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Indexed as:

**780 Eglinton Avenue West Ltd. v. Chislett Asphalt Roofing Ltd.**

Between

780 Eglinton Avenue West Limited, plaintiff, and  
Chislett Asphalt Roofing Ltd. and Trow Consulting Engineers  
Ltd., defendants

[1996] O.J. No. 319

Court File No. 93-CQ-40080 CM

**Ontario Court of Justice (General Division)**  
**Toronto, Ontario**  
**Gibson J.**

February 1, 1996.

(19 pp.)

*Building contracts — Liability of builder — Defective workmanship or design — Roof repairs.*

Action for damages arising out of the repairs to a leaking roof of an apartment building owned by the plaintiff. Only liability was in issue. The defendant's quotation for the work included installation of four insert drains. The defendant finished the job in early 1991. The life of the roof was to be 20 years. Following a storm in 1992, there was a serious flood which caused substantial damage to the plaintiff's building. The main issue in the action was whether the flooding resulted from the defendant's defective installation of the drain inserts or whether the flood resulted from other causes. The evidence established that one of the drain inserts was improperly installed by the defendant.

**HELD:** Action allowed. On the totality of the evidence, especially the findings that the defendant had improperly installed one of the drain inserts, the probable cause of the flooding was the defectively installed drain insert. While it was not conclusive, the fact that after the recaulking and reinstallation of the insert there was no further leaking, was of some significance and confirmed that the problem had been rectified.

**Statutes, Regulations and Rules Cited:**

Professional Engineers Act, S.O. 1990, s. 46(1).

**Counsel:**

Thomas J. Hanrahan for the plaintiff.  
Eric D. Zeldin for the defendant Chislett Asphalt Roofing Ltd.  
John M. Burnes for the defendant Trow Consulting Engineers Ltd.

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¶ 1 **GIBSON J.**— In this subrogated action, the plaintiff corporation (which in conjunction with Philmore Corporation Limited owned a nine storey apartment building at 780 Eglinton Avenue West, Toronto) sought damages from a roofing contractor, Chislett Asphalt Roofing Ltd. ("Chislett") and a firm of consulting engineers, Trow Consulting Engineers Ltd. ("Trow") in respect of the repairs to a leaking roof on the plaintiff's building.

¶ 2 The damages have been agreed at \$46,000 together with prejudgment interest at 7% from September 1, 1993.

¶ 3 On consent the jury notice herein was struck out.

¶ 4 In this my final draft of the reasons, I have revised them considerably, and rather than summarizing the evidence of each witness, I have tried to deal with each factual issue seriatim, and collect the various testimony in respect of each issue before setting out my findings.

¶ 5 I will summarize the background (hopefully) briefly.

¶ 6 The plaintiff corporation purchased the building in 1987, and at that time retained Trow to do a building assessment, which was done. Trow reported that the building was in fairly good repair, although fifty years old, and recommended a \$20,000 repair of the flashing be done.

¶ 7 At all times Highmark was the property manager.

¶ 8 In 1990 the City of Toronto issued a Work Order, as there were complaints of water leaking through the brick face and the roof.

¶ 9 Trow did a further inspection, and in their report, in exhibit 1, recommended that a new roof be installed, and the owner decided to do so. Trow recommended to the property manager, Highmark, that Chislett be awarded the contract, which was agreed upon. Trow chose a two ply modified bituminous membrane type of roof.

¶ 10 Chislett's quote to Highmark of November 12, 1990 (in exhibit 2) was in the amount of \$95,000. In the original quotation, an item was included to install four insert drains.

¶ 11 Trow was hired to monitor the roof repairs - to specify, supervise and certify the work. Trow was to be paid on a per diem rate plus inspection report fees.

¶ 12 Chislett, having being awarded the contract, finished the job in early 1991. During the

installation of the roof, Trow submitted eleven formal reports, plus six handwritten ones to Highmark which the owner received. The life of the roof was to be twenty years.

#### Circumstances Re The Installation of Replacement Roof Oct. - Nov. 1991

¶ 13 Shortly before the original roof was completed, there was a complaint of water penetrating from the roof. Trow investigated the complaint, and its engineer, Paul Whaley, testified that he felt that the membrane had been ruptured, that the job was not satisfactory, and would not certify it. He directed in his report, exhibit 4, that it be replaced at the expense of Chislett, and Chislett agreed to redo the work. No new written contract was entered into with respect to the replacement roof, but the evidence was that it was to be according to the original roofing contract and Trow's specifications. Chislett started the work around October 23rd.

