

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

ZANIIVI DEVELOPMENTS INC.

Plaintiff

- and - SHAHEEN & PEAKER

LIMITED

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

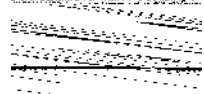
If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs.

Date:



ZOO L

Issued by:

Local Registrar

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Address of court office: 393 University
Avenue 10th Floor
Toronto, ON M5H 2N2

TO: SHAHEEN & PEAKER LIMITED
250 Galaxy Boulevard Etobicoke, Ontario M9W 5R8

CLAIM

The plaintiff claims:

- (a) Damages in the amount of \$1,500,000.00;
- (b) Pre-judgement interest and post-judgement interest pursuant to *the* Courts of Justice Act, as amended; and
- (c) Costs of the action on a solicitor and client scale, including GST.

2. The plaintiff, Zanini Developments Inc. ("Zanuu") is a land developer and a builder of new homes, with its head office located in Toronto, Ontario.

3. The defendant, Shaheea & Peaker Limited ("S&P"), was, at all material times, an environmental consultant carrying on business in Ontario.

4. By an Agreement of Purchase and Sale dated December 22, 1999 (hereinafter the "Agreement"), Fred Piddington agreed to sell and Zanaii agreed to buy the property known municipally as 1 Beaverdale Road, City of Toronto (hereinafter the "Property"), for \$2,500,000. The sale was initially to be completed on February 15, 2000.

Pursuant to the terms of the Agreement, Zanini had until January 15, 2000, to conduct any due diligence on the Property "Yo determine whether or not the property was environmentally suitable for residential development."

6. Zanini retained S&P to provide it with environmental consulting services in connection with its proposed purchase of the Property, and thereafter with its development of the Property. S&P conducted a Phase I Environmental Site Assessment of the Property, the results of which are set out in S&P's report dated December 20, 1999. S&P recommended that "a Phase 2 subsurface investigation comprised of a borehole drilling

program should be undertaken to determine the soil and groundwater quality on the subject property...".

Zanini accepted S&P's recommendation and retained S&P to conduct a Phase II Environmental Site Assessment of the Property, the results of which were communicated to Zanini on or before January 15, 2000 and are set out in S&P's January 19, 2000 report ("Phase II ESA Report"). S&P's Conclusions and Recommendations in its Phase II ESA Report are as follows:

The site has been used occupied by the current occupant, a manufacturer of exhibit displays since 1975. Previous occupants included a manufacturer of plastic products and a metal plater. The results of the investigation are summarized below:

- (i) A total of 13 boreholes were drilled on the site including six (6) boreholes outside the building and seven (7) boreholes inside the building. Five (5) groundwater monitors, three (3) outside the building and two (2) inside the building were installed. Ten (10) soil samples were analyzed and all soil samples met the Table B criteria for residential land uses for the parameters tested.
- (ii) Three groundwater samples were submitted for chemical analysis and the concentration of vinyl chloride in the sample from borehole BH2 was 5.6ug/L which exceeded the Table B criteria of 0.5ug/L. All other parameters analyzed were within the Table B criteria for non-potable groundwater.
- (iii) The groundwater gradient is towards Miniico Creek located adjacent to the eastern margin of the site. The exceedance of vinyl chloride was recorded in the groundwater sample from borehole BH2 located near the southeast corner of the site.
- (iv) The vinyl chloride exceedance indicates that the groundwater has been impacted and will require remediation in order to meet the Table B criteria. Based on the results to-date, the impacts appear to be limited to the groundwater in the southeastern corner of the site.
- (v) Based on the borehole results in the vicinity of the vent pipe and the absence of indications of a tank from the survey by the utility contractor, it

is unlikely that an underground tank exists or was formerly present in the vicinity of the vent pipe.

In summary, the results of the investigation indicated that the groundwater in the vicinity of the southeastern margin of the site has been impacted by concentrations of vinyl chloride that exceed the Table B criteria. The exceedance of vinyl chloride may represent an off-site migration issue. Resampling of the groundwater is recommended as part of any groundwater remediation program. The soil on the site at the locations investigated meets the applicable criteria for residential land use. Thus remediation of the soil is not required.

