Robert McAlpine Ltd. v. Byrne Glass Enterprises Ltd., [2001] O.J. No. 403

Ontario Judgments

Ontario Court of Appeal
Toronto, Ontario
Osborne A.C.J.O., Weiler and Charron JJ.A.
Heard: May 24, 2000.
Judgment: February 9, 2001.
Docket No. C33682

[2001] O.J. No. 403 | 141 O.A.C. 167 | 7 C.L.R. (3d) 155 | 102 A.C.W.S. (3d) 1082 | 2001 CanLII 23996

Between Robert McAlpine Ltd., plaintiff/appellant, and Byrne Glass Enterprises Limited, The Guarantee Company of North America and PPG Canada Inc., defendants/respondents And between Robert McAlpine Ltd., plaintiff/appellant, and Woodbine Place Inc. and National Bank of Canada, defendants/respondents

(106 paras.)

Case Summary

Building contracts — Liability of builder — Delay — Damages.

Appeal by the plaintiff contractor Robert McAlpine Ltd. from a finding that it was liable for deficiencies and delays in an office building that it built for the defendant Woodbine. On appeal, McAlpine accepted its liability to Woodbine but contested the assessment of damages at $1.7 million for deficiencies and $770,000 for the five-month delay in completion of the building. The floor slabs in the building were deficient. It was uneconomical to repair or replace the floor slabs, so the trial judge assessed the damages at the diminution in value of the building. She found that the deficiencies reduced the building from a Class A to a Class B building. She found that Class B buildings were subject to an increased capitalization rate resulting in the damages assessed. She found that Woodbine took reasonable steps to mitigate its damages. She found that McAlpine was responsible for the five-month delay and that rent that would have been received during that period of $261,650 from committed tenants was payable. She found that $770,000 would have been received from prospective tenants based on an adjustment to a flawed analysis. Tenants had committed to lease 62 per cent of the available space before or during the building's construction. Woodbine did not establish that there were tenants that would have leased space but for the delay. There was an excess supply of Class A office space that had an adverse impact on vacancy rates during the delay period. In calculating the loss in prospective rents, the trial judge used rents payable for a Class A building.

HELD: Appeal allowed in part.

The trial judge did not err in her assessment of damages for deficiencies either in the approach of diminution in value of the building or in the finding of mitigation. The calculation of loss for the delay was flawed. The prospective tenants delay assessment was not supported by the evidence. The precise quantification was difficult. The court assessed it at $65,000. This took into account the lack of evidence supporting the claim and the fact that the trial judge used Class A rents in the prospective tenants loss calculation but also compensated Woodbine for having been relegated to a Class B building.

Appeal from:

On appeal from the judgment of Justice Bonnie J. Wein dated February 11, 1998.

Counsel

David Stockwood, Q.C. and Johanna Braden, for the appellant. John C.L. Ritchie, for the respondents, Woodbine Place Inc., et al.

The judgment of the Court was delivered by

OSBORNE A.C.J.O.

Overview

1 After a lengthy trial before the Honourable Madam Justice Wein,[1] the appellant, Robert McAlpine Ltd. (McAlpine), the general contractor, was held to be liable for certain deficiencies in a 6 storey office building (Woodbine Place) which it constructed for the owner, the respondent, Woodbine Place Inc. (Woodbine). The Trial Judge also found that McAlpine was obligated to compensate Woodbine for a five-month delay in completing the construction of Woodbine's building. She assessed Woodbine's damages at $2,470,000 under these two heads of damages.

2 Although liability was hotly contested at trial, on its appeal McAlpine accepts its liability to Woodbine. However, McAlpine appeals the Trial Judge's assessment of damages. Its appeal centres on two discrete damage assessment issues:

* Damages arising from deficiencies in the concrete floor slabs of Woodbine Place.

* Damages arising from the five-month delay in completing the construction of Woodbine Place.

3 On the floor slab deficiency issue, the Trial Judge found that the appropriate measure of damages was the diminution in the value of Woodbine Place resulting from these deficiencies. She assessed this head of damages at $1.7 million. McAlpine does not take issue with the diminution in value approach to the quantification of damages; however, it does take issue with the quantum of the assessment. It does so on two general bases. First, it submits that the Trial Judge erred when she relieved Woodbine of its duty to mitigate its damages because McAlpine had not acted openly in its various attempts to determine the cause of, and remedy for, the floor slab deficiencies. Second, McAlpine submits that the $1.7 million assessment under this head of damages is excessive. It contends that, quite apart from the issue of mitigation, the Trial Judge's $1.7 million diminution in value finding is not supported by the evidence.

4 With respect to the delay damages, McAlpine accepts the Trial Judge's five-month delay in completion finding and her assessment of damages of $261,650 for tenants which had agreed

to lease space in Woodbine Place before the building was completed. This compensates Woodbine for rents it did not receive from the committed tenants because of the five-month delay.

5 McAlpine does not accept the Trial Judge's assessment of $770,000 for the loss caused by the five-month delay as it relates to prospective tenants. It submits that the Trial Judge's assessment of damages in respect of prospective tenants is not supported by the evidence and that the Trial Judge's findings on this issue are inconsistent. McAlpine also submits that the floor slab diminution in value damages of $1.7 million and the delay damages as related to the prospective tenants of $770,000 overlap to some degree with the result that Woodbine was, in part, compensated twice for the same loss.

6 Before I consider the somewhat complex damage issues, I should comment briefly on the standard of appellate review.

The Standard of Appellate Review

7 This Court will not interfere with findings of fact made by a Trial Judge unless the Trial Judge made a palpable and overriding error in her appreciation of the evidence. It is not the function of an Appellate Court to substitute its view on factual matters for those of the Trial Judge: see Equity Waste Management of Canada v. Halton Hills (Town) (1997), 35 O.R. (3d) 321 (C.A.). Where it is contended that the Trial Judge's conclusion on a particular issue is not supported by the evidence, the question to be answered in both criminal and civil cases is whether a trier of fact, acting judicially, could have come to the conclusion reached by the Trial Judge.

8 There is a wide discretion to be exercised in the assessment of damages in a case like this. An Appellate Court will not change a damage award because, on its view of the evidence, it would have come to a lower or higher assessment: see Woelk v. Halvorson, [1980] 2 S.C.R. 430; Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), 162 D.L.R. (4th) 574 (C.A.). An Appellate Court will, however, examine the record to determine if the Trial Judge disregarded, misapprehended, or failed to appreciate relevant evidence, or, in assessing damages, made findings that were not supported by the evidence. An Appellate Court may also intervene if the Trial Judge failed to confront serious, and relevant, evidentiary conflicts.

Factual Background

9 I propose to review the evidence only to the extent necessary to bring the damage-related issues into some kind of reasonable focus. When I address the issues raised on this appeal, I will refer to particular aspects of the evidence that are relevant to those issues. I will also address the Trial Judge's findings on an issue-by-issue basis.

10 In mid-1988, Woodbine and McAlpine contracted for the construction of a six storey office building to be called "Woodbine Place". McAlpine, as I have said, was the general contractor. The required building permit was issued in late September 1988 and construction began at that time. The completion date for the project was contractually set at October 31, 1989, that is about 13 months from the construction commencement date. The concrete work was initially scheduled to be completed by February 15, 1989 and the glass curtain-wall work was to be completed by May 31, 1989. Had this construction schedule been followed, the elevators would have been installed by September 1989 and the building would have been ready for occupancy by tenants by late October 1989.

11 McAlpine encountered difficulties from the outset. Problems developed on all floors with respect to the level and evenness of the floor slabs. These problems were rectified on the ground floor, but unacceptable variations in the slope of the other floors remained. Apart from some localized levelling to accommodate individual tenants, these problems have not been corrected.

12 The floor slab problems were not discovered until the fall of 1989, by which time it was impossible to correct them without considerable expense and difficulty. By early 1990, negotiations began in an effort to resolve the problems. For an extensive period, McAlpine and Hardrock, the floor slab subcontractor, maintained that the floor slab deficiencies were design-related. After Woodbine commissioned expert reports as to the cause of the problem, McAlpine eventually accepted that the floor slab difficulties were the result of improper workmanship. I will deal with this aspect of the dispute in more detail when I address the issue of mitigation.