¶ 14 The evidence on behalf of the plaintiff, from Philip Macarz, was that about that time Trow had decided to change the mode of inspection from fulltime to daily periodic inspections. According to Macarz, Trow's expenses on the replacement roof were being paid by Chislett. Macarz was aware of this change by Trow, as it had been discussed with Highmark, Trow and Chislett.

¶ 15 However if one looks at the letter from Trow of October 24, 1991, exhibit 5, the change was suggested by Brad Smith, of Highmark (the Property Manager).

¶ 16 One issue is to what extent did Trow supervise or instruct Chislett with respect to the installation of the replacement roof, and in particular with respect to the installation of the four roof drain inserts, and inspect the installation of same?

¶ 17 It was the evidence of Chislett on his discovery (as read into the trial record) that he had twenty five years in the roofing business, that he personally was on the site every moment of the job, and that they had started at the east side of the building and worked their way to the west. They removed the existing drains as they reached them, and replaced and installed four new drain inserts. During this particular operation, one of the Trow representatives was present - either Jim Hahn, an unidentified chap, or Paul Whaley.

¶ 18 The process was to wiggle out the original drain, remove the insert, wrap the insert with cellulose fibre (which expands when it becomes wet), and then replace the insert back down into the drain pipe. Caulking cement was applied around the rim of the insert and the bottom of the insert where it joined the drain pipe.

¶ 19 Chislett stated that Whaley never told him to use cellulose caulking. Either Hahn or the other chap observed every step of this installation and that there was no complaint by any Trow representative about the manner in which the drains were sealed. It was Trow's function to see that Chislett installed the roof according to their specifications and proper roofing instructions.

¶ 20 In his viva voce evidence, in-chief, Chislett stated that he was present when the drain inserts were forced into the drain pipe, and at that time the Trow representative was present. Cellulose

was used on one drain but he could not recall which one. It was his testimony that the drain in issue was tight and had caulking around it, and below at the pipe, but that no cellulose was used. The drain insert was dipped into caulking material, and his manager would have been responsible for this step. Once the drain was inserted into position, more caulking was applied, which was done by his people under Trow's supervision.

¶ 21 There were three building drains in this building.

¶ 22 In cross-examination, Chislett stated there were four drains in the roof. He used the same type of drain inserts as were previously in position, as his quotation was to "replace" the drain inserts.

¶ 23 He reiterated that Trow observed the installation of the inserts.

¶ 24 Chislett stated that sealant would not prevent water backup from a drain pipe.

¶ 25 Chislett stated he was aware the drain pipe had to be caulked before insertion into the drain pipe. Sometimes black tar is applied around the pipe and he stated that in this case black tar was applied, but he could not recall if cellulose was used.

¶ 26 The only witness from Trow, Paul Whaley (since Mr. Hahn had unfortunately passed away prior to trial), testified that he had been on the site two to three times during the October - November 1991 roof installation, and had received progress reports from the Trow technicians who had monitored the job.

¶ 27 He testified that the late Jim Hahn, who he had known for many years, was a very careful and experienced technician, and very experienced in roofing installations.

¶ 28 Whaley testified that the two ways in which a drain insert, which fits into the drain pipe, could be sealed or caulked were caulking the exterior of the insert, or applying a rubber gasket or seal.

¶ 29 Whaley stated he had been involved in the installation of the first roof, and at that time there had been no discussion with Trow and Chislett as to the type of sealant to be used by Chislett.

¶ 30 He stated that they carefully followed Chislett's work.

¶ 31 In his view, it was permissible to install inserts without caulking, if the inserts were tight. Caulking was to be used to avoid a backup of water.

¶ 32 There is no record in their file that Chislett's work was in any way improper. Whaley further testified that the industry standard was to either caulk or seal a drain insert, and if Chislett did not apply caulking, one of their forces would probably have said something, but my notes indicated he reiterated that it would be in order for Chislett not to caulk.

¶ 33 Also put into evidence as part of exhibit 3 was the last report from Trow, dated November 12, 1991. It stated "a visual observation was made. The roofing system has been completed in a workmanlike manner and the deficiencies noted on the November 8, 1991 fax have been rectified".

¶ 34 The report by Hahn on November 7, 1991 indicated that there were a couple of problems that Chislett was to rectify.

