurred). As s. 7(2) was in force before WBH became aware it had a claim against the defendants, s. 7(2) had "immediate effect", not retroactive effect. A statute of immediate effect can modify the future effects of a fact that occurred before the statute came into force without affecting the prior legal situation of that fact. Furthermore, both the Alberta Court of Appeal and the Court of Queen's Bench have held that there is no legitimate reason why s. 7(2) should not have retroactive effect and therefore it ought to apply to any and all claims or actions commenced after April 1, 1999.

IV Law on Summary Judgment

29 As stated by our Court of Appeal this year in *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, 94 Alta. L.R. (5th) 301 (Alta. C.A.), modern civil procedure has come to recognize that a full trial is not always the sensible and proportionate way to resolve disputes, citing *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) [hereinafter Hryniak].

30 In *Hryniak*, the Supreme Court encouraged the courts to newly embrace simplified and proportionate procedures for adjudication which permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. Summary judgment is one option for parties to consider where a fair and just disposition

for both parties can be made on the existing record. Karakatsanis J. held at para 5 that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. Karakatsanis J. added that the evidence on a summary judgment motion need not be equivalent to that at trial, but must be such that the judge is confident that s/he can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

31 A defendant may apply for summary judgment in Alberta under Rule 7.3(1)(b) in respect of all or part of a claim on the ground that there is no merit to the claim or part of it. The pre-*Hryniak* decisions held that the test on a summary judgment application brought pursuant to Rule 7.3(1)(b) was whether the applicant had established that there was no genuine issue for trial: *Onischuk v. Alberta*, 2013 ABQB 89 (Alta. Q.B.) at para 38, (2013), 555 A.R. 330 (Alta. Q.B.). That test did not change under the new rules: *Encana Corp. v. ARC Resources Ltd.*, 2011 ABQB 431 (Alta. Q.B.) at para 7, (2011), 523 A.R. 108 (Alta. Q.B.). However, the Court of Appeal in *Windsor*, having considered *Hryniak*, held at para 14 that R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules.

32 Nevertheless, the bar is high on a motion for summary judgment: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 (S.C.C.) at para 11, [2008] 1 S.C.R. 372 (S.C.C.). The Alberta Court of Appeal explained the test for summary judgment in *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69, 384 A.R. 251 (Alta. C.A.):

> 24 Summary judgment against a plaintiff ... will only be granted where there is no genuine issue for trial. It must be "plain and obvious" that the action cannot succeed... Other formulations of the burden to be met by a moving party include the "beyond doubt" standard. When a chambers or case management judge must necessarily assess the quality and weight of evidence to come to a decision, the failure of the case is not beyond doubt...

33 The legal burden to establish that there is no merit to the claim is on the applicant throughout. The respondent is not obliged to provide any evidence. However, if the applicant discharges the evidentiary burden, the obligation then shifts to the respondent to show that there is a real chance of success or arguable merit to the case: *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.) at paras 10-11, (2006), 401 A.R. 88 (Alta. C.A.).

34 This remains the case in Alberta subsequent to *Hryniak*. Karakatsanis J. at para 49 noted that there will be no genuine issue requiring a trial only where the judge is able to make the necessary findings of fact, and apply the law to those facts.

35 In *Tottrup*, the Court noted that where the ultimate outcome of the case depends on the interpretation of a statute or document, or on some other issue of law that arises from undisputed facts, the test is not whether the issue of law is "beyond doubt", but whether the issue of law is too unsettled, complex or intertwined with the facts to be fairly decided on the record before the court.

36 In *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] S.C.J. No. 53 (S.C.C.), the Supreme Court unanimously held that although interpretation of a written contract was historically considered to be a question of law, that approach should be abandoned. Contractual interpretation involves issues of mixed fact and law, since the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. Further, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation.

V Section 7(2) of the Limitations Act

A Law

37 The general scheme of the *Limitations Act* is that limitation periods commence upon either discovery of the defendant's malfeasance or 10 years from the date the "claim" arises: *Stuffco* at para 26.