Overview of the Trial Judge's Reasons

(a) The Floor Slab Deficiency Issues

13 After fully reviewing the evidence, the Trial Judge concluded that construction, not design, factors were the underlying cause of the floor slab problems. That is to say that she accepted Woodbine's position on this issue. McAlpine does not appeal from that finding.

14 The Trial Judge found that it was not possible to correct the floor slab deficiencies to a standard of "perfection". She also concluded that the cost of remedying these deficiencies was disproportionate to the benefit that could be reasonably attained. She, thus, held that the appropriate measure of damages could best be assessed by determining the extent to which the value of Woodbine Place had been diminished as a result of the defective floor slabs. In assessing Woodbine's damages in this way, the Trial Judge accepted that the approach of Thomas Stevens, an expert witness called by Woodbine, was a proper starting point for the assessment of damages. Stevens testified on the practical effects of the floor slab deficiencies on the sale, financing and leasing of Woodbine Place. By his calculation, the cumulative diminution in the value of Woodbine Place as a result of the structural deficiencies was $5,500,000. This took into account three factors:

* The relegation of Woodbine Place from a Class A to a Class B building as a result of the floor slab deficiencies.

* The cost of testing and remediation to ensure compliance with Building Code and design specifications and requirements.

* The impact of the long term stigma associated with the structural deficiencies becoming known. Stevens suggested that regardless of what was done with respect to the floor slab deficiencies, there will be a permanent reduction in the market classification of Woodbine Place which will have an impact on value, cash flow, and on the speed of any potential resale.

15 The Trial Judge did not accept Stevens' cumulative approach to the diminution in value of Woodbine Place caused by the floor slab deficiencies. She did, however, accept his diminution in value approach to the assessment of damages and his evidence that the deficiencies reduced Woodbine Place from a Class A to a Class B building. In the end she quantified those damages,

as I have said, at $1,700,000, not $5,500,000, which was Stevens' estimate of Woodbine's loss. In doing so, she accepted evidence that the floor slab deficiencies exposed Woodbine Place to "an increased capitalization rate" as of the fourth quarter of 1989. Use of "an increased capitalization rate"[2] to assess Woodbine's damages worked to lower the value of Woodbine Place. In the end the extent to which the value of Woodbine Place was diminished by the floor slab deficiencies was determined by subtracting the value of Woodbine Place as a Class B building from its value as a Class A building. Different capitalization rates were used to determine these values.

16 The concept of an increased capitalization rate comes mainly from Stevens' evidence. It does not stand alone and requires some explanation which I will try to provide shortly. I will deal with the overall approach to the floor slab deficiencies and the quantification of the diminution in value of the building when I consider the merits of McAlpine's submissions with respect to the Trial Judge's $1.7 million assessment on this head of damages.

(a) The Delay Issue

17 At trial, it was agreed that McAlpine did not complete Woodbine Place on time. Indeed, McAlpine admitted its liability for damages arising from its delay. There was, however, a dispute with respect to the length of the delay and the quantum of the damages resulting from it.

18 The Trial Judge found that the period of delay was five months. She rejected McAlpine's argument that the effective delay in substantial completion was less than five months. This finding has not been appealed.

19 The Trial Judge assessed the damages flowing from the delay by considering first the extent to which revenues from committed tenants, which were unable to move into Woodbine Place as scheduled, were reduced. She assessed Woodbine's delay damages applicable to committed tenants at $261,650. McAlpine does not challenge that finding. She then considered Woodbine's loss as related to prospective tenants, that is tenants which might have leased space in Woodbine Place during the five-month delay period. Sixty-two tenants were identified as prospects by one of Woodbine's leasing agents. The Trial Judge assessed the delay damages applicable to prospective tenants at $770,000. McAlpine takes issue with this part of the Trial Judge's assessment of damages.

Analysis

(a) Floor Slab Deficiency Damages (Diminution in Value)

20 As I have noted, Stevens testified that the value of Woodbine Place had been diminished by the floor slab structural deficiencies. In particular, he stated that Woodbine Place had been reduced from a Class A to, at best, a Class B building.[3] In his report, to which the Trial Judge referred in her reasons, he explained the Class A - Class B building distinction. He said that a Class A building is a building which has greater tenant appeal for a variety of reasons that I need not set out here. In result, a Class A building will attract higher rents and lease available space more quickly than a Class B building. A Class A building also has greater investment appeal. This too affects the building's market value. Stevens said that a Class A building will also have a greater ability to obtain financing and will attract a "lower market capitalization rate". To determine Woodbine's market value, Stevens used the different capitalization rates

applicable to Class A and Class B buildings. The Trial Judge rejected McAlpine's submission that there was no evidence that Woodbine Place was viewed by the market as a Class B building as a result of the floor slab problems.

21 McAlpine takes issue with the Trial Judge's finding that Woodbine Place was reduced to a Class B building. Woodbine submits that Stevens' evidence supports the Trial Judge's finding on this issue.

22 Stevens said that as a Class A building, Woodbine Place, with its high intended quality, excellent location and superior building amenities, would have leased up relatively quickly. He suggested that Woodbine Place would have been accorded the lowest market capitalization rate available for assets of a similar size and quantity. He explained (at p. 18 of his report) that:

> ... A potential purchaser of Woodbine Place would use a Class B capitalization rate to determine value. A capitalization rate is used by the real estate market to determine the value of a building by using the net income as an investment return in calculating the investment amount it would produce that net income, by dividing the net income by the Class B market capitalization rate.

23 According to Stevens, the applicable Class B building capitalization rate was 1 percentage point higher than the capitalization rate for a Class A building.[4]

24 McAlpine's expert, Drivers-Jonas, disagreed. Drivers-Jonas noted that there was no evidence that any tenants:

> * were deterred from leasing space in the building or did lease but at a lower net effective rent,
>
> * had difficulty in occupying space because of insufficient live load capacity,
>
> * have attempted to re-negotiate their leases because of operating difficulties due to the uneven floor slab,
>
> * declined to renew their leases because of the floor slab deficiencies, or renewed their leases using the floor slab deficiencies to negotiate better terms.

25 In short, Drivers-Jonas contended that while Stevens concluded that the floor slab problems converted Woodbine Place from a Class A to a Class B building, there was no evidence that the market (tenants, investors, lenders and their real estate advisors) shared that view. In this general way McAlpine attacked Stevens' central conclusion that Woodbine Place was a Class B building because of the floor slab problems.

26 The Trial Judge clearly accepted Stevens' opinion that the floor slab deficiencies did reduce the overall quality of Woodbine Place so as to render it a Class B building in the sense that it would command lower rents and require Woodbine Place to provide greater tenant inducements than would otherwise have been the case. This finding, which supports Woodbine's entitlement to damages, is based on evidence which the Trial Judge accepted. There is, therefore, no reason to interfere with it. However, the issue whether the Trial Judge was correct in quantifying Woodbine's damages at $1.7 million remains. McAlpine takes issue with the Trial Judge's assessment of diminution in value damages, which were quantified on the basis of evidence that Woodbine suffered from "an increased capitalization rate". This novel route to the quantification of the floor slab damages requires some explanation.

27 I do not think that the notion of an increased capitalization rate should be viewed as an element of damages in and of itself. As used in this case, it seems to me to represent something in the nature of a shortcut to the calculation of the diminution in value of Woodbine Place caused by the floor slab problems.

28 It appears to have been more or less agreed that a capitalization rate of 7.5 percent was the norm in the relevant timeframe for a Class A building. Thus, to determine the present value of the net rental income stream of a Class A building over a certain period of time (eg. one year), a capitalization rate of 7.5 percent is typically used in the calculation.