¶ 35 In Mr. Hanrahan's written submissions, it was stated that Trow Engineering stated that they were not on site at the time the roof drains were installed, but according to my notes Whaley conceded that they were, and I find, on the basis of this evidence and that of Chislett, that Trow was present when the drain inserts were replaced in late October and November 1991.

#### Events of May 2 - 12, 1992

¶ 36 No problems occurred between the completion of the roof in November 1991 until a small escape of water was noticed during or after a fairly substantial storm on May 2, 1992. Water was found in the lower suites.

¶ 37 Lynn Stedelbauer, one of the plaintiff's property managers, testified she called Chislett's office immediately, and followed it up with a fax on May 4th (exhibit 10). The fax stated that "it appeared that the drain inserts backed up and were not sealed, and requested Chislett to look into the matter as soon as possible".

¶ 38 Ms. Stedelbauer did not really recall exactly when Chislett came to the site, but there did not appear to be any evidence to contradict Chislett's evidence, as set out in his letter of May 28th, that he attended on May 5th.

¶ 39 On his discovery evidence, Chislett stated that he sent in two of his men, Stuart Potter and George Potter, within twenty-four hours of Ms. Stedelbauer's call. They reported to him that they were unable to observe any reason for a leak and there was no visible damage. The Superintendent showed them inside the building where water was coming in from above, and they paced off (on the roof) the distance from the site of the water, and observed that it was in the general vicinity of the drain. A visual check of the drain from below failed to disclose if the problem was the sealing between the insert and the cast iron drain pipe, because it was below the roof line. Chislett stated that the consensus was that it was a drain problem. No steps were taken by Chislett's forces at that time.

¶ 40 Ms. Stedelbauer in her evidence did not seem to recall what was actually done on May 5th, and stated that no repairs were made before May 23rd to the best of her knowledge.

¶ 41 She also confirmed that at this time no notice was sent to Trow of the problem, either verbally or in writing, and in fact no notice was ever sent to Trow in May.

¶ 42 Again, from the reading in of the discovery evidence of Chislett, he stated that he attended on a site meeting on May 5th, which was within a day or two of his men's attendance at the site. Present at

this meeting were Lynn Stedelbauer, a representative from Philmore (the owner), a Rick Foreman (a representative of the roof manufacturer), and the building superintendent. At this meeting it was determined that the problem was in the drain. The superintendent had deliberately plugged the drain, and flooded the roof (a flood test) before he arrived. Since there appeared to be no further leakage from the roof, it was concluded that it was not exterior water that had leaked into the building. The owner's forces tore the ceiling down underneath the drain, since they decided that was where the problem was, but they found no blockages. Chislett stated that they surmised that the problem was in the drain. All of the elbows and other connections were checked underneath and everything seemed secure.

¶ 43 Chislett stated that he discussed with the owner or the property manager that his forces would make the repairs, but when his forces tried to gain access (perhaps on May 12th) the superintendent refused them access, and they never had a chance to correct the problem.

#### Events of May 23, 1992 and Thereafter

¶ 44 Unfortunately, a serious flood occurred after a second storm on May 23rd, even though the storm apparently was less severe than the one on May 2nd. Lynn Stedelbauer testified she immediately called Chislett, and their insurers.

¶ 45 Lynn Stedelbauer testified that she was at a site meeting on May 25th. Chislett had sent in his workmen, who opened up the roof at the drain in question. She took photographs prior to any remedial work being done (exhibit 11).

¶ 46 Ms. Stedelbauer testified that Chislett's men removed the drain insert, and that the drain insert that was removed (as shown in exhibit 11(d)) failed to reveal any sign of caulking. She also stated that she did not observe any caulking around the pipe of the insert, and none around the funnel of the old drain.

¶ 47 She also testified in-chief that Chislett's men installed a new drain insert, and applied tar around where the pipes joined (the pipe on the insert where it goes into the drain pipe). The owner's superintendent then added more tar to the insert to make sure it was well covered, and when the insert was back in the box he also applied tar by a brush to the insert. Thereafter, she went into the building.

¶ 48 It was her evidence that after this remedial work, there were no further leakages.

¶ 49 In cross-examination she stated that she was not aware that the superintendent had refused entry to Chislett's forces.