38 In *Sun Gro Horticulture Canada Ltd. v. Abe's Door Service Ltd.*, 2006 ABCA 243, 397 A.R. 282 (Alta. C.A.), the Court of Appeal explained:

> 11 ...The *Limitations Act* defines a "claim" as a matter giving rise to a civil proceeding in which a claimant seeks a remedial order (s. 1(a)). A "remedial order" is defined as a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with the duty or to pay damages for the violation of a right (s.1(i)). The Act defines "injury" to mean personal injury, property damage, economic loss, non-performance of an obligation or, in the absence of any of the foregoing, the breach of a duty (s. 1(e)). ...Section 3(1)(a) ...links immunity with the discoverability of the injury, not the discoverability of a cause of action for any injury....

39 Section 7 of the *Limitations Act* provides:

> 7(1) Subject to section 9, if an agreement expressly provides for the extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.
>
> (2) An agreement that purports to provide for the reduction of a limitation period provided by this Act is not valid.

40 In *Edmonton (City) v. TransAlta Energy Marketing Corp.*, 2008 ABQB 426, 441 A.R. 228 (Alta. Q.B.), TransAlta provided some representations and warranties respecting a composter which remained in effect for 18 months, during which time the City was to give notice to TransAlta of any inaccuracy or misrepresentation in any representation or warranty. The agreement provided that other than those representations, warranties and covenants, the assets were sold "as is". Gill J. held that the clause in question did not breach s. 7(2) of the *Limitations Act*, as it did not address the issue of the limitation period to commence an action. It simply limited the warranties provided under the agreement.

41 Côté J.A., writing for the Court in *Shaver v. Co-operators General Insurance Co.*, 2011 ABCA 367, 515 A.R. 345 (Alta. C.A.) commented on the interpretation of s. 7:

> 33 A narrow picky reading restricting the words "limitation period" in s 7 to the interval (number of months or years) between commencement and expiry, would have odd and unpredictable results...
>
> 34 Worst of all, a standing pre-accident contract ... could then evade s 7(2)'s prohibition on shorter limitation periods, by manipulating the start dates. As noted, the ordinary period ... runs two years from discoverability. Businesses could slip into their contracts contractual limitation periods running two years and one day from the accident or occurrence. In a very large number of cases, that would expire before the ordinary two-year discoverability period did. But two years plus a day is longer than the ordinary limitation period of two years.
>
> . . .
>
> 36 The only way that I can see to reconcile all this is to interpret s 7(1), (2) the way that a plaintiff or a practising lawyer would. What is the last day that the Act allows the plaintiff to sue? Does the contract choose a date earlier or later than that? If earlier, that contract is invalid; if later, that is valid.

42 As for retroactivity, as noted above s. 7(2) came into force on April 1, 2006.

43 Retroactive operation of a statute is exceptional. However, Alberta's *Limitations Act* was specifically designed to disturb rights that have arisen in the past and to apply retroactively, in order to rectify the unfairness inherent in the former statute where a limitation period could expire before a potential plaintiff discovered s/he had been harmed: *Stuffco* at paras 29-30.

44 In *421205 Alberta Ltd. v. Lloyd's Underwriters*, 2011 ABQB 180, 511 A.R. 275 (Alta. Q.B.), 421205 Alberta sued for indemnification from Lloyd's under a motor truck cargo insurance policy which specified a 2 year limitation period for bringing claims. Lloyd's argued that s. 7(2) of the *Limitations Act* should not be applied retroactively. Ross J. concluded

that s. 7(2) applied, reasoning that while s. 7(2) was not in force when the loss occurred, it was in force when Lloyd's denied coverage. Therefore, the amendment had an immediate effect on an ongoing legal situation, as described in *Union des consommateurs c. Dell Computer Corp.*, 2007 SCC 34, [2007] 2 S.C.R. 801 (S.C.C.). Alternatively, Ross J. cited *Stuffco* for the proposition that the *Limitations Act* as a whole was intended to have retroactive effect in regard to pre-existing claims, and held that there was no reason why this general purpose would not apply to s. 7(2).

B Analysis

45 The question before the Court is whether the Waiver constitutes an agreement that purports to provide for the reduction of a limitation period under the *Limitations Act*.

46 In my view, the interpretation of s. 7(2) is an extricable question of law.

47 Under s. 7(2), an agreement that purports to provide for the reduction of a limitation period provided by the *Limitations Act* is not valid. The clear meaning of s. 7.2 is that in Alberta parties cannot contractually reduce an applicable limitation period.

48 The only question for the Court in applying s. 7(2) is whether the *Limitations Act* would allow the plaintiff to sue past the date specified in the Waiver. If so, the contractual provision is invalid: *Shaver*.

