

# Suppa Construction Ltd. v. Corporation of City of Etobicoke

[Indexed as: Suppa Construction Ltd. v. Etobicoke (City)]

10 O.R. (3d) 430  
[1992] O.J. No. 1675  
Action No. 23957/91U

**Ontario Court (General Division)**  
**Wilson J.**

August 11, 1992

*Limitations — Municipalities — Public utilities — Estoppel — Conduct estopping municipality from relying on limitation period — Public Utilities Act, R.S.O. 1990, c. P.52, ss. 2(1), 28(1), 33.*

*Municipal law — Actions against municipality — Limitations — Estoppel — Conduct estopping municipality from relying on limitation period — Public Utilities Act, R.S.O. 1990, c. P.52, ss. 2(1), 28(1), 33.*

In 1990, S Ltd. constructed a watermain for the City of Etobicoke. S Ltd. relied on the city for advice about the location of water services. There were problems; the city's advice was incorrect about the location of a service, and there was no disclosure of an abandoned watermain. As a result, in March 1990, floods occurred in the area of S Ltd.'s work. Between January and May 1990, a third problem occurred from a series of six watermain "blow-outs". After each of these problems, the parties met and S Ltd. made it clear that it would seek compensation from the city for damages. The city's representative admitted that the city initially undertook to pay at least part of the plaintiff's damage. Similar claims had been paid in the past. Partial payment was made for the third problem. In September 1990, S Ltd. wrote two letters to the city's engineer itemizing its claim of \$72,730.16 for the first two problems and its claim of \$14,117.12 for the third problem. No response was received until the city's solicitor sent a letter on May 10, 1991, denying responsibility due to the expiry of the limitation period under s. 33 of the Public Utilities Act. S Ltd. sued and both parties moved for summary judgment.

**Held**, plaintiff's motion for judgment should be granted in part; defendant's motion should be dismissed.

The plaintiff sought to avoid the limitation period arguing first that the Act did not apply to the circumstances of this case or second that if the Act applied to the circumstances, the city's conduct estopped it from relying on the Act. The first argument failed but the second argument succeeded. The Act's limitation period applied for "anything done in pursuance of this Act", and the city was correct in asserting that its advice was given within the meaning of the "management of the works" referred to in s. 28(1) of the Act and that the problems about the abandoned watermain and the blow-outs came within the ambit of s. 2(1) of the Act, which referred to work to "maintain and operate a water works". The city, however, was estopped from relying on the limitation period because there was a course of conduct that had the effect of leading S Ltd. to suppose that the city's strict legal rights and the limitation period would not be enforced and that bona fide negotiations would continue until the matter was settled. Accordingly, the defendant's motion seeking dismissal of the action should be dismissed. As there was an admission of liability for the first two problems, the plaintiff's motion for summary judgment for these matters should be granted. The issue of liability and damages for the third problem should be

referred to trial.

*Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, 3 O.R. (3d) 510 n, 50 C.P.C. (2d) 213, 80 D.L.R. (4th) 652, [1991] I.L.R. 1-2728, 125 N.R. 294, 47 O.A.C. 333, revg (1989), 70 O.R. (2d) 360, 62 D.L.R. (4th) 570, [1990] I.L.R. 1-2539, 35 O.A.C. 297 (C.A.), *apld*

#### **Other case referred to**

*Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545, 1 C.P.C. (3d) 248, 83 D.L.R. (4th) 734, 20 R.P.R. (2d) 49 n (C.A.)

#### **Statutes referred to**

Public Utilities Act, R.S.O. 1990, c. P.52, ss. 2(1), 28(1), 33

#### **Rules and regulations referred to**

Rules of Civil Procedure, O. Reg. 560/84, Rule 20

MOTIONS for summary judgment.

Keith M. Landy, for plaintiff.

John R. Hart, for defendant.

---

**WILSON J.**—The defendant brings a motion pursuant to Rule 20 of the Rules of Civil Procedure, O. Reg. 560/84, requesting that the claim be dismissed due to the expiration, prior to the institution of these proceedings, of the limitation period stipulated in s. 33 of the Public Utilities Act, R.S.O. 1990, c. P.52.

The plaintiff, Suppa Construction Limited (Suppa), brings a cross-motion for judgment in the amount of \$86,847.28 as requested in the statement of claim in these proceedings.

The facts are relatively simple and not in dispute. They are as follows:

1. Suppa is an Ontario Corporation and carries on business as a construction contractor building public works. Suppa entered into a contract with Metropolitan Toronto to construct a watermain underneath certain streets in the City of Etobicoke.
2. Suppa obtained "locates" from the defendant, the Corporation of the City of Etobicoke (the City of Etobicoke) to identify the location of Etobicoke's watermains, and connections thereto.
3. There were three significant problems experienced by Suppa in connection with the information provided to them by the City of Etobicoke. They were:

#### **Problem 1**

The first problem arose on March 15, 1990. While Suppa was performing excavation work near or at 18-22nd Street in the City of Etobicoke, Suppa encountered a water service approximately 10 feet in

advance of its marked locations, contrary to the information provided to them by the City of Etobicoke. Significant damage and flooding resulted.

