

DANGEROUS DEFECTS AND RESULTING DAMAGES: MANITOBA COURT OF APPEAL LEAVES DOOR OPEN TO FURTHER CLAIMS

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In 1995, the Supreme Court of Canada in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, established that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building are potentially liable to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a *substantial danger* to the health and safety of the occupants.

The decision in *Bird Construction* changed the law. No longer were third parties without a remedy because they didn't have a contract with the original contractor. The Supreme Court felt that when a contractor's work went beyond merely "shoddy construction" and became "dangerously defective", they should be held liable for correcting the defect.

In the 13 years since *Bird Construction* was decided, Courts have struggled with the question of just how far this duty of care should extend and precisely what level of compensation might be available to an aggrieved party.

What exactly constitutes a "dangerous defect"? Is the contractor who created the danger liable for only the cost of remedying the defect, or is the aggrieved party entitled to something more?

A recent decision of Manitoba's highest court¹ has left the door open.

Facts

Brett-Young Seeds Ltd. (Brett-Young), a company in the agricultural grain business, contracted with a manufacturer to supply cones to be used at their premises in Gilbert Plains, MB. The manufacturer retained an engineer, K.B.A. Consultants Inc. (KBA), to assess its design and specifications for the cones and to make recommendations for their installation under Brett-Young's grain bins.

The Problem

After the cones were installed to the grain bins, Brett-Young discovered problems with the structure and thereafter sought expert advice. The expert concluded that the cones as originally installed would have posed a hazard to the safety of Brett-Young's employees working in the area of the grain bins because of a risk of collapse causing injury.

When the manufacturer of the cones refused to do the necessary remedial work, Brett-Young had it done at its own expense. It later sued KBA alleging that its acts posed a foreseeable and substantial danger to the safety of workers.

¹ Brett-Young Seeds Ltd. v. K.B.A. Consultants Inc., 2008 MBCA 36

The Claim

Although the cones did not actually cause any damage or injury to workers, Brett-Young argued that it had to take pre-emptive action and reduce their use of the cones to one-third capacity until the cones were fixed. Not only did Brett-Young claim the cost of repair (estimated at \$179,000), they sought additional damages for profits lost during the time period that the bins were underutilized.

KBA applied to summarily dismiss the claim for lost profits on the basis that *Bird Construction* restricted the types of purely economic loss claims to the cost of *repairing the defects* and nothing more.

The Decision

The Manitoba Court of Appeal concluded that Brett-Young's claim relates to a developing area of the law and that nothing in *Bird Construction* necessarily precludes a claim for lost profits.

A further question that arose was whether it could truly be said that KBA's design posed a "danger". At most, KBA argued, this was a case where a product was allegedly not designed and built for its intended purpose. The case was about "shoddy construction" not "danger".

The Court explained that the law is unsettled as to precisely what is required to meet the threshold of a "real and substantial danger". Simply because the cones may not have presented an "imminent risk of harm", that was not enough to say that KBA was not responsible for rectifying the potentially hazardous situation.

The Supreme Court may soon have to revisit the principle in *Bird Construction* to provide greater clarity. For now, 'dangerous defect' litigation continues to evolve.

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