S&P intended Zanini to rely on S&P's Phase II ESA Report in completing the purchase of the Property, and Zanini did so. By an Amendment to Agreement dated January 17, 2000, the purchase price was reduced to \$2,400,000. The purchase and sale was completed on February 17, 2000.

Thereafter, until approximately July 2000, Mr. Piddington and/or his company leased the Property from Zanini, and the company continued to operate from the Property, as it had since approximately 1975.

10. In November 2000, S&P was retained by Zanini to undertake further testing to delineate the area around borehole BH2 that was impacted with vinyl chloride, in order to collect the necessary data required to prepare a Site Specific Risk Assessment ("SSRA"), which would allow Zanini to proceed with the development of the Property without the need for significant groundwater remediation. As Zanini relied on the recommendation of S&P's Phase II ESA Report that concluded the vinyl chloride contamination was limited to a small position at the Property, a SSRA was the most logical course of action.

It. During the course of this further testing, S&P found soil contaminated with hydrocarbons and extensive contamination of the groundwater with vinyl chloride, at levels in excess of

Ministry of Environment criteria The hydrocarbon contaminated soil was found around borehole BL-12. S&P in its Phase II ESA Report did not identify this hydrocarbon contamination. While S&P in its Phase II ESA Report did identify the limited presence of vinyl chloride in the groundwater, the extent of the contamination found was widespread and far in excess of that reported by S&P.

12. During this same period, as a result of demolition activities being carried out by Zanini's contractor, the presence of two underground storage tanks on the Property were discovered. Both underground storage tanks were filled with fuel oil. S&P in its Phase II ESA Report failed to identify and confirm the presence of these underground storage tanks.
13. Zanui states that S&P was negligent in the preparation of its Phase R ESA Report in failing to identify and advise Zanini of the overwhelming contamination of the Property with vinyl chloride, hydrocarbons and the presence of two underground storage tanks filled with fuel oil. S&P's negligence deprived Zanini of the opportunity of renegotiating the purchase price of the Property, or alternatively withdrawing, without penalty, from the purchase of it, as Zanini was entitled to have done.
14. Zanini relied on S&P's Phase R ESA Report to its detriment.
15. The particulars of S&P's negligence are as follows:
 - (a) S&P failed to identify and disclose to Zanini that the entire south-east portion of the Property was contaminated with hydrocarbons at levels that exceeded the Table B criteria;
 - (b) S&P failed to identify and disclose to Zanini the widespread extent and excessive levels of vinyl chloride contamination throughout the Property that well exceeded

the Table B criteria. Furthermore, its recommendations and conclusions relating to vinyl chloride contamination in its Phase .2 report were inaccurate and misleading.

- (c) S&P failed to assess the source of the vinyl chloride contamination and by doing so failed to determine the entire scope of the vinyl chloride contamination.
- (d) S&P failed to drill adequate boreholes and monitoring wells in areas of the Property where the contamination was found;
- (e) S&P failed to identify and disclose to Zanini the presence of two underground storage tanks filled with fuel oil;
- (f) Suspecting the presence of underground storage tanks by virtue of the presence of a vent, S&P failed to drill adequate boreholes in areas of the Property where the underground storage tanks were found;

S&P failed to, advise Zanini of the existence of hydrocarbon contamination and the overwhelming extent of the vinyl contamination, thereby, not allowing Zanini to make an accurate and informed purchasing decision; and

- (h) S&P in its letter entitled Groundwater Remediation Options dated January 19, 2000 provided Zanuu with a grossly inaccurate remediation cost estimate of \$50,000.00.
- tb. The presence of hydrocarbons and vinyl chloride on the Property at levels in excess of the Ministry of Environment criteria, and the presence of fuel laden underground storage tanks required remediation before the City of Toronto would issue Zaninim the necessary planning approvals and therefore building and site servicing permits. Remediation necessitated excavation, off-site disposal and backfilling of an extensive portion of the Property and at the location of the underground storage tanks. Particulars of these costs will be provided before trial.
- 1"7. In addition to the cost. associated with the remediation of the hydrocarbons, the vinyl chloride and underground storage tanks, the remediation action itself delayed municipal approvals, and therefore the commencement of construction and site servicing. The first permits were delayed by 6 months, and the final permits were delayed by 9 months. This

delay increased Zanini's carrying costs and reduced the profit it will make from the sale of the residential unit, and has raised the possibility that Zanini will miss the current selling cycle. Particulars of these losses will be provided before trial.

