

CANADA / JUDGMENT

0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.

2021 BCSC 258

COURT

Supreme Court of British Columbia

DECIDED

5 February 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 258 0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.,

2021 BCSC 258

Date: 20210205

Docket: S1510418

Registry: Vancouver

Between:

0790482 B.C. Ltd.

Plaintiff

And

KBK No. 11 Ventures Ltd., 1100 Georgia Partnership, Peterson Investment (Georgia) Limited Partnership, Abby Adelaide Holdings Inc., LJV Georgia Investments Inc., No. 274 Cathedral Ventures Ltd.

Defendants

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

Counsel for the Plaintiff:

J. K. McEwan, Q.C.

K.A. Maw

Counsel for the Defendants:

H. Silber, Q.C.

D. Lucas

Place and Dates of Hearing:

Vancouver, B.C.

February 3 and 5, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 5, 2021

Introduction

- [1] These reasons concern the sequence in which two applications in this proposed class proceeding concerning alleged defective windows at the Shangri-La Hotel building in Vancouver ("Hotel Building") should be heard. The plaintiff brings this sequencing application seeking an order that the defendants' extant want of prosecution application be heard at the same time as the plaintiff's certification application, and not before. The defendants oppose the order sought and instead assert that their want of prosecution application should proceed first.
- [2] I was appointed to case manage and preside over the trial of the defect actions (defined below) when Mr. Justice Grauer was appointed to the Court of Appeal. I have presided over 11 case management conferences in the defect and insurance warranty insurance actions (also defined below) since February 21, 2020. More recently, when it became clear that the plaintiff planned to pursue certification, this action was included within the ambit of my appointment as case management and trial judge.
- [3] The Hotel Building is composed of three air space parcels: the hotel itself which occupies floors 1-15; the live-work parcel occupied by the Owners, Strata Plan 3165 ("SP 3165") on certain portions of floors 5 and 6 and 16-43; and residential units occupied by the Owners, Strata Plan 3206 ("SP 3206") on floors 44-62.
- [4] The plaintiff in this action is a numbered company who took an assignment of a contract of purchase and sale in August 2009 for strata lot 64 in the residential parcel of the Hotel Building.

- [5] In addition to the present action, there are four other actions extant in this Court - VA S1510431, S117461, S117480, and S1510419 - alleging that the windows throughout the entirety of the Hotel Building are defective and require replacement.
- [6] Two of those four actions involve breach of contract and tort claims brought by SP 3206 and SP 3165 against various defendants, who in turn have added numerous third parties. Those actions were referred to as "the defect actions" in submissions on the sequencing application and I will do so as well. The other two actions concern claims brought against home warranty insurers for coverage (the "insurance warranty actions").
- [7] In all, there are, in addition to the Strata Plan plaintiffs, approximately 42 parties to the four actions (including the developer, project architect, engineers, manufacturers, suppliers, and installers).
- [8] SP 3206 and SP 3165 were, up until December 2020, separately represented. Importantly, those plaintiffs took different approaches to the litigation in certain key respects, including the ambit of individuals each Strata Plan represented.
- [9] For example, as a result of certain amendments to its notice of civil claim, SP 3165 claims to represent all current and former owners of individual units in the Hotel Building (i.e., all pre-sale and re-sale purchasers), grounding its claim on *Donoghue v. Stevenson*, [1932] A.C. 562, and subsequent authorities imposing liability based on a duty of care. SP 3165 alleges that the windows (or pieces or shards from them) in the Hotel Building are at risk of falling out, either inward into strata units or outward onto the street below, and thus pose a risk of injury to persons and property. It has named over 40 defendants in its action, who in turn have issued numerous third party notices. Its claim includes breach of contract, breach of duty, negligence, negligent failure to warn, and negligent misrepresentation.
- [10] In their response pleading filed in the defect action brought by SP 3165 in May 2018, the developer defendants, who are also the defendants in the case at bar, dispute SP 3165's standing to include within the ambit of its claim, on a representative basis, anyone but current owners who are original purchasers. In respect of former owners, the defendants maintain that s. 171 of the Strata Property Act, S.B.C. 1998, c. 43 allows a strata corporation to bring an action with respect to common property (which includes the windows in the Hotel Building) only as the claim affects a current owner's share of the common property. However, one of the grounds on which the defendants deny liability to current owners who are not original purchasers is the absence of any contractual relationship in which any express or implied terms or warranty exists. Thus, the ambit of the group in which SP 3165 asserts standing to advance its claims is one of the many issues to be determined at trial.
- [11] SP 3206 took a different approach to its claim from the outset, framing it more narrowly to include claims on behalf of current owners only, per *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.