49 The defendants wish to rely on GC 12.2 as a bar to WBH's claim. In order for this argument to succeed, the Court would have to interpret GC 12.2 as limiting claims to those made in writing, at the latest, within a period of 2 years from the date of Substantial Performance of the Work.

50 The defendants argue that the Waiver does not reduce the limitation period, as the written notice would simply trigger the appropriate limitation under the Act.

51 The Court of Appeal indicated in *Shaver* that courts should avoid a narrow reading of s. 7(2) which defeats the purpose of the provision. The matter simply boils down to determining the limitation period under the contract and comparing it to the period under the Act.

52 Under the defendants' approach to the interpretation of the Waiver, the effective limitation where a claim in writing was made 2 years from the date of Substantial Performance of the Work would be a further 2 years pursuant to s. 3 of the Act (or a total of 4 years from Substantial Performance, being June 2006), since a claim in writing would only be made where the plaintiff has knowledge of the injury.

53 Under s. 3 of the *Limitations Act*, WBH would have 2 years after the date on which it first knew or ought to have known, that: the injury had occurred, it was attributable to the defendant's conduct, and it warranted bringing a proceeding. Under the Act, if WBH learned of the injury on November 2, 2007, it would have had until November 1, 2009 to file its claim.

54 November 2009 is later than June 2006. Therefore, the Waiver reduces the limitation and is invalid under s. 7(2).

55 I find *Edmonton (City) v. TransAlta Energy Marketing Corp.* to be distinguishable from the present case as the provisions of the purchase and sale agreement in that case included representations and warranties on the sale of an asset that were valid for 18 months. The agreement stated that other than those representations, warranties and covenants, the assets were sold "as is". The time limit provided an expiration date for the specified warranties. Here, the time limit relates to all claims that might arise, where no notice of claims is given.

56 The defendants argue that s. 7(2) does not apply to contracts entered into before March 31, 2006.

57 The express provisions of ss. 2(1) and 2(2) mean that the new Act was intended to have a retrospective or retroactive effect: *Stuffco*. However, specific provisions dealing with retroactivity accompanied some amendments and not others. No such explicit provision dealing with retroactivity accompanied s. 7(2).

58 Ross J. noted in *421205 Alberta Ltd* that a statute has immediate effect when it applies to a legal situation that is ongoing or occurring at the moment of its commencement as well as any future developments of this situation. For example, a warranty clause does not produce tangible effects or come into play unless and until a problem arises and the warrantor is put in default or when a claim is made. A statute of immediate effect can therefore modify the future effects of a fact that occurred before the statute came into force without affecting the prior legal situation of that fact. She further held that all sections of the Act should be interpreted as applying to proceedings commenced after the section came into force in the absence of an explicit provision.

59 The applicants argued that Ross J.'s statement in *421205 Alberta Ltd. v. Lloyd's Underwriters*, 2011 ABQB 180, 511 A.R. 275 (Alta. Q.B.) was expressed as an alternative ground for the decision, and her comments were *obiter* because the cause of action in that case did not arise until after s. 7(2) had been proclaimed and was the law at the time.

60 I note that s. 7(2) was in force prior to end of the ultimate limitation period prescribed in the Waiver, being June 2006. As well, it was in force by the time of the fire on April 17, 2007 and WBH's discovery of the injury. Section 7(2), like the rest of the Act, is remedial. It was open to the legislature to expressly indicate that s. 7(2) was not intended to apply retrospectively or retroactively.

61 Further, a statute has immediate effect when it applies to a legal situation that is ongoing or the facts or effects are occurring at the time the law is being modified at the moment of its commencement and governs the future developments of this situation. I agree with Ross J. that s. 7(2) should be interpreted as applying to proceedings commenced after the section came into force.

62 Consequently, as the effect of GC12.2.1 is to provide for the reduction of a limitation period, it is invalid and does not bar the claim.

63 I will, however, consider whether the Contract should be interpreted to incorporate the principle of discoverability, in case I am wrong with respect to the effect of s. 7(2).