#### Problem 2

On March 28, 1990, the second problem occurred. The plaintiff, while performing excavation work at or near 28-22nd Street, encountered an abandoned water service. In the information given to Suppa by the City of Etobicoke no disclosure was made of the abandoned service. Further, it is acknowledged by the solicitor for the City of Etobicoke that the abandoned service was not abandoned properly. Water was retained in the abandoned service, resulting in floods in the area being excavated by Suppa.

#### Problem 3

The final problem relates to a series of six "blow-outs" of the adjacent Etobicoke watermain which occurred between January 26, 1990 and May 9, 1990. These "blow-outs" affected properties in the vicinity of 30th Street where Suppa was performing work.

Counsel for the City of Etobicoke admits liability on Problems 1 and 2. His position in connection with Problem 3 is that there are a variety of potential factors relating to liability including possible contractor error by Suppa.

It is clearly established that, immediately following the occurrence of each of the three problems, meetings occurred between January 1990 and August 23, 1990, with representatives of Suppa, the City of Etobicoke, and Metropolitan Toronto to discuss the ongoing project work, including discussions of Problems 1 to 3. There is no disagreement that Suppa made it clear that it was seeking compensation for damages from the City of Etobicoke during these discussions. Suppa's representative states that they were assured by representatives from the City of Etobicoke that Suppa would be paid compensation for any loss. This fact is contested by the defendant. Suppa proceeded with work to rectify the problems to enable Suppa to complete the contract with Metropolitan Toronto.

In at least one of the discussions, responsibility for part of Problem 3 was allocated between the City of Etobicoke, the plaintiff, and Metropolitan Toronto, and terms of payment were agreed to.

In September 1990 after Suppa completed the work to rectify Problems 1 to 3 and were in a position to assess their damages, they sent an itemized account to the City of Etobicoke in the form of two letters sent to the engineer for the City of Etobicoke. The first was dated September 14, 1990, and sought compensation in connection with Problems 1 and 2 in the amount of \$72,730.16. An additional letter was sent September 20, 1990, detailing the costs associated with Problem 3 and requesting compensation of \$14,117.12.

No response was received from the City of Etobicoke until a letter was sent May 10, 1991, by the solicitors representing the defendant denying responsibility in this matter due to the expiration of the limitation period. The plaintiff immediately commenced these proceedings by way of statement of claim issued May 28, 1991.

The issues relating to the limitation period are as follows:

1. Do the Public Utilities Act and the limitation provisions of s. 33 apply to the facts and circumstances of this case?

2. If the Act does apply, was there an express or implied admission of liability or was there a course of negotiations which had the effect of leading the plaintiff to suppose the strict rights under statute would not be enforced?

ISSUE 1 -- APPLICATION OF THE PUBLIC UTILITIES  
ACT

Sections 2(1), 28(1) and 33 of the Public Utilities Act are as follows:

2(1) The corporation of a local municipality may, under and subject to the provisions of this Part, acquire, establish, maintain and operate waterworks, and may acquire by purchase or otherwise and may enter on and expropriate land, waters and water privileges and the right to divert any lake, river, pond, spring or stream of water, within or without the municipality, as may be considered necessary for waterworks purposes, or for protecting the waterworks or preserving the purity of the water supply. . . . .

28(1) The council may pass by-laws for the maintenance and management of the works and the conduct of the officers and others employed in connection with them, and may also by by-law or resolution fix the rates or charges for supplying the public utility and the charges to meet the cost of any work or service done or furnished for the purpose of a supply of a public utility, and the rent of or charges for fittings, apparatus, meters or other things leased or furnished to consumers and provide for the collection of such rates, charges and rents, and the times and places when and where they shall be payable, and for allowing for prepayment or punctual payment such discounts as may be considered expedient. . . . .

33. No action shall be brought against any person for anything done in pursuance of this Act, but within six months next after the act committed, or in case there is a continuation of damage, within one year after the original cause of action arose.

Counsel for the defendant states that Problems 1 to 3 fall within the responsibility contemplated by the Public Utilities Act. Counsel for the plaintiff states that the Public Utilities Act does not apply and therefore the limitation periods stipulated in the Act were not relevant.