29 If one resorts to the income approach to valuation (an approach the parties appear to accept), Woodbine Place was worth the discounted value of its net income (almost entirely derived from rents). To convert the stream of rental income into a capital amount to establish the value of Woodbine Place, some discount rate has to be used. The Trial Judge, relying on Stevens' evidence, used a discount, or capitalization rate, of 7.5 percent for a Class A building. Since the floor slab problems relegated Woodbine Place to a Class B building, Woodbine Place would, according to Stevens, command lower rents than would be the case if it were a Class A building. Instead of capitalizing the lower stream of rents applicable to a Class B building, Stevens, and others, simply took a shortcut and increased the applicable capitalization rate without specific mathematical concern about the quantum of the theoretically diminished rents. By increasing the capitalization rate by 1 percentage point from 7.5 to 8.5 percent, what is really being accomplished is to lower the value of the building. That is to say, the resultant capital value calculation will be inverse to the capitalization rate employed - the higher the capitalization rate, the lower the value of the building. In the end, the expert witnesses, principally Stevens, who testified on the subject concluded they could roll all valuation related factors up into one by using an increased capitalization rate to value Woodbine Place. It seems to me that they could have come to the same conclusion by taking into account specific reduced (Class B) rents and using the same capitalization rate. The notion of Woodbine suffering from an increased capitalization rate worked to Woodbine's advantage on the issue of the extent to which the value of Woodbine Place was diminished since it assumes lower, that is Class B, rents.

30 Although the Trial Judge accepted Woodbine's evidence that the floor slab problems converted Woodbine Place into a Class B building, she did not accept all of Stevens' evidence on the quantification of the decrease in Woodbine Place's value. She said:

> However, the cumulative approach to diminution in value by Eagle cannot be accepted in its entirety because in effect it overlaps the categories of a change in classification, the risk factor associated with rectification, which would include partial rectification on changes in tenancy, and the long-term stigma effect.
>
> ...
>
> I accept that the best quantification of diminution in value relating to the floor slab deficiencies is that based on the presumed increase to the capitalization rate assessed in the fourth quarter of 1989, because that was the time when the breach occurred. Even the witnesses from Drivers-Jonas agreed that this methodology, of applying an increased capitalization rate, was appropriate. On the Eagle report calculations, which were not disputed by alternative evidence from McAlpine in mathematical terms, this yields a diminution in value of $1,700,000.

31 Although I might have come to a different conclusion, in my view, there was evidence, which was accepted by the Trial Judge, to support the Trial Judge's diminution in value findings generally and her quantification of Woodbine's loss under that head of damages, if the Trial Judge was correct in not reducing Woodbine's claim because of its failure to mitigate. I will consider the mitigation issue next.

(b) Mitigation

32 Recoverable damages may be reduced if a plaintiff fails to mitigate its damages. Mitigation is an aspect of causation in the sense that a defendant's breach of contract cannot be said to cause losses that the plaintiff could reasonably have avoided. See S.M. Waddams, The Law of Contracts 3rd ed. at para. 747.

33 McAlpine takes issue with the Trial Judge's conclusion on the issue of Woodbine's alleged failure to mitigate its damages. It focuses on that part of the Trial Judge's reasons where she seems to relieve Woodbine of its duty to mitigate because McAlpine failed to give Woodbine a report (the Langley report) which confirmed that the floor slab problems were caused by faulty workmanship, not faulty design.

34 The Trial Judge linked the Langley report and Woodbine's duty to mitigate in these terms:

> ... In most cases Woodbine Place's failure to mitigate its damages by accepting this obvious partial solution would require a reduction in the damages. However, in the unique circumstances of this case, and particularly in view of McAlpine's deliberate hiding of the Langley Report, it is my view that no reduction should be assessed as a result of the failure to mitigate, because Woodbine was obviously not dealing with a party that was acting openly in an effort to resolve the issue.

35 I am not aware of any authority that would suggest that a plaintiff may be relieved of its duty to mitigate as a penalty for a defendant's failure to disclose a report such as the Langley Report. To that extent, I agree with McAlpine's submission on the mitigation issue. However, I think when the evidence and Trial Judge's reasons are considered in their entirety, the Trial Judge's mitigation finding is supported by the evidence and I would, therefore, not interfere with it.

36 In dealing with the mitigation issue, some reference to the Trial Judge's approach to the assessment of damages resulting from the floor slab problems is required. The Trial Judge rejected complete rectification as impractical because of the enormous cost ($3,570,000) involved. She found that partial rectification, as suggested by McAlpine, was neither feasible nor sufficient. Her findings on these issues make sense and are supported by the evidence.

37 Woodbine first noticed the floor slab problem in the fall of 1989, and tried to determine the nature and cause of the problem. In December 1989, it asked Roger Avis Surveying to complete a floor slab level survey to determine the extent of the problem. The results of this survey were forwarded to McAlpine along with a request that they propose a solution to bring the floor slab levels to specified tolerances. McAlpine and its flooring subcontractor, Hardrock, took the position that the floor slab deficiencies were caused by improper design, and not by deficient workmanship. That is to say, they denied responsibility for the problem.

38 Until May, 1990, McAlpine maintained its position that faulty workmanship was not the cause

of the problem. However, it did not provide Woodbine with anything to substantiate its position. Thus, Woodbine retained an independent engineering firm, which confirmed that there was nothing wrong with the structural design as it related to the floor slab problem.

39 In a report dated May 8, 1990, the original structural engineer for the project, John Stephenson Consultants Ltd., concluded that the slabs had not been constructed in accordance with the contract specifications. This report indicated that rectification was not possible as a result of safety concerns. The report thus recommended only local levelling which would provide an appearance of a flat floor. James Goad, the architect and consultant under the construction contract, testified that McAlpine made an attempt to comply with this recommendation that the floor slabs be levelled on an ad hoc basis.

40 As I have said, the Trial Judge accepted that full rectification was impractical and partial rectification was not feasible by the time it was determined that the cause of the floor slab problems was faulty workmanship. She went on to refer to potential Ontario Building Code problems which would arise if partial rectification, in the form of local levelling of the floors by adding cement on an as-needed basis, were undertaken.

41 The local levelling which the Trial Judge found should have been done by Woodbine in the summer of 1990, was the levelling recommended by Stephenson's May 1990 report. This was not wholesale levelling but rather spot levelling to minimize bumps. As a practical matter, this remedial work could only have been done on the 2nd and 5th floors since the other floors were occupied. McAlpine refused to do this local levelling in the spring of 1990 and in any case localized levelling would not have eliminated the floor slab deficiencies.

42 Localized levelling, to the extent that it was done, undoubtedly achieved a cosmetic purpose. It did not, however, resolve all of the problems caused by the floor slab deficiencies. Moreover, throwing cement at the problem by way of localized levelling of the floor had its obvious limits. Additional structural stresses would be imposed which could have given rise to violations of the Building Code.

43 After Woodbine learned of the floor slab problem, early delays were attributable to an ongoing and serious debate about the cause of the problem. As I have said, the debate centred on whether that problem was caused by inadequate design or faulty workmanship. It was spring of 1990 before the parties accepted that workmanship was the problem.

44 The debate about the cost of remedial work was significant. McAlpine said the partial rectification costs were either $65,625, as determined by the architect in 1990, or $136,759, as determined by McAlpine's experts. Woodbine took a different view. It had an expert's report which estimated rectification costs at $3,570,000. Furthermore, if Woodbine's damages were to be determined on a diminution in value basis, the range of damages was between $1,700,000 and $5,550,000. The existing difference of opinion made a speedy solution, particularly one reached without the benefit of hindsight, difficult. I agree with the Trial Judge's finding that "... the court ought not to be overly critical of an owner's decision not to rectify defects since the necessity of making a decision is occasioned in the first place by the builder's own breach of the contract". I also agree with the Trial Judge's conclusion that partial rectification could have been done when the floor slab problem was first discovered at least on the unoccupied floors, but even with partial rectification the floor slab problem would remain.

45 It does not seem to me to be reasonable to criticize Woodbine for not having proceeded with

the localized levelling throughout the building before the cause of the problem was determined. See Costello v. Calgary (City) (1997), 152 D.L.R. (4th) 453 (Alta. C.A.). Nor do I think that Woodbine acted unreasonably in not undertaking additional localized levelling after the cause of the floor slab problem was determined. Had localized levelling been done, the floor slab problem would have been less visible, but this would not have meaningfully reduced Woodbine's floor slab deficiency claim.