VI Interpretation of the Waiver

A Law

64 The Court of Appeal in *Galichowski v. Shaw GMC Pontiac Buick Hummer Ltd.*, 2009 ABCA 390 (Alta. C.A.) at para 18, (2009), 469 A.R. 156 (Alta. C.A.) outlined the general rules of interpretation of written documents as summarized by GHL Fridman in *Law of Contract in Canada*, 5th ed (Toronto: Carswell, 2006) at 454-462:

> a) Where there is no ambiguity in a written contract it must be given its literal meaning.
>
> b) Words must be given their plain, ordinary meaning, at least unless to do so would result in absurdity.
>
> c) The contract should be construed as a whole, giving effect to everything in it if at all possible.
>
> d) In cases of doubt, as a last resort, language should always be construed against the grantor or the promisor under the contract; *verba fortius accipiuntur contra proferentem*.
>
> e) The *ejustem generis* rule.

65 The court must objectively construe only and entirely the words actually used. Extrinsic or direct evidence beyond what is contained within the four corners of a written agreement is generally inadmissible to contradict, vary, add to

or subtract from its terms: *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*, 1998 ABCA 333 (Alta. C.A.) at para 27, (1998), 223 A.R. 180 (Alta. C.A.).

66 However, contracts are not to be interpreted in a vacuum. Evidence of surrounding circumstances, disclosing facts known to the parties at the time of contracting, is part of the interpretive process: *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2013 ABCA 40 (Alta. C.A.) at para 20, (2013), 542 A.R. 212 (Alta. C.A.).

67 Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact. The surrounding circumstances include anything which would have affected the way in which the language of the document would have been understood by a reasonable person. Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact: *Sattva*.

68 Contextual evidence must not be confused with parole evidence of the subjective intentions of the parties, which is generally inadmissible: *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 46 A.R. 22, [1983] A.J. No. 873 (Alta. C.A.) at para 31. The court must assume that the parties intended what they have said in their agreement: *Paddon-Hughes* at para 26. As Fruman J. stated in *Prenor Trust Co. of Canada v. Nunn* (1998), 214 A.R. 1, [1998] A.J. No. 130 (Alta. Q.B.) at paras 42-43, contracting parties believe their terms mean what they think they mean and not what a judge, later and with the full benefit of hindsight, thinks they should have meant:

> 43 ... our struggle should be to apply a contract as written, not to give in to the temptation to redraft it. Business people are accustomed to weighing risks and benefits. They make bad deals all the time. A breach does not give courts license to sweeten them. By implying terms in situations in which they are not imperative, we encourage litigation and suspend certainty of contract until a final determination in a court of law. That is not how the world of commerce goes round.

69 Parole or extrinsic evidence may only be admitted in aid of interpretation of any ambiguous terms of a contract for the purpose of explaining the sense in which the words were used, but not to contradict them or to imply terms where certain details of the contractual relationship have been left out. Difficulty of interpretation is not synonymous with ambiguity: *Paddon-Hughes*, paras 28-29, 41.

70 Exemption clauses are, as a general rule, strictly construed against the parties who draft and rely on them: *Sinclaire v. South Trail Shell (1987)*, 2002 ABQB 378 (Alta. Q.B.) at paras 58-62, (2002), 1 Alta. L.R. (4th) 135 (Alta. Q.B.).

71 As is the case with respect to other types of contractual provisions, the meaning of a release must be determined from the words used by the parties within the context of the entire document and the contextual evidence. The more general the release, the more important the context or factual matrix of the document becomes: *Toscana Ventures Inc. v. Sundance Plumbing, Gas & Heating Ltd.*, 2013 ABQB 289 (Alta. Q.B.) at para 16 (Master).

72 A cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff exercising reasonable diligence, having regard to a particular claimant's individual circumstances: *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, [1986] S.C.J. No. 52 (S.C.C.), *Boyd v. Cook*, 2013 ABCA 27 (Alta. C.A.) at para 20, (2013), 542 A.R. 160 (Alta. C.A.).

73 When time runs from the accrual of the cause of action or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. However, the law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action, for example, termination of services: *Ryan v. Moore*, 2005 SCC 38 (S.C.C.) at paras 23 and 24, [2005] 2 S.C.R. 53 (S.C.C.).

74 In Alberta, the judge-made rule of construction has been codified by statute and now forms the basis for commencement of the limitation period in s. 3(1)(a) based on the discoverability of the injury: *Gayton v. Lacasse*, 2010 ABCA 123 (Alta. C.A.) at para 16, (2010), 482 A.R. 179 (Alta. C.A.).