- [12] However, counsel for SP 3206 filed this proposed class action at the same time to protect and advance the purported rights and claims of all purchasers of strata units in the Hotel Building, including original owners who have since sold their units in the Strata: see paras. 22-24 of the notice of civil claim.
- [13] The notices of civil claim in the case at bar and the defect action brought by SP 3206 are nearly identical in respect of the cause of action concerning breach of contract and breach of an implied warranty.
- [14] The proposed class action has been in abeyance since it was commenced. The plaintiff advised the defendants they did not need to file a response pleading until further notice. As none was filed, the timelines in the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] to move the case along to a certification hearing were never triggered.
- [15] Although no response pleading has been filed by the defendants in the case at bar, in May 2017, they filed a response to SP 3206's pleading in its defect action, which as I pointed out, advances the same causes of action as in this action.
- [16] This action has remained dormant until September 22, 2020, when the plaintiff advised at a case management conference of its intention to proceed to a certification hearing. Until that time, plaintiff's counsel advised at case management conferences over which I presided of his expectation to receive instructions to discontinue the action but also advised of his expectation to amend pleadings in the action brought by SP 3206 to mirror those issued by SP 3165. The basis of the plaintiff's decision was set out in correspondence to the defendants dated September 22, 2020, *inter alia*:

The Class Action proceeding has remained dormant due to continuing investigations into the alleged deficiencies with the IGUs and most significantly, the proceedings in the two Construction Defect Actions have been proceeding through their respective counsel. To date, the Construction Defects Actions have been the preferable procedure for advancing claims on behalf of the strata unit owners through the two strata corporations (BCS 3206 and BCS 3165). However, in current circumstances, as some of you will be aware, counsel for BCS 3165 has been unable to obtain instructions in the litigation and it is unclear on what basis the plaintiff BCS 3165 strata corporation is proceeding or the source of the current issues. Accordingly, in light of the foregoing and the court's order to advise of any intention to proceed with the Class Action by September 22, 2020, we advise that we will be taking steps to move forward with the class action to ensure that all members of the class who wish to pursue their action are protected.

Further in that regard, given the purposes of the Class Proceedings Act, the ongoing investigations and discovery in the Construction Defect Actions which are in relatively early stages, and to avoid any prejudice that could be caused to the proposed class members, we are instructed to schedule an application for certification of the Class Action.

- [17] The plaintiff then requested the assignment of a judge on September 29, 2020, per BCSC Practice Direction 5.

- [18] I was also advised by counsel for SP 3206 and the plaintiff in the case at bar that in view of the risk of injury to persons and property posed by the windows, the nature of the claim is to pivot to the broader Donoghue approach.
- [19] The defect and insurance warranty actions are to be tried together. They are presently scheduled to proceed to trial on October 20, 2021. The current estimate is that the trial could take up to 100 days. That said, only two parties now maintain that they will be ready to proceed to trial on the scheduled date. Many interlocutory processes in the action brought by SP 3165 were delayed since August 2020 as its counsel was without instructions. This led to a delay in what I was advised were anticipated to be amendments to SP 3165's pleadings and other important interlocutory processes in its lawsuits. SP 3165 recently retained the same counsel acting for SP 3206 and the plaintiff in this action, who formally came on record on February 5, 2021. In the result, the claims of the plaintiffs in all five actions will now be prosecuted by the same counsel with what I am advised will be a timely, coordinated, and like approach.