¶ 50 In response to questions by Mr. Burnes, she stated that she assumed the roofer had put the insert into the drain pipe, and then shortly thereafter stated that "the roofer did it" (inserted it).

¶ 51 She again conceded there was no note or fax to Trow with respect to the May 23rd flood or the May 25th meeting.

¶ 52 Ms. Stedelbauer stated that she did not recall a plumber coming to fix a drain pipe, and she had no report with respect to any work.

¶ 53 In his discovery evidence, Chislett stated that "we repaired the roof on May 25th", but then stated, "they actually did nothing, except cut the roof open at the drain". One of his men went down to the truck to get something, and by the time he got back the superintendent had taken a big pail of caulking material, wiped it all around the drain, and said "its fixed".

¶ 54 Chislett stated that they had intended to pull the drain up to investigate to see if there was any defect in it. His men called him, and he said "close up the roof and come away", which they did. He reported this incident to Macarz that day, but has never heard anything further and has not been back to the site.

¶ 55 In his viva voce evidence, he confirmed that he personally was not at the site on May 25th, only his men. His evidence, according to my notes, was that they did install a new insert, and the superintendent did the actual caulking.

¶ 56 He reiterated that as a result of the May 12th meeting, it was determined that there was a drain overflow problem.

¶ 57 When he was shown the photographs in exhibit 11, he agreed that in photo (D) there appeared to be no black substance on the new insert, and if in fact the older drain insert was the one that was removed, there should have been black sealant upon it. From a visual inspection it does not appear that there was any sealant upon it.

¶ 58 Chislett agreed that the fact that his forces were refused admission by the superintendent around May 12th was not mentioned in his letter of May 28, 1992 to Highmark (exhibit 6).

¶ 59 When one looks at this letter, it appears to state that a drain insert was replaced on May 25th by his roofer, Stuart Potter.

¶ 60 Whaley, in his testimony, on a review of the photographs in exhibit 11, and particularly (D), stated that with respect to the two inserts, the preparation on the square based one is so that the sealant would adhere. The end of the pipe on the old insert appears not to contain any sealant. If sealant had been used on the old insert, when it was removed the sealant should have been apparent.

¶ 61 Mr. Zeldin also read in a portion of the discovery of H. Doshi, of Trow, that the installation of a drain insert does not require caulking because water flows by gravity. However, in his view it would be a good idea to put a gasket or seal between the male and female parts of the installation for added protection.

¶ 62 There was a conflict in the evidence as to what Chislett's forces did on May 25.

¶ 63 It was the evidence of Ms. Stedelbauer that she observed his forces cut into the roof at the

drain, remove the insert, and install another insert (which at the time was caulked by one of Chislett's men). Thereafter, the superintendent applied further caulking after it was inserted into the drain pipe.

¶ 64 It was her evidence that there was no further leaking after these remedial steps were done.

¶ 65 Chislett, in his evidence on discovery, initially stated that his men replaced the insert on May 25, but in the same answer stated that all his forces did was open the roof. While one of his men had gone to the truck to get something, the superintendent apparently re-caulked the insert, and stated "it was fixed". This evidence by Chislett is obviously hearsay. In his evidence, Chislett did not state whether or not the superintendent removed the insert.

¶ 66 Neither of Chislett's forces who were on the site on May 25 were called (and there was no evidence as to why they were not available or were not called), nor was the superintendent, or the property manager, Brad Smith, and the same comments apply.

¶ 67 Ms. Stedelbauer took various photographs (exhibit 11) of the stages of the work done on May 25. While I will deal with them in more detail when I discuss the cause of the flood, the photographs certainly appear to indicate that the old insert was removed and a new one installed. Ms. Stedelbauer struck me as an intelligent and observant young woman who had been in property management work for some period of time. The negatives of the photographs were filed the next day, and I have compared the number of the negatives of the photos, and they were put in a slightly different sequence (there are a further five photographs that were not put in, but I cannot tell from the negatives what they actually show). I am satisfied there was no attempt at deception.

¶ 68 Absent any proper evidence from Chislett's men to the contrary, I accept the evidence of Ms. Stedelbauer and find that Chislett's men did remove the drain insert, and subsequently reinstall an insert on the roof on May 25.