Counsel for the defendant states that Problem 1 relating to the misplaced watermain, and the advice given to the plaintiff, falls within the ambit of "management" within the meaning of s. 28(1) of the Public Utilities Act. He further states that the nature of Problems 2 and 3 relating to the abandoned water service and the blow-outs clearly falls within the ambit of s. 2(1) of the Public Utilities Act which includes work relating to "maintain and operate a water works".

The solicitor for the plaintiff states that protection of the limitation provision in s. 33 of the Public Utilities Act is not available to the defendant as it is the evidence of the witness called on behalf of the City of Etobicoke that reliance cannot be placed upon information given by the representative of the City of Etobicoke and therefore the information does not fall within the ambit of the Act.

No case law was provided in connection with this issue and reference was made only to the statutory provisions of ss. 2(1), 28(1) and 33 of the Public Utilities Act .

I find that information provided to the plaintiff in connection with Problems 1, 2 and 3 by the City of Etobicoke falls within the scope of ss. 2(1) and 28(1) of the Public Utilities Act and therefore the limitation provisions of the Act are prima facie applicable.

Section 33 provides for a six-month limitation period or, alternatively, a one-year limitation period, if there is the continuation of damage. I find, based on the facts of this case, that there was a continuation of damage from January 26, 1990 to May 9, 1990. Therefore the one-year limitation period began to run from January 26, 1990, when the original cause of the action arose.

This action was commenced on May 28, 1991, and therefore the action is prima facie statute barred before considering the second issue of promissory estoppel.

## ISSUE 2 -- PROMISSORY ESTOPPEL OR DETRIMENTAL RELIANCE

The plaintiff states that the effect of promissory estoppel and detrimental reliance is that the defendant is precluded from relying on the limitation period stipulated in s. 33 of the Public Utilities Act.

### The law

Counsel, in their submissions, relied upon the elements of promissory estoppel outlined in the Ontario Court of Appeal decision *Maracle v. Travellers Indemnity Co. of Canada* (1989), 70 O.R. (2d) 360, 62 D.L.R. (4th) 570. Counsel neglected to mention that this decision was overruled by the Supreme Court of Canada at [1991] 2 S.C.R. 50, 80 D.L.R. (4th) 652. The judgment of that court was delivered by Sopinka J., who held, on pp. 50-59 S.C.R., pp. 657-58 D.L.R.:

In my view, while an admission of liability is clearly one of the factors from which a court may infer as a finding of fact that a promise was made not to rely on the limitation period, it is not an alternate basis of promissory estoppel. . . . .

An admission of liability is frequently made in the course of settlement negotiations. This is often a preliminary step in order to clear the way to enter into a discussion as to quantum. Indeed, when an offer to pay a stated amount is made by one party to the other, an admission of liability is usually implicit. In this type of situation, the admission of liability is simply an acknowledgment that, for the purpose of settlement discussions, the admitting party is taking no issue that he or she was negligent, liable for breach of contract, etc. There must be something more for an admission of liability to extend to a limitation period. The principles of promissory estoppel require that the promisor, by words or conduct, intend to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period must be such that the trier of fact can infer from it that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. Whether this inference can be drawn is an issue of fact.

The representative for Suppa states that there was an express agreement by the City of Etobicoke to reimburse the plaintiff for all expenses incurred in connection with rectifying Problems 1, 2, and 3. I have been referred to the transcript of the cross-examination of Mr. Peter Ozaruk which took place on March 12, 1992. Reference is made to pp. 19, 20, 21, 29, 30 and 43 of that transcript confirming the plaintiff's understanding that there was an agreement that the plaintiff would be paid by the defendant. This understanding is supported by the final paragraph of Suppa's letter to the engineer of the City of Etobicoke dated September 14, 1990. That letter states:

The total loss to Suppa Construction [for Problems 1 and 2] has been evaluated at

\$72,730.16. Mr. Ron Standish advised us at the time of the breaks to submit our claim to your office once it was completed.

Additionally, Exhibit "E" to the affidavit of Mr. Peter Ozaruk, the daily time sheet of Suppa Construction Ltd. dated Thursday, March 15, 1990, has a notation on the back that Mr. Ron Standish had asked Suppa to make repairs and that "somebody would pay".

Although the agreement to pay was refuted by Mr. Michael Mansfield in his affidavit, in his cross-examination, in answer to questions 149 and 163, he admitted that the defendant initially undertook to pay for at least part of the plaintiff's damage. He said in answer to question 149, concerning the costs incurred due to repairs to watermain breaks on 30th Street from Akron Road to Horner Avenue (Problem Three):

A. Well, it's my understanding that the City undertook to pay Suppa to assist in the excavation or to assist in the repair of the broken watermain by undertaking the excavation, I assume backfill.