Sequencing: Legal Authorities

- [20] Judges presiding over putative class actions have discretion to make sequencing and case management orders under ss. 12 and 40 of the CPA, including setting a timetable for the steps to be taken in the action and the conduct of any application: *British Columbia v. Apotex Inc.*, 2020 BCCA 186 at paras. 13-14 [Apotex C.A.]; *British Columbia v. Apotex Inc.*, 2020 BCSC 412 at paras. 16-17 [Apotex S.C.]. Until a class action is certified, the Supreme Court Civil Rules apply in the usual course. That said, a proposed class action is viewed differently than a regular action. In *MacKinnon v. Instalogs Financial Solution Centres (Kelowna) Ltd.*, 2004 BCCA 472, Madam Justice Saunders described it as an "action with ambition":
- [33] It is true that in one sense the action, before certification, is an ordinary action. And s. 40 of the Class Proceedings Act expressly provides that the Rules of Court apply. It does so, however, with the caveat "to the extent those rules are not in conflict with this Act". I think it is also clear that an action commenced under the Class Proceedings Act is, even before the certification application, more than just "any old action": it is an action with ambition. That ambition, by Rule 4(4.1), must be reflected on the face of the pleadings. The question is whether that ambition stated on the face of the pleadings affects the application of Rule 19(24)(a) to the question before this Court.
- [21] The case authorities are clear that absent the defendants demonstrating exceptional circumstances and providing compelling reasons for their want of prosecution application to be heard prior to the certification application, the certification application is the first procedural application to be heard in a proposed class action: *Gill v. Yahoo! Canada Co.*, 2018 BCSC 290 at para. 13; *Forster v. Monsanto Company*, 2020 BCSC 1376 at paras. 32-33. Underlying this general rule is the Supreme Court of Canada's caution to avoid "litigation in installments", particularly where pre-certification applications could result in appeals and

lengthy delays before a certification application is finally heard: Gill at para. 16, citing *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 90.

- [22] Sequencing and scheduling proposed applications are considered on a case by case basis taking into account individual circumstances of each case: *Apotex C.A.* at para. 27; *Strohmaier v. British Columbia (Attorney General)*, 2014 BCSC 2078 at para. 13. A case management judge's discretion in this respect is guided by factors laid down in *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146 ("Cannon Factors").
- [23] The Cannon Factors have been consistently applied in this province: *Apotex S.C.* at paras. 25-27; *Li v. British Columbia*, 2017 BCSC 1616 at paras. 17-18; *Watson v. Bank of America Corporation*, 2012 BCSC 146 at paras. 21-22; *Forster* at paras. 56-57; *Strohmaier* at para. 14; *Gill* at para. 18.
- [24] The Cannon Factors are usefully summarized by Mr. Justice Bowden in *Li*:
- [17] While the certification hearing is usually the first step in a class proceeding, the court may exercise its discretion to hear an application before certification where it goes to the merits of the case, narrows or defines the nature and scope of the case for certification or otherwise moves the litigation forward. There is no absolute rule in this regard and each application must be looked at individually in the context of the particular case before the court. (*Consumers' Association et al. v. Coca Cola Bottling Company et al.*, 2005 BCSC 1042).
- [18] The relevant factors that a court may consider when determining whether to proceed with a motion or an application such as this, before a certification hearing, as described in *Cannon*, are as follows:
1. Will the application dispose of the entire proceeding or substantially narrow the issues to be determined?
 2. What is the likelihood of delays and increased costs associated with the application?
 3. Will the outcome of the motion promote settlement?
 4. Will the outcome of the motion give rise to interlocutory appeals and delays that will affect certification?
 5. The interests of economy and judicial efficiency; and
 6. Generally, will scheduling the application in advance of certification promote the fair and efficient determination of the proceeding?
- [25] In *Apotex S.C.*, Mr. Justice Brundrett noted at para. 24 that where a preliminary application is time-sensitive, would benefit all parties, further the objective of judicial efficiency, or have the potential to dispose of the litigation or more efficiently address the general policy objectives of the class proceedings, it may be brought before the certification motion. However, in that case, he determined that the defendant's Rule 9-5 strike application should wait until after certification because any potential benefits in narrowing the issues,

