

Homeowner Must Establish Diminution in Value to Obtain Judgment

In *Gold Key Construction v Leung*, the British Columbia Court of Appeal held that a homeowner who failed to establish a diminution in value in his property as a result of a breach of contract by a contractor was not entitled to an award of damages.

The contractor entered into a contract with the homeowner to construct a home which provided for an inspection with the homeowner's architect and rectification of defects in the building to the satisfaction of the architect within 30 days of the inspection. The homeowner was entitled to withhold an amount as a deficiency holdback to be calculated by the architect as the cost of remedying the defects plus 50% of that cost.

The contractor presented its final invoice for just under \$70,000.00. The homeowner advised that he would not pay the invoice until all deficiencies in the construction were remedied to his satisfaction. The homeowner's architect listed some 40 deficiencies with an estimated cost of repair at around \$60,000.00. The contractor's expert estimated the cost of remedying the deficiencies at approximately \$70,000.00 which amount was accepted by the Court. The contractor was awarded Judgment in the amount of \$58,876.00 on the basis that the homeowner had no present intention to remedy the deficiencies and failed to

establish any diminution in value as a result of the deficiencies in construction.

Material Supplier Not Entitled to Additional Payment for Materials where Agreement Acknowledged No Further Payment Due

In a recent decision (*Miller Paving v Gottardo Construction Ltd.*) the Ontario Court of Appeal upheld the validity of an agreement between the parties acknowledging that Miller Paving had been paid in full for all materials it had supplied.

In December 2001, Miller Paving acknowledged that it had been paid in full and all materials had been supplied.

In January 2002, Miller Paving rendered a further invoice after discovering materials for which it did not bill Gottardo. Gottardo relied on the agreement to resist the claim although Gottardo had itself been paid by the owner for the materials. The court concluded that the December 2001 agreement was a complete bar to Miller's claim and concluded that the misapprehension as to facts or any mistake did not justify setting aside the agreement.

The December agreement clearly allocated to Miller the risk and the amount Miller Paving represented as being full payment.

Retaining Wall Encroaching on Adjoining Property Deemed to be a Trespass

In *Bellini Custom Cabinetry v Delight Textiles Limited*, the Court of Appeal upheld the decision of the lower court which found that a retaining wall which encroached on an adjoining property's land constituted a trespass.

Delight Textiles purchased its property in 1984 which was subject to an agreement registered on title between the predecessor owners of the property and the adjoining property.

The 1973 agreement was a settlement agreement entered into by Delight Textile's predecessor for the retaining wall which encroached upon the adjoining property. A 1971 survey showed the wall encroached on the property line at its bottom and top.

The 1973 agreement provided that if there was any further encroachment the adjoining property owner's consent to the encroachment would be rescinded. The agreement also provided for a survey of the lot every 3 years although only a survey in 1978 was obtained. In 1978, the top of the wall had

continued to move. The increasing encroachment varied from 21/2" to 1/8".

The retaining wall was holding up Delight Textiles' land which was used as a parking lot. Expert evidence indicated that Delight Textiles parked vehicles on the property and the pressure from the force of the parked cars and a wooden fence resulted in concern regarding the structural integrity of the wall. The lower court concluded that the further encroachment of the wall resulted in a trespass on the basis that the original encroachment was an unlawful trespass which was allowed to continue under the terms of the 1973 settlement agreement however the further encroachment revived the original trespass under the terms of the agreement. Second, the further encroachment was itself a trespass caused by the actions of Delight Textiles.

Court Rescinds Agreement of Purchase and Sale Based on Seller's Failure to Accurately Answer Questions in a Seller Property Information Statement

In *Crawford v Gibson*, the Plaintiffs discovered water damage in several locations throughout their home in February 2004. The problem was apparently caused by ice damming due to snow and ice conditions in the winter. The Plaintiffs listed their home for sale and signed a Seller Property Information

Statement as part of the agreement. The statement indicated that there were no water problems. The Defendants put in a cash offer of \$475,000.00 but later withdrew from the transaction when they learned of the water problem. The Plaintiffs eventually sold their home for \$398,000.00 and sued the Defendants for the difference.

The Plaintiffs' action was dismissed and the agreement was rescinded. The Plaintiffs' home inspection was not determinative of issues which were not visible to the naked eye. The Plaintiffs repaired the roof and covered up what had happened from the ice damming.

The Plaintiffs were found to have unlawfully withheld information from the Defendants that was extremely relevant to the signing of the agreement. The Plaintiffs' made false representations as to the condition of the home which justified rescission.