46 As part of its submissions on mitigation, McAlpine contends that under the contract, the architect could have instructed McAlpine to rectify the floor slab problems. Instead, proceeding down that road, Woodbine, according to McAlpine, continued to attempt to determine first whether the deflections in the floor slabs were outside the variations permitted by the contract and second, whether the cause of the problem was faulty design or faulty workmanship. Throughout this period of examination and inquiry both the flooring contractor, Hardrock, and McAlpine took the position that:

> * the floor slab deflections were not attributable to faulty workmanship;
>
> * since faulty workmanship was not the cause of the floor slab problems, McAlpine and Hardrock were not required by the contract to remedy them;
>
> * McAlpine and Hardrock were awaiting instructions from the architect as to how to proceed and;
>
> * neither McAlpine nor Hardrock would undertake any levelling of the floor slabs unless they were clearly instructed to do so. They took the position that this work, if done, would be done under protest in order to protect their rights to look to Woodbine for the costs of the remedial work. It was not until October 1990 that the architect received an estimate of the costs of rectifying the floor slab problems.

47 McAlpine submits that had the relevant provisions of the contract been invoked, Woodbine could have referred the floor slab problems to the architect, who in turn could have instructed McAlpine to rectify the problems under Article GC 7.3 of the contract. That Article provides:

> If the matter in dispute is not resolved promptly the Consultant [Mr. Goad] will give such instructions as in his opinion are necessary for the proper performance of the Work and to prevent delays pending settlement of the dispute. The parties shall act immediately according to such instructions, it being understood that by so doing neither party will jeopardize any claim they may have. If it is subsequently determined that such instructions were in error or at variance with the Contract Documents, the Owner [Woodbine] shall pay the Contractor [McAlpine] costs incurred by the Contractor in carrying out such instructions which he was required to do beyond what the Contract Documents correctly understood and interpreted would have required him to do, including costs resulting from interruption of the Work.

48 Under the contract, McAlpine was bound until the architect certified total performance. The architect never certified total performance of the work. In addition, McAlpine, as the general contractor, had complete control of the work to ensure performance of the contract. It was solely responsible for the construction methods and procedures (Article GC 25.1). McAlpine had primary responsibility to correct defects in the contract work (Article GC 24.2). The architect was not responsible for construction means or for deficiencies in the work or for acts of omission by the contractor (GC 3.3 as amended by the contract specifications). The architect in the first instance was to be the interpreter of the contract and was empowered to make findings as to the

performance of McAlpine (Article GC 6). The architect's authority to act under the contract did not create a duty or responsibility of the architect to McAlpine (Article GC 3.8). McAlpine was required to reimburse Woodbine for all damages resulting from any wrongful act or omission and it had a right of set off under the contract (Articles GC 22.1 and GC 23.3). Finally, all rights and remedies under the contract were in addition to and not a limitation of any common law rights accruing to Woodbine and no action or failure to act would constitute a waiver or acquiescence of any breach by McAlpine.

49 Neither Woodbine nor its architect was required by the contract to identify and rectify defective work. Manifestly, Article GC 7.3, set out above, provides a dispute resolution mechanism in which McAlpine refused to participate as a result of the stance it took when the floor slab problems were first revealed. Article GC 7 was not intended to address deficiencies which could not be rectified and, in any case, its application would presume that Woodbine had full knowledge of the extent of the deficiencies and what was required for rectification.

50 In my view, Article GC 7 of the contract does not assist Woodbine generally, or in respect of its submissions on the issue of mitigation. It was not intended to address deficiencies which could not be rectified.

51 In my opinion, it is not necessary to consider whether McAlpine was required by law to give the Langley Report to Goad or to Woodbine. Even though Woodbine did not have the advantage of the Langley Report when it considered what should be done about the floor slab problems, Goad had reached a similar conclusion to that in the Langley report, namely that the deficiencies were not due to faulty design. Hence, the Langley report, if disclosed to Woodbine, would not have changed its position. Further, there was some question as to the value of the Langley report. This was made clear in the evidence of Thomas Blair, McAlpine's vice president and chief engineer. When asked about the Langley report he said: "I wouldn't have paid much attention to it anyway ... . So I don't believe the report was worth the paper it was written on". In the end, it seems to me that McAlpine's failure to disclose the Langley report is a non issue. The report's disclosure would not have changed McAlpine's position in the Spring of 1990.

52 In my view, on the Trial Judge's findings, Woodbine Place took reasonable steps, when it was reasonable to take them, to limit, and thus avoid, some of its losses. Woodbine's claim as accepted by the Trial Judge does not include losses that could reasonably have been avoided. The onus is on McAlpine on the issue of mitigation. In my opinion, on a fair reading of the evidence and the Trial Judge's findings, that onus has not been met. Although I do not accept McAlpine's failure to give the Langley report to Woodbine as a proper basis for relieving Woodbine of its duty to mitigate, I would not interfere with the Trial Judge's conclusion on the issue of mitigation.

53 Accordingly, I would not interfere with the Trial Judge's assessment of $1.7 million, as reasonable compensation for the floor slab deficiencies.

(c) Prospective Tenants - Delay

(i) Woodbine's calculation

54 For delay damage assessment purposes, tenants were viewed as committed or prospective. The committed tenants were tenants which had agreed to lease space in Woodbine Place before or during the building's construction. Those tenants had committed to lease

approximately 62 percent of the available space in Woodbine Place. No issue is taken with the Trial Judge's assessment of $261,650 for Woodbine's delay related loss with respect to the committed tenants. McAlpine does, however, take issue with the Trial Judge's assessment of Woodbine's loss as it relates to prospective tenants which, according to Woodbine, could and would have occupied the remaining 38 percent of Woodbine Place's available floor space[5] but for the 5-month construction delay.

55 At the risk of repetition, I should make some brief reference to what Woodbine's prospective tenants' claim was all about. As I noted above, Woodbine pre-leased 62% of Woodbine Place[6] and has been compensated for its net income loss arising from the five month delay in completing the building as related to that class of tenants. What is in issue here is Woodbine's loss of net income from prospective tenants, that is tenants which chose not to lease space in Woodbine Place, or to lease space at a lower rent, because of the five-month delay.

56 At all relevant times Woodbine Place's efforts to lease were in the hands of leasing agents. One of Woodbine's leasing agents, Mr. May, developed a list of 62 prospective tenants. The 62 prospects and other unidentified prospective tenants represent the source of potential income for Woodbine Place in the five-month delay.

57 Woodbine's claim could, in theory, be proved through the evidence of some (not necessarily all) of the identified potential tenants. Woodbine could also establish its prospective tenants delay claim without the evidence of the actual prospective tenants by reference to the market, and Woodbine Place's actual leasing performance after March 31, 1990, when the construction of Woodbine Place was completed. One way or the other, Woodbine had to establish that some named or unnamed prospective tenants did not lease space in Woodbine place in the delay period because Woodbine place was not completed.

58 Since no prospective tenant testified to support its claim under this head of damages, Woodbine, through the Royal LePage analysis prepared by John Davies, looked to the market to estimate its projected cash flow. It then subtracted its actual cash flow from its projected cash flow. In Woodbine's theory, the difference represented its prospective tenants delay loss. Woodbine's projected cash flow was to a large measure determined by Davies' narrow assessment of the market which led him to assume that Woodbine would have leased 3,000 square feet per month to prospective tenants starting in November 1989. Cooke, the author of the Drivers-Jonas reports, testified that Woodbine's 3,000 square foot a month leasing expectation was "just picked out of the air". He based his conclusion on the absence of evidence from any prospective tenant and his analysis of office space supply and demand factors (the competing market) that Woodbine had to face.

59 In summary form, to establish its entitlement to damage for prospective tenants, Woodbine had to establish, and did establish, that Woodbine Place was not completed by October 31, 1989, the stipulated construction completion date. It then had to establish, and in the view of the Trial Judge did establish, that in addition to the obvious loss of net income from committed tenants which were not paying full rent in the delay period, Woodbine sustained an additional loss of net income from tenants who might have leased space in the five month delay period but did not because the construction of Woodbine Place was not completed. To establish the quantum of that loss, Woodbine relied on the Royal LePage analysis of the market, and its conclusion or assumption that if the construction of Woodbine Place had been completed on October 31, 1989, the available floor space (reduced by an acceptable 10 percent vacancy rate assumption) would have been leased at the rate of 3,000 square feet in each of the next five

months. Taken that far, Woodbine's analysis gets notional, that is completely unidentified, prospective tenants into Woodbine Place on five-year leases.