I understand that also Suppa was requested to do some additional asphalt work to pave over the disturbed area on one of the breaks or on the longer break that was referred to --

Q. Yes.

A. -- and that the only question that was not resolved, was how much asphalt was used to repair that break site, as opposed to how much asphalt Suppa had to use in any case, to repave the damage they caused as a natural course of installing the Metro watermain.

Additionally, there are ample relevant documents and facts which substantiate a course of conduct that had the effect of inducing the plaintiffs to believe that the negotiations would continue until the matter was resolved. They are as follows:

- (a) There were a series of meetings from January to August 1990 after the incidents in question occurred, which were reflected in minutes which discussed, amongst other things, Problems 1, 2, and 3.
- (b) The defendant was at all times aware that the plaintiff was intending to seek compensation from the defendant for damages sustained.
- (c) Similar claims in the past had been paid by the City of Etobicoke, although the city took a while to pay them (Ozaruk's evidence p. 14, affidavit and p. 68 on of his examination for discovery -- Mansfield said past claims were different and that he was "unaware" of Etobicoke's late payment policy: Question 272, examination of Mansfield).
- (d) Partial payment has been made by the City of Etobicoke in connection with Problem 3. Aspects of Problem 3 were resolved amicably between the parties. The plaintiff was compensated for loss incurred and extra work performed. Reference to this transaction is to be found at pp. 60 and 61 of the transcript of Peter Ozaruk.

I find, upon reviewing the documents and the facts, that there clearly was a course of negotiations which was entered into by the parties which had the effect of leading the plaintiff to suppose that the strict legal rights and the limitation period would not be enforced and that bona fide negotiations would continue until the matter was settled. The promises to pay and the past relationship of the parties amounted to an implied waiver of the limitation period on the part of the defendant.

The defendants failed to advise Suppa of their position until after the expiry of the limitation period. For the reasons outlined above I therefore find that the defendant is estopped by their conduct from relying on the limitations in s. 33 of the Public Utilities Act.

It is essential when reviewing a business transaction in hindsight that practical business solutions to problems be encouraged. The parties involved pursued the goals of finding acceptable solutions to unanticipated problems. This must be encouraged. There is no evidence the defendant has been prejudiced. The defendant was advised days after the first problem occurred that Suppa took the position that the defendant was responsible for any damages.

In a recent decision of the Ontario Court of Appeal, *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545, 83 D.L.R. (4th) 734, Morden A.C.J.O., discussed the importance of avoiding trials or shortening the proceedings if a court could be satisfied that there is no genuine issue of fact that would require a trial. He said, at pp. 550-51 O.R., p. 739 D.L.R.:

The summary judgment rule, properly applied, is one of several rules which enables the policy expressed in rule 1.04(1) to be given effect. It reads:

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense. Rule 20 exists as a mechanism for avoiding these failures of procedural justice.

Here the motion for summary judgment to determine the effect of the limitation period defence was initiated by the defendant. The plaintiff responded with a cross-motion for judgment. I find under the circumstances that there is no genuine issue as to the effect of the limitation period and that requiring the matter to proceed to trial will needlessly add to significant costs and delays already incurred to date.

The defendant's motion seeking dismissal of this action is therefore dismissed. Costs in favour of the plaintiff fixed at \$2,000 payable forthwith by the defendant.

#### THE PLAINTIFF'S MOTION FOR JUDGMENT

The plaintiff brings a cross-motion for judgment for the amounts claimed in the statement of claim. There is an admission of liability in connection with Problems 1 and 2. In connection with Problem 3 there is an issue as to potential contractor liability, and therefore liability is not admitted. The issue of liability and damages with regard to Problem 3 is therefore referred to trial.

In quantifying damages the defendant raised the issue as to whether or not the damages should appropriately include downtime of staff and equipment. In connection with Problems 1 and 2 in assessing damages, I find that part of the claim for damages would include downtime of staff and equipment experienced by the plaintiff as a result of the occurrence of Problems 1 and 2. If the defendant is found liable in connection with Problem 3, damages should similarly include downtime.

Few submissions were made to me by counsel for the defendant in connection with quantum, although the issue of downtime was raised. It is appropriate for counsel for the defendant to have an opportunity to make submissions if he wishes to do so. I therefore give counsel for the defendant 30 days from the

date of these reasons being released to set up an appointment with me to make further submissions if he so desires in connection with the appropriate disposition for damages for Problems 1 and 2. If no appointment is set up within 30 days, I grant judgment in favour of the plaintiff for Problems 1 and 2 in the amount of \$72,730.16 plus prejudgment interest. Costs to the plaintiff payable by the defendants in the plaintiff's motion for judgment fixed at \$2,000 payable by the defendants forthwith.

The request for judgment in connection with Problem 3 is dismissed, and the issue of liability and damages in Problem 3 is referred to trial.

Order accordingly.