



Bob Aaron bob@aaron.ca

July 14, 2001

Final chapter written in 'infamous cement case'

The Ontario Court of Appeal has written the final chapter in the infamous eastern Ontario cement case. In a judgment released at the end of May, the court upheld the trial decision favouring the homeowners and pinning responsibility for the defective basement foundations on the concrete supplier and the ready-mix operator.

The "cement case" actually involves numerous individual claims, counterclaims and third-party actions which began in the days before class actions were permitted in Ontario. In total, about 139 homeowners sued Bertrand & Frère Construction Company Ltd., the ready-mix operator which supplied the concrete for the foundations of their homes, and Lafarge Canada Inc., a subsidiary of the multinational company, which supplied cement powder and fly ash used in the batching of the concrete.

All of the homes involved are located between Hawkesbury and Rockland in eastern Ontario, and further east into Quebec as far as Montebello. They were built and purchased in 1986 and 1987.

Within months of the homes being built, their owners had problems with the foundations. The walls started growing a fluffy white powder known as efflorescence. The concrete inside and outside above grade started deteriorating and disintegrating. The foundation walls were usually wet, and water was leaking into the basements. Black mould was growing on the walls, and many began to crack. Substantial deterioration of the parging occurred on the exposed exterior surfaces.

All attempts to repair the problems by applying latex or epoxy, or the installation of dehumidifiers and air exchangers, failed. For years, no one could figure out what the problem was.

The Ontario New Home Warranty Program belatedly got involved after receiving a large number of complaints. ONHWP hired experts to investigate and test the concrete, and they reported that the concrete in the foundation of each of the houses was structurally unsound. The only viable solution was the complete removal and replacement of the foundations at a cost of \$100,000-plus for each house.

Unfortunately, most of the homeowners had not filed claims with the warranty program within what was then a five-year guarantee period. The only alternative was the court system.

And so began what Superior Court Justice Albert Roy called the "infamous cement case." It involved about 139 plaintiffs suing three main defendants, who in turn sued 30 different insurance companies.

When the trial started in a special courtroom in September, 1997, there were 50 lawyers present. The proceedings were bilingual, and everything had to be translated simultaneously. The trial took 150 days over 16 months, and involved 110 lay witnesses and 15 expert witnesses. Some 600 exhibits, representing tons of paper, were put into evidence.

Most of the plaintiffs had been coping with their deteriorating basements for more than 10 years. They didn't have the use of the basements and couldn't enjoy their homes. With the concrete continually deteriorating, the walls were in danger of collapsing before being replaced. The owners couldn't sell, couldn't rent, and couldn't finance repairs. Nor could they afford to abandon their homes and live elsewhere.

I reported on the trial decision in this column last February. Justice Albert Roy found Lafarge 80 per cent responsible, and Bertrand 20 per cent responsible for replacing all of the foundations. Total damages were about \$15 million plus interest. The judgment itself was more than 500 paragraphs and 50,000 words long.

Justice Roy later handed down his ruling on costs, penalizing Lafarge with 90 per cent of the solicitor-client costs of the plaintiffs because its counsel needlessly lengthened the trial. Bertrand got hit with the remaining 10 per cent.

In a unanimous ruling at the end of May, appeal court justices Jean-Marc Labrosse, Kathryn Feldman and Robert Sharpe upheld the trial decision with some minor variations affecting the Ontario New Home Warranty Program. ONHWP was awarded \$3 million for its damages, plus interest at 6 per cent from 1994.

The main issue at the Court of Appeal was the cause of the premature deterioration of the concrete. The homeowners, Bertrand (the ready-mix supplier) and others argued that the type C fly ash in the concrete was the reason for its failure. The fly ash, they said, caused the premature deterioration because of a sulphate attack on the concrete, or the annual freeze-thaw cycle.

Lafarge, on the other hand, said the fly ash did not cause the problem, but rather it was the sand used by Bertrand in preparing the concrete. The sand, they said, required too much water to be added to the mixture, and this caused the deterioration in the freeze-thaw cycle.

At trial, Justice Roy accepted the homeowners' argument that the fly ash caused the deterioration through the primary mechanism of a sulphate attack. The appeal court said that Roy was fully justified in rejecting Lafarge's theory of the cause.

Earlier this week I spoke to William G. Simpson, the Ottawa lawyer who represented some of the homeowners. He told me that each homeowner was awarded about \$140,000 plus costs, and 80 per cent of each claim has already been paid by Lafarge. With accumulated interest, the judgment against Bertrand and Lafarge totals more than \$19.5 million to date, including about \$4.425 million to ONHWP.

Bertrand's 20 per cent share of the judgments has not yet been paid because of disputes among various insurance companies involved. These have yet to be resolved.

Costs of the plaintiffs' lawyers, for which the defendants are responsible, have yet to be assessed but could run into the millions. The expenses alone, including expert witness fees, will be in the hundreds of thousands of dollars.

One significant issue during the appeal was the conduct of the counsel for Lafarge who engaged in "repeated, serious and groundless allegations against the integrity of Bertrand's counsel." A court document prepared by the lawyer for one of the plaintiffs "sets out 35 instances where Lafarge's counsel accuses Bertrand's counsel of literally committing fraud on the Court."

"These accusations," said the Court of Appeal, "are shocking and unsupported." Although Lafarge's counsel later apologized, the appeal court upheld the trial assessment of 90 per cent of the costs against Lafarge (even though they were held 80 per cent responsible), as well as the calculation of those costs on a solicitor-client scale, which is much higher than the level of costs usually awarded to successful parties.

For owners of new homes, the lesson to be learned from the cement case is if you have a warranty claim against a builder, always file it with ONHWP before the warranty period expires.

Please send your inquiries and questions to bob@aaron.ca or call 416-364-9366.

***Bob Aaron** is a Toronto real estate lawyer. www.aaron.ca ©Aaron & Aaron. All Rights Reserved.*