75 The Alberta Court of Appeal has held that a release cannot be effective, notwithstanding its anticipatory wording, if it purports to waive a cause of action or apply to facts not known to the releaser at the time of its execution: *Tongue v. Vencap Equities Alberta Ltd.* (1996), 184 A.R. 368, [1996] A.J. No. 435 (Alta. C.A.) at para 26.

76 The case law is unsettled as to whether the principle of discoverability may apply to a limitation period agreed to by parties to a private contract.

77 Where such an interpretation could apply, some trial courts have concluded that the question should not be disposed of in a motion for summary judgment, but rather at trial so that an evidentiary base can be established to address the policy issues arising on application of the discoverability rule to simple contracts and, where appropriate, the date by which a claimant discovered or should have discovered its claim or injury: *Vine Hotels Inc. v. Frumcor Investments Ltd.* (2004), 73 O.R. (3d) 374, [2004] O.J. No. 4997 (Ont. Div. Ct.) at para 28.

78 Several decisions have addressed the argument that discoverability should be read in to contractual provisions similar to the Waiver.

79 The case of *Reed v. Garbutt*, [2003] O.J. No. 4201 (Ont. S.C.J.), 2003 CanLII 49356 involved an owner's claim against a contractor and an architect for breach of contract and negligence in the construction of a commercial building. The roof and windows leaked early on, but the defendants admitted that it would have been premature for the plaintiffs to commence an action regarding the building until some 8 years later, when they knew what was wrong with it. The contract included a waiver and release of all claims, including negligence, against the contractor 6 years after the date of total performance of the work as set out in the certificate of total performance, except those claims made in writing within that period. Eight years later the plaintiffs sued the engineer and the construction company in contract and negligence. The defendants submitted that the claim was barred by statute and by the waiver. The Court found that time did not begin to run for the purposes of Ontario's *Limitation of Actions Act* until the plaintiffs discovered or ought reasonably to have discovered the facts giving rise to their claim. The Court held that the contractual limitation period in the contract was dependent in law on the same discoverability principles. The Court also found the contractual limitation period was dependent on the delivery of a formal certificate of total completion, which the construction company had failed to obtain.

80 In *Howe Sound School District No. 48 v. Killick Metz Bowen Rose Architects & Planners Inc.*, 2007 BCSC 28, 64 B.C.L.R. (4th) 347 (B.C. S.C.), and *Campbell River School District No. 72 v. IBI Group Consultants Ltd.*, 2007 BCSC 280, 27 B.L.R. (4th) 95 (B.C. S.C. [In Chambers]), school boards claimed that design defects in the architects' plans led to water leakage problems. The defects were not discovered until more than 6 years after the schools were occupied following construction. Both summary trial judges concluded that the actions were out of time based on 6 year limitations on claims against the architects in the standard form contracts between the parties, and that the contractual limitations excluded the discoverability provisions of s. 6 of the *Limitation Act*, RSBC 1996, c 266.

81 The judges in both cases held that there was no ambiguity in the relevant contractual provisions. Gray J. in *Howe Sound* recognized that the question of whether the discoverability principle applies to contractual time limitations, as distinct from statutory time limitations, was not settled. However, she held that even with respect to statutes, the question of discoverability is a matter of interpretation. She identified three rationales for limitation periods, being certainty, evidence and diligence, but found that other principles arise in construing a contract. In particular, the court must take into account the principle of primacy of private ordering and the fact that parties to a contract allocate certain risks between them. The clause in question provided that the architect's liability arising out of the contract "shall absolutely

cease to exist" 6 years after the earlier of several dates. Time ran under the contract from a fixed event, being substantial performance, which occurred without regard to the school board's knowledge.

82 Gray J. noted that in *Reed v. Garbutt* the contractual limitation period was dependent on the delivery of a formal certificate of total completion of the work, which was never done. She characterized as *obiter* the court's comment that the contractual limitation period in the contract was dependent on discoverability principles.

83 Rice J. in *Campbell River* followed the reasoning of Gray J. in *Howe Sound*.

84 On appeal in *Howe Sound* and *Campbell River* (2008 BCCA 195, 78 B.C.L.R. (4th) 1 (B.C. C.A.)), the Court of Appeal found that the parties in both cases were sophisticated and had chosen to allocate risk between them. Specifically, they had agreed through clear and unambiguous words to allocate risks of negligent design in a manner that limited any application of the postponement provisions of the *Limitation Act* to a period within 6 years from the date of substantial performance of the work, and there were no policy reasons to interfere with that contractual arrangement.