¶ 69 The real issue in this case is what was the cause of the flood on May 23, 1992 - was it the result of a defective installation of the drain insert in question in 1991 by Chislett (probably due to a failure to properly caulk the insert itself, and caulk at the junction of the lower portion of the insert into the drain pipe); or, was it due to other causes - a blocked drain, drain overflow, improper or defective vents, or failure of same to be sealed properly, a drain system malfunction or backup, damage to the drain piping system by the insertion of the insert into the drain pipe by Chislett's forces, or repair work by a plumber retained by the owner or the property manager? These other causes would not be the responsibility of Chislett (apart from any damage caused to the drain system by improper installation of insert).

¶ 70 Chislett maintained that the insert was installed properly, according to the instructions of Trow's representatives (Whaley and Hahn), that his installation had been observed by Trow, and had been accepted and certified by them. He unequivocally stated that black tar sealant had been applied properly to the drain insert, and that the insert was positioned properly into the drain pipe. Chislett conceded that if the insert at photograph 11D was the insert that was removed on May 25, there should have been black tar present on the pipe portion of the insert.

¶ 71 According to my notes, Whaley testified, on the basis of their final report, that the installation



had been certified, and that they had "followed Chislett's work". One would have thought this would have been the case, since this was the second roof on this building and was to be at Chislett's expense.

¶ 72 Whaley's evidence was that in respect of photograph 11D, the used insert did not reveal any indication of the black tar sealant which he agreed should have been evident if in fact such sealant or caulking had been applied at the time of the installation in 1991. Whaley did not state that the used insert was not the one in exhibit 11D (he was not present of course), and as I recall his evidence, I felt he had conceded that the insert that had been removed from the roof was in the picture.

¶ 73 In my view, the preponderance of the evidence is that the industry standard was to either caulk the drain insert, or use a seal for proper installation procedures.

¶ 74 Ms. Stedelbauer also testified that the used insert, seen in exhibit 11(D), which had been removed by Chislett's forces, did not have any tar sealant on it, and there was no tar sealant in the box where the insert would have joined the drain pipe.

¶ 75 I accept the evidence of Ms. Stedelbauer that the used insert in 11(D) came out of the roof on May 25, was removed by Chislett's forces, and that there was no evidence that the insert had been caulked, or caulking was evident at the drain pipe, which is confirmed by the evidence of Whaley that there was no evidence of caulking on the insert in exhibit 11(D).

¶ 76 On this evidence, I find that the drain insert in question had not been properly installed in October/November 1991 by Chislett.

¶ 77 On behalf of Chislett, Robert D. Berardis, a consulting engineer, testified that in his opinion, Chislett had installed the drains properly, and that the reroofing and the drain installation was inspected and accepted by Trow.

¶ 78 It was his belief that the suspect drain was removed and replaced after the first flood (May 2). Macarz stated that the replacement of the insert was done after the second flood of May 23. Chislett did not testify that the insert had been replaced between the two floods. I have grave concern that such a misapprehension of the proper chronology of the correct facts would render his opinion suspect. It was Berardis' belief that the building drain and venting system, to which Chislett connected the roof drain and insert, were misaligned and/or defective due to age and related problems, or possibly that positioning the insert into the drain pipe resulted in misalignment/damage. Unfortunately, Berardis was not on the site, and there is no other direct evidence, that I can recall, that supported such having occurred. He conceded he had no personal knowledge of the condition of drain or drain inserts prior to or afterwards.

¶ 79 Berardis also believed that the cast iron drain pipe and vents (which may include elbows, connections, etcetera) may have been improperly secured which could cause them to be displaced by Chislett installing or pushing the roof drain and insert into the cast iron drain pipe.

¶ 80 However, as I recall it, his testimony was that there was no evidence of any misalignment of the

drain pipe. Whaley had been on the site in 1991 and certified the installation, and Berardis (without being critical of him) was never on the site, which, as I have stated in my respectful view, gives me grave concern about the correctness of some of his opinions.

¶ 81 Lastly, Berardis stated that a plumber had to repair and/or replace a faulty cast iron drain and vent piping, which was not part of Chislett's contract or responsibility. There was some mention of a plumber's report, but as far as I recall, it was never produced (I do not know why it was not, if it was in fact in existence), and in my view, there is no proper evidence as to exactly when any plumbing work was done, or precisely what was done by a plumber. Ms. Stedelbauer said she had no recollection of a plumber coming in to fix a pipe, or had seen any plumber's report.

¶ 82 Macarz had stated that he had talked to Chislett after May 23, and Chislett's opinion was that it was a venting problem, so the property manager brought in a plumber.