60 Having established prospective tenancies, Royal LePage, as I have said, calculated the delay loss, not just over the five-month delay period, but rather over a five-year period on the premise that these notional tenancies would be on five-year leases. This approach gives Woodbine Place a bomb proof 90 percent occupancy rate for five years. In any case, this is Woodbine's theoretical approach to the quantification of its damages. In my opinion, the Royal LePage approach to Woodbine's delay loss ignores the obvious prospect of other tenants leasing space in Woodbine Place in the five-year period after Woodbine Place's construction was completed.

(ii) Analysis of the Trial Judge's calculation of damages for prospective tenants

61 Woodbine bore the burden of proof to establish its entitlement to delay damages for prospective tenants and to establish the quantum of its loss to a standard of probability. The onus was not on McAlpine to disprove Woodbine's claim. I can accept the Trial Judge's somewhat fragile reliance on Mr. Weinberg's drive-by testimony discussed later, as an evidentiary basis for her conclusion that Woodbine sustained some loss of net income with respect to prospective tenants, on the basis, as found by the Trial Judge, that if Mr. Weinberg was concerned about the construction delay, prospective tenants might have similar concerns. However, Woodbine had to prove sufficient facts to enable the Trial Judge to determine that its prospective tenants loss was $770,000. In my view, it did not do so. I acknowledge that some claims, including this one, are difficult to prove with precision. This is particularly so in claims for non-economic loss such as claims for pain, suffering and loss of enjoyment of life or for loss of care, guidance and companionship.

62 In Toronto Transit Commission v. Aqua Taxi Ltd. (1956), 6 D.L.R. (2d) 721 (Ont. H. Ct.), Gale J. made a number of relevant comments with respect to the assessment of damages. He said, at pp. 743-745:

> It is a well-established principle that where the damages are by their inherent nature difficult to assess, the Court must do the best it can under the circumstances. Such is the case where the Court estimates the damages for loss of expectation of life or for pain and suffering, it being impossible to measure the loss with mathematical accuracy. That is not to say, however, that a litigant is relieved of his duty to prove the facts upon which the damages are estimated ... Mayne on Damages, 11th ed., points out at pp. 5-6:
>
> > A distinction must be drawn between cases where absence of evidence makes it impossible to assess damages, and cases where the assessment is difficult because of the nature of the damage proved. In the former case only nominal damages can be recovered. In the latter case, however, the difficulty of assessment is no ground for refusing substantial damages, as, for instance, in an action against a banker for not paying his customer's cheque, or on a covenant to pay off encumbrances. ...
>
> The general rule is that the plaintiff must prove sufficient facts to enable the Court to calculate the loss with reasonable certainty. To this must be added the qualification that, where the damages are, by their intrinsic nature, incapable of assessment with any degree of certainty, the plaintiff must prove the facts and the Court will approximate a sum, even though it may be little better than a guess. [Emphasis added.]

63 In Aqua Taxi, Gale J. awarded nominal damages after finding that the plaintiff did not prove the facts from which the Court could determine what the plaintiff's loss was. While he was satisfied that the plaintiff suffered some damages, he said that the plaintiff "has not shown the necessary facts from which I could come to an intelligent conclusion as to what it was. The only alternative would be for me to speculate and that I decline to do." See also, International Corona Resources Ltd. v. Lac Minerals Ltd. (1997), 62 O.R. (2d) 1 aff'd, [1989] 2 S.C.R. 574.

64 For the reasons that follow, I do not think that the $770,000 prospective tenants delay loss assessment can be sustained. In my opinion, that loss was not proved; it defies logic and to the extent that it may represent a compromise between the high (Royal LePage) and the low (Drivers-Jonas), it is inconsistent with the Trial Judge's findings.

65 The Trial Judge assessed Woodbine's loss as it related to prospective tenants in an amount almost three times the assessment of damages in respect of the committed tenants which, as I have said, had agreed to lease 62 percent of Woodbine Place. McAlpine contends that this distortion cannot logically be explained and is, therefore, unreasonable. I do not think that the loss attributed to the prospective tenants on the one hand, and committed tenants, on the other, should inevitably be proportional to the relevant space allocated to each class of tenant. Nonetheless, I think the Trial Judge's assessment of the delay related loss referable to 38 percent of Woodbine Place (space available for prospective tenants without factoring in the 10 percent vacancy rate assumption) in an amount that is close to three times the loss referable to 62 percent of Woodbine Place's leasable floor space requires considerable scrutiny.

66 It seems to me that although Woodbine's economic damages in respect of the prospective tenants were difficult to prove, its loss under this head of damages was capable of proof. To discharge the evidentiary burden that it bore, Woodbine had to establish, to a standard of probability, sufficient facts to enable the Trial Judge to determine its loss with reasonable certainty. What evidence will be required to establish damages with reasonable certainty will depend on the circumstances of each case. See for example International Corona Resources v. Lac Minerals Ltd., supra. There must be evidence, accepted by the Trial Judge, from which, as Gale J. stated in Aqua Taxi, supra, the Trial Judge can come to an intelligent conclusion on the quantum of damages. In my view, a defendant should not have to pay damages based on unproven, speculative assumptions.

67 In a case where the quantification of damages depends substantially on expert evidence, the weight to be given to the experts' opinions will depend on whether relevant underlying factual assumptions have been proved. See Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2d ed. (Butterworths) at p. 646; R. v. Abbey, [1982] 2 S.C.R. 24; R. v. Lavallée, [1990] 1 S.C.R. 852.

68 I will first consider some of the evidence relevant to Woodbine's prospective tenants claim. A number of expert witnesses gave evidence on Woodbine's delay related claims. The expert witnesses all prepared reports which were filed as exhibits at trial. It is not clear to me whether counsel at trial agreed that the expert witnesses' reports were to be accepted as evidence of the truth of their contents. From my review of the record, it seems likely that the reports were filed on that basis, perhaps subject to the proviso that the expert witnesses would give viva voce evidence and thus be available for cross-examination at trial. In the end, the Trial Judge referred to both the expert witnesses' trial testimony and their reports in her reasons. Neither Woodbine nor McAlpine takes issue with that aspect of the Trial Judge's reasons.

69 Royal LePage, for Woodbine, and Drivers-Jonas, for McAlpine, prepared reports which were essential to the parties' positions on Woodbine's delay claim as it related to prospective tenants. Before I comment on these important reports and the evidence of their authors, I should briefly refer to some of the other evidence relevant to Woodbine's claim for compensation due to the five-month delay, as that claim related to prospective tenants.

70 John H. May Realty Ltd., Woodbine's leasing agent in 1989, assembled a list of 62 tenant "prospects". Only 2 (Valdi and Monenco) of the 62 identified prospects testified at trial. I will refer to their evidence shortly.

71 In his trial testimony, John May could not identify any prospective tenants which in fact would have leased space in Woodbine Place but for the delay, or seemed interested in leasing space, but lost interest as the delay wore on. Mr. May made it clear in his trial testimony that his wife, who had signed the May report, knew more about the details of the leasing of Woodbine Place than he did. After Mrs. May apparently witnessed her husband being cross-examined, she decided not to testify. Woodbine's counsel simply advised the Trial Judge that although Mrs. May was to be his next witness, she had made it plain to him that she refused to testify. The Trial Judge referred to Mrs. May's refusal to testify in her reasons but drew no adverse inference from it. In the end, the Trial Judge gave little weight to Mr. May's evidence which she described as "unreasonably optimistic and not based on sound factual underpinnings".

72 Howard Weinberg, a man with considerable real estate experience, and a friend of one of Woodbine's principal shareholders, testified about his observations of Woodbine Place while it was under construction. He said:

> Well, by driving by it on a regular basis, I noticed that the finishing seemed to be lagging behind. ... I felt it was having a negative impact and I undertook to call one of the principals who I knew on a personal basis because I didn't know if it was because of financial trouble or what ... I called Mr. Levy. I said, if there's a problem you better deal with it because you have to get the building in a finished state to go forward in your leasing.