85 In the subsequent case of *Odell-Jalna Residences of London v. D. Grant & Sons Ltd.*, 2012 ONSC 6942, 21 C.L.R. (4th) 164 (Ont. S.C.J.), the plaintiff operated non-profit housing complexes. A clause in the contract waived claims after 6 years from the date of the earliest of certain events. The plaintiff commenced an action more than 9 years after the certificate of substantial performance was issued but within 2 years of discovery of the allegedly faulty construction. Although the plaintiff was not necessarily sophisticated in construction, the Court found that it had benefitted from an opportunity to review the contract with its consultant and the Ministry of Housing, and its solicitors had explained the effect of the clause in question. Bryant J. followed *Howe Sound* and summarily dismissed the action.

B Analysis

86 WBH distinguishes *Howe Sound*, *Odell-Jalna* and *Campbell River* on the basis that the relevant contractual limitation provided that claims against the architect would "absolutely cease to exist" after the specified time period and the Owner would have no claim whatsoever after that period. It clearly and expressly stated that all liability for claims ceases to exist after 6 years and no claim could be brought following the expiration of that time period, akin to the ultimate limitation period. It barred all claims irrespective of knowledge/discovery of the claim.

87 WBH submits that the wording of the provision in this case is much closer to the wording in question in *Reed*. The Court in *Reed* found that this wording specifically imports a knowledge and discoverability requirement and dismissed the contention that the limitation clause contractually barred the Plaintiff s claim.

88 The defendants argue that *Reed* is distinguishable due to the fact that no Certificate of Total Performance was issued in that case. Furthermore, the Court's comments on discoverability were *obiter*.

89 WBH also argues that proper interpretation of the Waiver in this case requires not only an analysis of the wording, but also of the surrounding circumstances, including the intent of the parties at the time the Contract was made. Specifically, the entire context of the project must be considered along with the fact that the Contract was executed prior to the commencement of construction. WBH submits that this requires full consideration of all of the evidence at trial.

90 However, the affidavit evidence before the Court gives no hint as to what circumstances existing at the time of the agreement might possibly persuade a trial court that the words are actually ambiguous or in need of additional context to fully understand them. As the Court of Appeal noted in *Windsor* at para 21, a party faced with an application for summary judgment must put its best foot forward and actually present evidence; it is not enough to speculate that evidence might be available at a trial.

91 In my view, Clause GC 12.2.1 is clear. The Court must give the words their literal, ordinary meaning, in the context of the entire contract and within the light of a sensible commercial result. The clause specifically states that "...the *Owner* expressly waives and releases ... from all claims ... *including without limitation those that might arise*...except ..."

92 It is a fundamental principle of law that a party cannot release or waive claims of which it is not aware at the time the release or waiver is signed. Such a release, given without any knowledge of the particulars, may only be effective if it also contains an exclusive acknowledgment of the fact of non-disclosure and an explicit acknowledgment of the duty owed.

93 However, the wording of GC 12.2.1 includes an acknowledgement of future unknowns, be it facts, injury or claims, as the wording specifies an express waiver and release of "claims ... including without limitation those that might arise" which must alert any party reading the words to the possibility of claims that might arise in the future beyond the time frame specified in the waiver clause, and which are as yet unknown or undiscovered or undiscoverable. If there were any doubt about the degree to which these words might extend to claims yet unknown the words "without limitation" make it clear that they cover all claims, thereby not excluding those yet unknown, discovered or discoverable.

94 The expectations and duties owed by the parties pursuant to the Contract are identified therein. Therefore the Waiver clearly expressly includes future claims that might arise of which the party was not now aware at the time of signing.

95 Further, time runs from an event - Substantial Performance or after a Certificate of Final Payment - which clearly occurs under the Contract without regard to the injured party's knowledge. The requirement to make claims in writing prior to certain dates does not, when viewed in the context of the entire clause, import a knowledge requirement.