¶ 83 Macarz testified that the property manager, after the May 23 flood had a plumber in, and that the vents were tested, and they were found not to be plugged, and this was confirmed by Trow.

¶ 84 In my view, the various theories or opinions put forth by Berardis as to possible causes of the May 23 flooding are just that, and in my view there is no credible evidence to support any of these theories as to being the probable cause of the flood. As I have stated, there is one material factual misapprehension in his report, and the other concern I have is that his evidence appears to have been based partly upon portions of the discovery of Macarz, some of which, according to my notes, were not put in as part of the trial evidence, so I reluctantly do not accept his opinion.

¶ 85 After considering all of the evidence, and submissions of counsel, and having found that Chislett had installed the drain insert in issue, and that it was not installed properly, I find that the most probable cause of the flooding of May 23 was the defectively installed drain insert by Chislett. While it is not conclusive, the fact that after the recaulking and reinstallation of the insert on May 25th there was no further leaking is of some significance and confirmatory of the problem having been rectified.

¶ 86 The plaintiff will therefore have judgment against Chislett for the sum of \$46,000 plus prejudgment interest as previously agreed upon.

¶ 87 With respect to Trow, since it clearly was its contractual obligation to supervise and inspect the installation of the roof (including the installation of the drain inserts) and having found that the drain insert installation was not done properly (and led to the flood and consequent damage), and having certified to the plaintiff that the installation was done in a workmanlike manner, Trow is also in breach of its contractual obligations to the plaintiff.

#### Limitation Defence

¶ 88 On behalf of Trow, the defence was raised that the action was statute barred, as not being brought within twelve months of the date "the service was or ought to have been performed", contrary to section 46(1) of the Professional Engineers Act, S.O. 1990 p. 28.

¶ 89 The action was commenced by a statement of claim issued on July 15, 1993.

¶ 90 Clearly this action was brought more than 12 months after the alleged breach of service under the contract, and the claim against Trow would have to be dismissed, unless the limitation period should be extended if the court is satisfied that there are apparent grounds for the proceedings, and there are reasonable grounds for applying for the extension.

¶ 91 The authorities make it clear that, to extend the limitation period, a two part test must be met. The court must first be satisfied that there are apparent grounds for the proceedings. Secondly, the court must be satisfied that there are apparent grounds for applying for the extension. In determining whether it is just to extend the period, the court must consider the circumstances of the particular case.

¶ 92 I am satisfied that there are apparent grounds for the proceeding to be brought, but the issue is the "apparent grounds for applying for the extension".

¶ 93 One of the various factors to be determined in the extension, as stated by Steele J. in *Scamolla v. Texax* (1990) 72 O.R. (2d) 125 is the respective prejudice to the parties involved if an order for extension is granted or is not granted.

¶ 94 It is clear on the evidence brought out by Mr. Burnes on behalf of Trow, that at no time did the owner, the property managers, Ms. Stedelbauer and Matthews, ever put Trow on notice in May of 1992 about the two incidents, or thereafter. This was the evidence of Macarz. Chislett in effect conceded that Trow was not involved.

¶ 95 Ms. Stedelbauer had stated in her evidence that after the May 23 flooding, she not only notified Chislett of the incident (and not Trow) but also notified "their insurer".

¶ 96 While there was no actual evidence of prejudice put forth on behalf of Trow, in the circumstances of this case, where the allegations are in respect of the work that was done by Chislett (for which they were to supervise and certify) and the flooding occurred some six months later, to not have been given notice of the event, or to be given the opportunity to investigate the situation and make any appropriate tests, particularly when there was such a conflict as to what the actual cause was, and to then have to respond to this claim many months later, in my view amounts clearly to prejudice.

¶ 97 On that basis, this is not an appropriate case for the court to exercise its discretion so as to extend the limitation period, and the action as against Trow will therefore be dismissed.

¶ 98 Counsel may speak to the issue of costs, and any other matter not dealt with by me in my reasons, by conference call. Such can be arranged through my secretary, Michelle Rowntree (327-5297).

¶ 99 I will be out of the country between February 24 and March 9.

¶ 100 I expect to be a supernumerary judge by the end of March, but I will be pleased to make myself available thereafter to deal with the issue of costs, if we are unable to deal with same prior to that time.

¶ 101 I am grateful to counsel for their capable presentation of the evidence and their able submissions.

GIBSON J.

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