73 Jonathan Weinberg, Howard Weinberg's son, was retained by Woodbine Place to be Woodbine's in-house leasing agent. He was asked what kind of reception he received from prospective tenants in December 1989. He gave the following response: "The feeling of most of the prospective tenants was, again, the question of, did this landlord go bankrupt? Did they run out of money? Was it ever going to be finished?"

74 Dennis O'Neil, an employee of Valdi, one of the prospective tenants, testified that he did not try to obtain space in Woodbine Place any earlier than he did because it was obvious to him that it was still under construction. He thus negotiated a deal to lease space in Woodbine Place as of February 1, 1990. As I have said, the Valdi loss was taken into account under the committed tenants head of damages.

75 Andrew McGilliard, the manager of Inspection Services for Monenco Limited, testified that Monenco had never considered leasing space in Woodbine Place. He added that the construction delay had nothing to do with that decision. As I noted earlier, Monenco was another one of the 62 prospective tenants identified by John H. May Realty Ltd.

76 Hugh Lynett, an agent for Arnoldi, a large commercial leasing agent, was responsible for the marketing of Woodbine Place from October 1990 through June 1991. His job was to find tenants directly or by introducing other brokers to Woodbine Place in the hope that they would bring prospective tenants to Woodbine Place. Lynett was Woodbine Place's general leasing agent when Jonathan Weinberg was its on-site leasing agent. He attributed Woodbine Place's leasing problems to the competition it faced from other buildings and its location. On those two subjects, he said:

> ... it is a matter of the alternatives out in the market place. I think that if Woodbine Place was the only building out there and people needed space, I don't think it would be an issue, but it is my experience - it has been my experience and is a continuing experience that tenants certainly in the west end, most of the commercial space that has been very successful has been built close to major access points to the 401, the 427, QEW - the major highways, if you will, that bisect Toronto in the west end.
>
> ...
>
> ... I just think there was a tremendous amount of options out in the market place. When there is that many options out in the marketplace the tenants clearly have a lot more choices.
>
> ...
>
> I think what it came down to was the large supply in the market and the fact that the building, although maybe of reasonable location, wasn't as good as the locations of the alternatives in the marketplace.

77 Peter McKenna, an employee of J.J. Barnicke Limited, the tenant representative for Pepsico Foods, a potential Woodbine Place tenant, testified that in 1989 an informed real estate developer would have allocated a 6 to 9-month pre-completion leasing period and an 18-month post-completion leasing period, at which point it would be expected that the building would be 97 percent leased. He said Woodbine Place performed exceptionally well in the pre-leasing period. He also said that Pepsico chose not to lease space in Woodbine Place for reasons unrelated to the floor slab deficiencies and the construction delay.

78 This brings me to the evidence of Royal LePage, which was central to Woodbine's position, and Drivers-Jonas' responses, which were central to McAlpine's position at trial. I will make more extensive references to the Drivers-Jonas (Cooke) evidence because the Trial Judge accepted that the Drivers-Jonas approach was "... the most reliable calculation of Woodbine's prospective tenants' loss."

79 The Royal LePage report was prepared by John Davies. It was significant to Woodbine's claim in a number of respects, but principally in its baseline conclusion that Woodbine would have been able to lease the available space in Woodbine Place at the rate of 3,000 square feet per month in each of the five months of construction delay. Woodbine's projected cash flow as presented at trial, depended to a large measure on this 3,000 square feet per month assumed absorption rate. Davies' methodology was to take Woodbine's projected cash flow and then to subtract its actual cash flow. According to Davies, the difference represented Woodbine's loss as related to the prospective tenants. Davies accepted that Woodbine Place would have a 10 percent vacancy rate (a 90 percent occupant rate), delay or no delay. Davies' approach

assumed that Woodbine Place's notional prospective tenants, tenants who did not lease space in Woodbine Place in the five-month delay period, would be on five-year leases.

80 Richard Cooke, who prepared the Drivers-Jonas reports, testified that Davies (Royal LePage) overestimated Woodbine Place's projected cash flow and understated its actual cash flow. He took serious issue with Davies' 3,000 square feet per month absorption rate conclusion. In doing so, he attacked Davies' methodology which he said focussed only on market demand in the delay period. He opined that the Davies-Royal LePage approach eliminated the supply part of the economic picture and thus distorted Davies' conclusions to Woodbine's advantage by increasing its projected cash flow. He emphasized that Woodbine had provided no evidence of particular tenants who would have leased space in Woodbine Place in the 5-month delay period, but chose to lease elsewhere because of the delay. When Cooke considered the supply problems Woodbine faced and its failure to identify specific tenants who went elsewhere because of the delay, he said:

> Because they [Royal LePage and Davies] concentrate on the demand side of the equation. The market is made up or pricing is made up of supply and demand for office space. Looking at absorption, that is the demand side. It takes no account of the supply side. And LePage says there was a ton of office space absorbed or the demand was there, therefore, this building should have been leased up. They don't recognize that there was a considerable over supply at the same time causing immense competition in the marketplace.
>
> ...
>
> Again my real concern there is these numbers are just picked out of the air. There is no evidence to support the argument at all.
>
> ...
>
> I don't think it really bears out the reality of what was happening in the market, that is, that there was an enormous availability of space elsewhere. I have already indicated that from my analysis relative to other buildings it was already on or probably over the target for leasing performance. So to assume, given the enormous availability of other space from competing buildings at that time, I don't understand and LePage don't provide any evidence to support that it could actually have absorbed 3,000 square feet a month.
>
> ...
>
> There is no evidence being put forward that tenants looked at the building and turned away because it wasn't ready for completion. In fact most of the tenants who I am aware did look at the building eventually occupied space in it anyhow. [Emphasis added.]
>
> ...

81 On the subject of Royal LePage's assumed 90 percent occupancy rate, Cooke said:

> By their [Royal LePage's] calculations they show or they assume that it would achieve and maintain that 90 percent occupancy level which takes no recognition of the fact that in reality it only achieved 89 percent occupancy by October 1994, and even that was only for a couple of months because shortly after that the Price Waterhouse lease expired and they vacated. The actual vacancy dropped back to 71 percent. This is a period of very difficult times in the real estate industry. There were many other buildings downtown far

> better located, far superior. ... Occupancy levels were generally declining not increasing and it was very difficult to sustain and maintain a high occupancy level of 90 percent.

82 He made it clear that, in his opinion, using Royal LePage's methodology, Woodbine's prospective tenants delay related loss was less than $850,000. This conclusion was based on his corrective adjustments of Davies' actual and projected cash flow numbers.

83 In his cross-examination, Davies accepted some of Cook's corrective adjustments. I see no need to review this part of the evidence. It is important to note that in the final analysis Cooke did not accept that $850,000 was an appropriate measure of damages in respect of the prospective tenants delay related loss claim. He rejected Royal LePage's methodology, generally because the market which Royal LePage assessed was too narrow with the result that Royal LePage ignored the significant increase in the supply of competing office space and because even Royal LePage's adjusted loss figure of $850,000 included losses attributable to "hypothetical tenants". He put it in this way:

> When I said that the projected cash flow and the actual cash flow together caused an overstatement of the loss by Royal LePage of $1.85 million, if you deduct that from the $2.7 million they estimate, that brings you back down to a number of approximately a real claim of $850,000, but that still includes what are the unrealized tenants or assumed impacted leasing from these hypothetical tenants who have appeared in the market place. I don't believe that was achievable. To the extent that $850,000 is a net number, I still believe that it is overstated. [Emphasis added.]

84 Drivers-Jonas' analysis, which the Trial Judge accepted for the most part, was that starting before the delay period commenced in October 1989, the supply of office space in the area of competition as far as Woodbine Place was concerned had outstripped the demand. This conclusion was based upon a review of data assembled by Royal LePage. Cooke testified that between September and December 1989 the vacancy rate in the Western Fringe of Toronto increased from 6% to 34%. In the Airport Concentration area the vacancy rate increased from 13.8% to 28.85% between June 1989 and September 1989. According to Cooke and Drivers-Jonas these figures are a product of the entry of over 600,000 square feet of class A office space in these two sub-markets within Metro West. These vacancy rates, if theoretically applicable to Woodbine Place, would suggest that Woodbine's 10% vacancy rate assumption was wrong with the result that its projected cash flow was significantly overstated.