96 Use of the word "claims" without further defining that term to specifically include "actions, suits, or proceedings" as was done in GC 12.1.1 does not assist the argument that knowledge of a claim was an intended component of CG 12.2.1. Neither does the fact that in GC 2.1.5 the Owner waives any "right of action" against the Consultant except to the extent that the Owner may be entitled to "make a claim" against the Design-Builder under the Contract. In Alberta, s. 1 (a) of the *Limitations Act* defines claim as a "matter" giving rise to a civil proceeding in which a claimant seeks a remedial order. The term "claim" refers to the matter that gives rise to a civil proceeding, meaning the "facts giving rise to the injury or offence for which a remedial order is sought": *Stuffco* at para 25. The term "claim" is broader than "cause of action": *Greentree v. Martin*, 2004 ABQB 365, 369 A.R. 263 (Alta. Q.B.).

97 This interpretation of CG 12.2.1, based on the clear language used, is not inconsistent with the balance of the Contract, which also includes a waiver and release by the Design-Builder of the Owner from all claims against the Owner, including without limitation those that might arise from the negligence or breach of contract by the owner as of the date of the Final Certificate for Payment with certain exceptions. The indemnification provisions include a hold harmless agreement from "claims, demands, losses, costs, damages, actions, suits, or proceedings" by third parties. The warranty provisions are for a specified time period. Under GC 12.3.4, the Owner is to give the Design-Builder notice in writing of "observed" defects and deficiencies occurring during the warranty period. The Design-Builder is then obligated to correct or pay for damage resulting from those deficiencies. It is argued that the provisions of GC 12.2.1 merely give some time for that process to occur, and that the "claims" referred to therein are claims for observed defects and deficiencies under the warranty provisions of the Contract. However, such an argument contradicts the actual wording of GC 12.2.1 which provides an express waiver and release from all claims including without limitation those that "might arise".

98 WBH also argues that there is an obvious disparity in the level of sophistication between a design-builder or architect and an owner when it comes to the use of standard form construction contracts and therefore any ambiguity, uncertainty, or inconsistency, in its interpretation or application of it should be resolved against the applicants after a full trial on evidence by both parties. Unfairness or unconscionability in the relationship could engage the application of the fundamental breach doctrine.

99 The British Columbia Court of Appeal indicated in *Howe Sound* at para 14 that where there is a power imbalance between parties to a contract, the court may lean in favour of a strict construction against the stronger party to protect the weaker party.

100 Again, no evidence of unfairness or unconscionability in the relationship is provided in the affidavits filed in support of this application. Thus, short of speculation, there is nothing before the Court that would enable me to conclude that there is any power imbalance which would constitute a genuine issue for trial.

101 Therefore, I would not have dismissed the summary judgment application on this basis.

VII Negligent Misrepresentation

A Law

102 In *Swift v. Eleven Eleven Architecture Inc.*, 2014 ABCA 49, 90 Alta. L.R. (5th) 283 (Alta. C.A.), leave denied [2014] S.C.C.A. No. 135 (S.C.C.), negligent misrepresentation took defects outside the parameters of a limitation clause regarding a cause of action that "arises solely and directly" out of the defendant's duties and responsibilities, especially as the structural defects presented a real and substantial danger to occupants.

B Analysis

103 WBH argues that negligence and breaches of the duty of care in design and construction alleged by the respondent created a real and substantial danger to the occupants of the building. Further, the Certificate of Substantial Completion misrepresented that the building had been properly constructed, substantially complied with the requirements of the Alberta Building Code, and that all relevant life safety features had been incorporated into the building which was confirmed by Liam in making application for Final Payment.

104 The defendants argue that GC 12.2.1 provided for the release and waiver of all claims, including negligence, which extends to negligent misrepresentation.

105 It is true that the Waiver purports to cover claims in "negligence or breach of contract". However, it is the impugned Certificate of Substantial Completion itself which triggered the contractual limitation relied upon by the defendants. I find that the question of whether "negligence" in the Waiver extends to negligent misrepresentation in the Certificate of Substantial Completion in this case is a genuine issue for trial. Further, the parties should have the opportunity to lead evidence regarding whether or not the alleged negligence and breaches of duty in design and construction created a real and substantial danger to the occupants.

106 If I am wrong with respect to my determination regarding s. 7(2) of the *Limitations Act*, I would deny the application for summary judgment with respect to the claim for negligent misrepresentation.

VIII Conclusion

107 The application for summary judgment is dismissed.

IX Costs

108 Unless the parties agree otherwise, costs will be in the cause.

Application dismissed.