18. The plaintiff proposes that this action be tried at Toronto.

May 9, 2002

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Solicitors for the Plaintiff

BETWEEN:

ZANINI DEVELOPMENTS INC.
LIMITED

- and -

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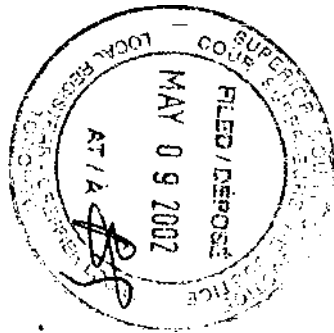
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ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding Commenced at TORONTO

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STATEMENT OF CLAIM

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ONTARIO SUPERIOR COURT OF
JUSTICE

BETWEEN:

ZANINI DEVELOPMENTS INC.

Plaintiff

-and SHAHEEN & PEAKER LIMITED

Defendant

STATEMENT OF DEFENCE

1. The defendant, Shaheen & Peaker Limited (hereinafter referred to as S & P) admits the allegations contained in paragraphs 2, 3, 6 and the first sentence of paragraph 10 of the Statement of Claim.
2. S & P denies the allegations contained in paragraphs 7, 11, 12, 13, 14, 15, 16 and 17 of the Statement of Claim subject to admitting the extracts of the January 19, 2000 report. S & P denies the second sentence of paragraph 10 of the Statement of Claim.
3. S & P denies the first sentence of paragraph 8 of the Statement of Claim and states that the due diligence period had expired when the Phase II ESA report was delivered.
4. S & P has insufficient knowledge to admit or deny the allegations contained in paragraphs 4 and 5, the second and third sentences of paragraph 8 and paragraph 9 of the Statement of Claim.
5. S & P states that it reported to the Plaintiff that ground water in the southeast portion of the site was impacted and remediation of ground water would be

required. S & P also reported that additional work would be required to delineate the extent of exceedances of vinyl chloride.

6. S & P states that on or about December 9, 1999 it was retained by the plaintiff to carry out a Phase I Environmental Site Assessment (ESA) of the property arising out of the inspection condition contained in the Agreement of Purchase and Sale between the plaintiff in trust as purchaser and Frank Piddington as vendor.

7. The Agreement of Purchase and Sale required the vendor to supply to the plaintiff an Affidavit affirming that to the best of its knowledge there were:

- a) no underground storage tanks; and
- b) no contaminants or hazardous substances anywhere throughout the property.

8. S & P states that the vendor did in fact provide a Statutory Declaration in accordance with the requirements of paragraph 7 herein and the plaintiff relied upon the Affidavit of the vendor when closing the within transaction.

9. S & P states that on or about January 13, 2002, it provided to the plaintiff a preliminary report but it was not until January 19, 2000 following expiration of the inspection period that S & P provided its Phase II ESA report. Accordingly, when the S & P Phase II ESA report was delivered the inspection period called for in the Agreement of Purchase and Sale had expired.

10. S & P states that as part of its Phase II ESA report it drilled boreholes at random locations but in none of those locations was there evidence of any underground storage tanks or hydrocarbons found.

11. S & P states that it acted in a careful, competent, skilful and diligent manner with respect to the preparation of the Phase II ESA report.

12. S & P states that it had no involvement during the course of the demolition activities carried out by the plaintiff's contractor nor was their opinion sought during the course of the remediation undertaken by the plaintiff.

13. S & P states that the remediation undertaken by the plaintiff with respect to the removal of all contaminated soil to address the vinyl chloride exceedances in the groundwater was excessive and unnecessary.

14. S & P states that the plaintiff has failed to mitigate its damages.

15. S & P denies that the plaintiff has suffered the damages alleged and puts the plaintiff to the strict proof thereof.

16. S & P submits that the plaintiff's action as against it be dismissed with costs.

September 3, 2002

STIEBER BERLACH GIBBS

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ZANINI DEVELOPMENTS INC.
Defendant
Court File No: 02-CV-229233 CM 2
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UPERIOR COURT OF JUSTICE eding commenced at Toronto
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