85 The Trial Judge concluded that there was "some evidence, that prospective tenants were not affected by the delay in their decision to lease elsewhere." McAlpine, through Drivers-Jonas, made the same point, emphasizing that there was no evidence that any prospective tenant would have leased space in Woodbine Place but for the delay. However, the Trial Judge accepted Howard Weinberg's "drive-by" evidence on the premise that if he thought the delay in completion might have been the result of financing problems, others might have reached the same conclusion. Thus, the question that remained to be answered was what was the quantum of the loss based on the evidence that the Trial Judge accepted.

86 After she reviewed the important competing evidence (particularly the Royal LePage-Drivers-Jonas evidence) with respect to Woodbine's construction delay related losses, the Trial Judge made four important findings. First, she concluded that Woodbine established "some loss concerning prospective tenants" attributable to the delay. Second, she expressed a clear preference for the Drivers-Jonas analysis of Woodbine's prospective tenants delay claim. She

explicitly rejected the Royal LePage analysis, including its five-year damage assessment period. Third, she found that economic risk factors, including the impact of the market downturn, should not be borne by McAlpine. Fourth, she made a concurrent finding that Woodbine did not take risk factors, including the market downturn and competition from better located buildings, into proper account. She set out these findings in this way:

> The conservative assessment of that loss as calculated in the Drivers-Jonas report is the most reliable calculation of that aspect of the loss. ...
>
> I cannot accept the Davies report with respect to the calculation of damages in relation to the prospective tenants. ... I do not accept all of the results or calculations flowing from the basic Davies' assumption with respect to the five-year period of calculations damages. [Emphasis added.] ...
>
> To my mind, this project was in part a speculative investment and the full impact of the high level of risk that was undertaken by the owners ought not now to fall on the shoulders of McAlpine simply because there was a 5-month delay in the building. The evidence produced by Woodbine did not satisfy me that their damage calculations properly took into account other significant risk factors including the unexpected downturn in the market and the competition from better-located buildings.

87 The Trial Judge did not accept the Drivers-Jonas evidence on the issue of the length of the delay. However, she seems to have clearly preferred the Drivers-Jonas analysis over that of Royal LePage. The Trial Judge noted some of the important differences between the Drivers-Jonas and Royal LePage approaches. She said:

> The Drivers-Jonas analysis differs from the Davies [Royal LePage] report in that it used a broader market analysis of the Metro West Office market, which indicated that the market had begun to deteriorate by the early days of 1989. In other words, the drop off in leasing had occurred by the last quarter of 1989. As a result, Woodbine Place would have had difficulty in leasing in any event even if it had been finished on time ... As well, taxes were higher than in Mississauga. In conclusion, it was the impact of an over supply of similar office space augmented by the reduced demand that caused the lease-up problems.
>
> ...
>
> I am satisfied on a balance of probabilities that Woodbine has proven damages relating to prospective tenants but not in the amounts set out in the Davies Report.

88 In her summary of her findings, the Trial Judge stated that, the Davies [Royal LePage] report "was overly optimistic and generous, and failed to take into account factors that would have impacted on Woodbine Place even if it had been ready on time". She also referred to and questioned Davies' underlying assumptions on the basis of their subjectivity.

89 In her review of the evidence, the Trial Judge referred specifically to Davies' "assumption" that in the delay period, Woodbine Place would have leased space at the rate of 3,000 square feet each month. I assume that this assumption, perhaps among others, was included within the Trial Judge's reference to Davies' subjective assumptions which the Trial Judge found undermined Davies' "entire approach".

90 In fairness, I should add that although the Trial Judge expressed a clear preference for the Drivers-Jonas' analysis, she did find that the Drivers-Jonas' opinion was "overly pessimistic" in

three specific respects: the committed tenants delay loss (not in issue on this appeal); Woodbine Place's location; and Drivers-Jonas' criticism of Woodbine's effort to market its available space. The Trial Judge did not criticize Drivers-Jonas' broad market analysis approach or its continued reference to the failure of Woodbine to identify any particular prospective tenants who were deterred from leasing space because of the delay.

91 In spite of her findings, most of which favoured McAlpine, the Trial Judge concluded that the delay related damages with respect to committed tenants should be assessed at $261,650, plus a "conservative amount" for Woodbine's prospective tenants delay claim. She referred to the Drivers-Jonas evidence to support her finding that $850,000 was a "valid starting point" for the assessment of Woodbine's prospective tenants claim. She then deducted $80,000 from her $850,000 starting point because it was an amount that was clearly referable to committed tenants in accordance with the Drivers-Jonas reports and Cooke's evidence. The Trial Judge described her approach to the prospective tenants loss as an approach that "was not directly addressed in the evidence". I have difficulty in accepting the assessment of $770,000 for the prospective tenants as "conservative", particularly in light of the absence of evidence to support it.

92 I turn first to the Trial Judge's $850,000 starting point. The Trial Judge referred to $850,000 as "the loss as calculated by Drivers-Jonas". Accepting the loss "as calculated by Drivers-Jonas" was consistent with the Trial Judge's stated preference for the Drivers-Jonas analysis. However, the Trial Judge seems to have proceeded on the basis that Drivers-Jonas' opinion was that Woodbine's prospective tenants delay loss was $850,000. In my opinion this represents a misapprehension of Drivers Jonas' evidence in two general respects. First, the $850,000 loss calculation as referred to in the Drivers-Jonas reports and Cooke's evidence did not represent the Drivers-Jonas opinion on the quantum of Woodbine's prospective tenants loss. Drivers-Jonas simply opined that if obvious errors in the Royal LePage calculations were corrected, using the Royal LePage data and its methodology, the calculation of the prospective tenants loss would be reduced from $2.7 million to about $850,000. Second, Cooke was quick to add that, "I don't believe [the loss of $850,000] was achievable to the extent that $850,000 was a net number. I still believe that it is overstated". It is thus apparent that Cooke thought that even using the Davies-Royal LePage approach, the Royal LePage damage conclusion for the prospective tenants loss should be less than $850,000.

93 The $850,000 figure used by the Trial Judge as a starting point, came from Drivers-Jonas' first report which was confined to an analysis and criticism of the Royal LePage report. As was made clear in Cooke's evidence, Drivers-Jonas' opinion on Woodbine's prospective tenants delay claim was that Woodbine had not established any proved loss in respect of prospective tenants in the delay period. Drivers-Jonas reached this conclusion that there was no loss of net income in respect of prospective tenants since it found no evidence that any prospective tenant was deterred by the delay from leasing space in Woodbine Place, and because a reasonable market vacancy-occupancy rate analysis suggested that there was no prospective tenants delay loss.

94 Since it could not rely on the evidence of particular prospective tenants, Woodbine's case on the issue of the quantification of its prospective tenants loss mainly rested on the expert opinion of Royal LePage. Even a cursory examination of that evidence reveals errors of the sort Cooke identified in his evidence. In addition, it seems to me that the Royal LePage analysis was conceptually flawed, given the Trial Judge's stated preference for Driver-Jonas' broad market analysis, since the factual underpinning for its conclusion that Woodbine would have been able

to lease (to unnamed prospective tenants) 3,000 square feet each month in the delayed period is missing. On my review of the evidence, it is hardly surprising that the Trial Judge both preferred the Drivers-Jonas analysis and questioned the validity of the Royal LePage analysis on the basis that it was overly optimistic and generous and failed to take account of economic circumstances Woodbine would have faced, even if there was no delay.

95 If one looks at the market competition which Woodbine faced at the relevant times (as defined by Drivers-Jonas and accepted by the Trial Judge) it quickly becomes apparent that the excess supply of Class A office space had an adverse impact on vacancy rates before, during and after the five-month delay period. This raises the question whether there is any reason in the evidence to conclude that Woodbine Place would have outperformed the market. Unfortunately, the Trial Judge did not directly confront this important issue. It is at this level of the analysis that the absence of any evidence from a particular prospective tenant becomes important in that it denies Woodbine access to evidence which, if available, could have supported a conclusion that Woodbine Place would have outperformed the market because of the interest of particular prospective tenants.