promoting settlement, or facilitating judicial economy and efficiency were outweighed by the potential for significant delays and further costs that the hearing of the application and associated appeals would bring: at paras. 35-41.

- [26] An example of a case where an application was allowed to be heard prior to the certification application is *Li*. In that case, determining the constitutional validity of the foreign transferee provisions of the Property Transfer Tax Act, R.S.B.C. 1996, c. 378, predominantly a question of pure law, was seen as likely to dispose of the entire proceeding, and could be determined without extensive evidence about individual plaintiffs.

Overview of the Positions of the Parties

- [27] The plaintiff argues that no extraordinary circumstances exist to allow the want of prosecution application to proceed ahead of the certification application. It submits that the certification and want of prosecution applications should be heard at the same time given the intersection of many issues arising on both applications, when a fulsome evidentiary record (as opposed to the current factual vacuum) can be before the court as it considers issues such as inordinate delay, prejudice, and what is just in the circumstances.
- [28] In view of the ongoing litigation in the defect and insurance warranty actions, and to minimize delay, the plaintiff proposes a compressed schedule for the filing of materials to expedite the hearing of both applications. It proposes that the defendants file their response pleading within 21 days; the plaintiff will then file and serve its certification application materials and response to the want of prosecution application 30 days later, to be followed by the defendants' response materials for the certification application and reply to the plaintiff's want of prosecution application materials 30 days following. The applications would then be ready to be heard by late May 2021.
- [29] The plaintiff points out that if I dismiss the proposed class action now, I will effectively dismiss potential claims of class members who are not presently before the court and such an approach would be contrary to the legislative framework and policy of the CPA, relying on *Greater Canadian Gaming Corporation v. British Columbia Lottery Corporation*, 2017 BCSC 574 at para. 30, citing *Endean v. British Columbia*, 2016 SCC 42 at para. 1. The plaintiff also points out that since the limitation period was tolled (under s. 38.1 of the CPA) when this action was commenced, SP 3206 and SP 3165 could convert their actions into proposed class actions under the CPA; or further, relying on *Bosworth v. Jurock*, 2011 BCSC 1583, aff'd 2013 BCCA 4, that individual owners could, since their limitation periods were tolled as a result of the commencement of this action, bring separate class proceedings.
- [30] The plaintiff also objects to the defendants' reliance on transcripts of counsel's submissions at past case management conferences to support their application because it is prohibited: *Parti v. Pokorny*, 2011 BCSC 955 at para. 35. The plaintiff points to the order of Mr. Justice Grauer issued May 7, 2019, which permits the parties to access the transcripts but does not authorize their use in this or other proceedings.

