



Bob Aaron bob@aaron.ca

March 22, 2003

Legal wrangles continue in cement case

Insurance companies to pay legal costs
Faulty foundations had to be removed

The infamous cement case is back in the news again with the decision of the Ontario Court of Appeal to hit 17 insurance companies with almost \$20 million in legal costs in addition to the nearly \$20 million in damages they already paid. But the legal wrangles are not over yet.

The cement case involves 137 homes in Eastern Ontario located between Hawkesbury and Rockland, in the eastern reaches of the province, and further east into Quebec as far as Montebello. Most were built and purchased in 1986 or 1987.

Within the first year after the purchase, their proud owners started experiencing 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.

Finally, in 1992, the Ontario New Home Warranty Program 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 all of the houses was structurally unsound because the concrete mix used fly ash, a material produced when solid carbon fuel is burned.

The foundations in every house had to be completely removed and replaced at a cost of about \$100,000 each.

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.

In the days before class actions, 137 plaintiffs sued three main defendants, who in turn sued 30 different insurance companies. The trial took 150 days and kept 50 lawyers glued to the courtroom for 16 months.

The trial decision of Justice Albert Roy awarded the plaintiffs \$15 million plus interest and costs, and in July, 2001, payments totalling some \$19,550,000 were made to the homeowners. (See Title Page, Feb. 17 and July 14, 2001, at <http://www.aaron.ca>.)

But the issue of another \$20 million in legal costs was still outstanding as was the question of which insurance companies had to bear the brunt of the payouts.

The problem was that the main defendants, Bertrand & Frere Construction, the ready-mix operator, and Lafarge Canada Inc., which supplied cement powder and fly ash used in the batching of the concrete, had a number of insurance companies covering their operations at various times between 1986 and 1992.

Unlike in a fire, where all the damage occurs at once, in the cement case it took years to discover and remedy the problem.

The issue was which policies had to pay the \$40 million in damages and costs the ones in effect at the beginning when the mistakes were made, or only when the damage became known, or throughout the period damage was being done, or finally, throughout the entire period from the first cause to the time when the damage became known.

This last option is known as the continuous-trigger theory, which means that damage is deemed to have occurred from the beginning to the end of the process of ongoing deterioration. Both the trial judge and the Court of Appeal chose this option and apportioned the damages as fairly as possible among all the insurers (except one) who issued policies throughout the whole period.

Although nearly \$20 million in actual damages has been paid out, the plaintiffs and their lawyers are still waiting for payment of another \$20 million in costs.

The end is still not in sight, since an application for permission to appeal to the Supreme Court of Canada was filed in February.

Watch this column for further developments.

Bob Aaron is a Toronto real estate lawyer. Send questions to Bob Aaron, 10 King Street East, #1400, Toronto, Ontario M5C 1C3, or by e-mail to bob@aaron.ca, phone 416-364-9366, or fax 416-364-3818.