96 It must be remembered that throughout Woodbine Place was being marketed by professionals who kept Woodbine's principals informed of any leasing progress and developments. If there were any prospects who were actually interested in leasing space in Woodbine Place, I would think that evidence would have been made available to the Court. I recognize that Woodbine's prospective tenants case rests on the notion that the delay in finishing Woodbine Place caused some prospective tenants to ignore the building, and thus in some measure they remain unidentified.

97 The Trial Judge had to assess damages without knowing who Woodbine's prospective tenants were or where they leased office space in the five-month delay period. However, there was evidence on Woodbine Place's leasing performance after March 31, 1990, when Woodbine Place's construction was more or less finished. Woodbine Place did not achieve a 90 percent occupancy rate even by 1994, the end of the five-year prospective tenants damage calculation period. That is to say, when it was completed, Woodbine Place did not in fact outperform the market. It did not come close to leasing 3,000 square feet per month after March 31, 1990.

98 The practical effects of Woodbine's position as asserted at trial and on this appeal deserve some comment. As Royal LePage would have it, Woodbine would be compensated on the basis that it had leased 62 percent of its available floor space to committed tenants and the remaining available space (to a 10 percent vacancy rate) to unnamed, unknown prospective tenants on notional five-year leases. This is how Woodbine's calculation of its five-month delay claim gets extended for five years, that is until 1994. In the end result, according to Royal LePage, Woodbine was 90 percent filled, but in the real world competing office buildings were not. Moreover, the Royal LePage approach, if followed to its logical conclusion, fills Woodbine Place for five years with the result that any tenant which actually leased space in the notional five-year tenancy period would represent a bonus to Woodbine.

99 Although the Trial Judge expressed a clear preference for the Drivers-Jonas analysis, she did find that Woodbine Place suffered some loss of net income from prospective tenants because of the delay. I accept that finding, but I have difficulty in accepting the Trial Judge's "conservative" compromise which led to her assessment of $770,000 for Woodbine's prospective tenants delay loss.

100 Woodbine submits that there was a "reasonable preponderance of credible evidence" to substantiate an income loss due to the delay. That, however, begs the question - what was the loss? Woodbine also submits that possibilities based on expert evidence must be considered in the assessment of damages and that causation need only be established to a standard of probability. I agree, provided that the existence of the possibility is established in the reasonable balance of probability. See Schrump v. Koot (1977), 18 O.R. (2d) 337 (Ont. C.A.). I accept that it was open to the Trial Judge to conclude that there was a real possibility that some prospective tenants did not lease space in Woodbine Place during the November 1, 1989 to March 31, 1990 period. But the existence of a real possibility, or probability, of a loss must lead to an assessment of damages that have a principled connection with the evidence that the Trial Judge accepted. In my view, the assessment of $770,000 for the prospective tenants delay loss does not pass that test.

101 The Trial Judge used $850,000 as a starting point in her quantification of Woodbine's prospective tenants loss. It appears to me that she got to this starting point in one of two ways. Either she accepted the Davies (Royal LePage) evidence as amended in Davies' cross-examination and by Cooke's evidence, or she picked a number somewhere between the Royal LePage view of Woodbine's prospective tenants loss and the Drivers-Jonas view of the loss. I have already indicated that if the Trial Judge viewed the $850,000 starting point as Drivers-Jonas' estimate of the loss, she misapprehended the Drivers-Jonas evidence. I will, accordingly, say no more about that aspect of the loss. Furthermore, if the Trial Judge chose to accept part of Royal LePage's analysis (the $850,000 part) and reject the rest of it, it seems to me that the Trial Judge would have said so and would not have stated that her compromise approach was not directly addressed in the evidence. And if the Trial Judge chose to accept part of the Royal LePage analysis (the $850,000 part) and reject the rest of it, it seems to me that she failed to confront the serious evidentiary conflicts raised by the Drivers-Jonas and Royal LePage evidence: see R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.).

102 On balance, it seems likely to me that in quantifying Woodbine's prospective tenants delay damages, the Trial Judge chose a figure between the opinions of Drivers-Jonas on the low end and Royal LePage on the high end. This middle ground approach is consistent with Davies' evidence, which the Trial Judge referred to in paragraph 152 of her reasons. Davies testified that if two experts disagree with percentage assumptions with respect to the forecasting aspects of the case, it is statistically acceptable to pick a number in the middle. I rather doubt that statisticians would accept this broad open-ended statement. For purposes of achieving a just resolution of the issue of the quantum of Woodbine's prospective tenants loss, I can only accept it if the compromised "starting point" is based on some reasonable view of evidence that the Trial Judge accepted.

103 By way of conclusion, this brings me back to the evidence that the Trial Judge accepted. She made it clear, as I have said, that, apart from her finding that Woodbine sustained some prospective tenants loss, she preferred the Drivers-Jonas methodology over that of Royal LePage. She explained why she came to that conclusion, albeit in somewhat general terms which included her reasons for rejecting the Davies-Royal LePage approach.

104 I do not think that the prospective tenants delay assessment is supported by evidence that the Trial Judge accepted. It cannot, therefore, be sustained. In such circumstances, I would normally set aside the $770,000 assessment and direct that there be a new trial. However, neither party seeks a new trial. Moreover, in the circumstances, it is unlikely that there would be

additional evidence relevant to Woodbine's prospective tenants delay claim if there were a new trial. Thus, I will address the assessment of the prospective tenants' part of Woodbine's claim directly.

105 Woodbine sustained some prospective tenants delay loss. Its precise quantification is difficult, if not impossible. Like the Trial Judge, I reject the Royal LePage approach to the quantification of Woodbine's loss. It seems to me that Woodbine established an entitlement to somewhat nominal damages. I would assess them at $65,000, an amount that is in significantly better harmony with the evidence and the Trial Judge's findings than the Trial Judge's assessment of $770,000. This assessment will also take into account the lack of evidence supporting Woodbine's prospective tenants claim and McAlpine's submission that in calculating Woodbine's prospective tenants loss at $770,000, the Trial Judge in part compensated Woodbine twice - she used Class A rents in the prospective tenants loss calculation and also compensated Woodbine for having been relegated to a Class B building in the diminution in value damages calculation.

106 For these reasons, I would allow the appeal by reducing Woodbine's damages by $705,000. McAlpine is entitled to its costs of the appeal. Unless there are settlement offers that might affect the trial costs, I would not interfere with the Trial Judge's costs order.

OSBORNE A.C.J.O.
WEILER J.A. -- I agree.
CHARRON J.A. -- I agree.

---

1 The trial judgment is reported at [1998] O.J. No. 504.

2 The capitalization rate is the interest rate used in calculating the present value of future periodic payments. See Black's Law Dictionary, 6th ed. (St. Paul, Minnesota: West Publishing Co.).

3 Stevens' report was frequently referred to as the Eagle Report. The Eagle Group was retained by Woodbine to prepare a report on the practical effects on the sale, financing and leasing of Woodbine Place as a result of the floor slab deficiencies. Stevens, a real estate executive and developer, was the author of the Eagle Report.

4 Stevens stated that in 1989, a class A building's capitalization rate was 7.50 percent and a Class B building was 8.50 percent; in 1993, a Class A buildings' capitalization rate was 9 percent and a Class B building 10 percent. In 1996, the Class A-Class B capitalization rate difference was 1.5 percent, according to Stevens.

5 Woodbine's experts (namely Royal LePage) assumed a 10 percent vacancy rate. Thus if 10 percent of the available floor space in Woodbine Place is deemed to be vacant, 28 percent of Woodbine Place's unleased floor space was available to the prospective tenants. McAlpine contended that in prevailing market conditions, the actual vacancy rate would be higher than 10 percent.

6 The principal committed tenants were Price Waterhouse, the Loopstra, Nixon and McLeish law firm and a ground floor restaurant.

End of Document