- [31] The defendants submit that they have demonstrated extraordinary circumstances are engaged. They assert that their want of prosecution application does not require a fulsome evidentiary record as inordinate delay causing prejudice is amply demonstrated on the existing record.
- [32] They point to plaintiff counsel's statements to the court at various case management conferences that he was expecting to receive instructions to discontinue the class action and assert that they relied on that advice to their detriment, especially as they are now outside the limitation period in which they can add third parties without leave. They assert they were not aware until the hearing of the instant sequencing application that the plaintiff objected to their use and reliance on transcripts from past case management conferences and had they known, they would have prepared and filed other materials and it is now too late to advance the objection.
- [33] The defendants characterize the plaintiff's changed intention to proceed with the class action as akin to "throwing a grenade at the eleventh hour" and go so far as to say the plaintiff engaged in a deliberate tactical decision to delay proceeding in this action and has failed to comply with certain court orders and directions.
- [34] The defendants also argue that if the hearing of their application is delayed to the hearing of the certification application, then:
- (a) their ability to assert inordinate delay will evaporate since the plaintiff will have taken steps in the proceeding;
 - (b) the trial will not proceed as scheduled; and
 - (c) they will incur costs in preparing for the certification application that they cannot recover.
- [35] In addition, citing *Birrell v. Providence Health Care*, 2006 BCSC 1814 at paras. 14-17, *aff'd* 2009 BCCA 109, and Michael A. Eizenga et al., *Class Actions Law and Practice*, 2nd ed. (Markham, Ont.: LexisNexis, 2008), ch. 6, the defendants submit that SP 3206 and SP 3165 are not automatically entitled to convert their actions into class actions and may be time-barred from doing so.

Determination

- [36] Based upon my analysis of the case authorities, including an analysis of the Cannon Factors, I have determined that the certification and want of prosecution applications must be heard together based upon a fulsome record on the fast-tracked time frame proposed by the plaintiff. My jurisdiction to make such an order, including imposing a deadline for the defendants to file their response pleading, is confirmed in the case authorities: *Apotex S.C.* at paras. 83, 90, 94; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2015 BCSC 74 at paras. 31-34; *Watson* at para. 43; *Forster* at para. 85; *Gill* at para. 47.

- [37] In *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, the Court of Appeal noted the three principal goals of a class action proceeding. One of those goals is to avoid unnecessary duplication in fact finding and legal analysis:
- [13] A class action is a procedural tool that allows an individual class member to prosecute a suit on behalf of other class members. The procedure has three principal goals: behaviour modification, judicial economy and access to justice: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 13, 27. Behaviour modification is facilitated by encouraging actual and potential wrongdoers to take full account of the harm they cause or might cause to the public; judicial economy, by avoiding unnecessary duplication in fact-finding and legal analysis: *Hollick* at para. 15. Access to justice is facilitated by providing class members with a fair, economical process to resolve their claims and, if the claims are established, with a just, effective remedy: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 24.
- [38] Having the applications heard together minimizes delay and costs, promotes judicial economy and efficiency, and allows appeals, should any be brought and allowed to proceed where leave is required, to be heard together.
- [39] The test for certification in s. 4(2) of the CPA requires the court to consider all relevant matters, including the claims advanced in the defect actions:

4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[Emphasis added]

- [40] The test for a want of prosecution application requires the court to consider four factors, as set out in *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 27:
- [27] These cases suggest to me that a chambers judge charged with the hearing of an application for dismissal of an action for want of prosecution is bound to consider the following:

- (1) the length of the delay and whether it was inordinate;
 - (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
 - (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
 - (4) whether, on balance, justice requires dismissal of the action.
- [41] As the defendants point out in their submissions, of all of the factors to be considered on a want of prosecution application, the overriding concern is the fourth factor -- justice must be done: *Callan v. Cooke*, 2020 BCSC 290 at para. 70.
- [42] The interests of judicial economy and efficiency and the requirements of s. 4(2) are promoted if the applications are heard together. Issues for consideration at a certification hearing include whether the pleadings disclose a cause of action and whether the class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. The issues raised by the defendants on their want of prosecution application, including the alleged improper conduct and tactical considerations of the plaintiff as well as the viability of the defect actions to advance claims on behalf of past and current owners of strata units, are bound up in those matters as part of the analysis of whether, on balance, justice requires dismissal of the action: *Rhyolite Resources Inc. v. CanQuest Resource Corp.*, 1999 BCCA 36 at para. 26; *North Shore Law LLP v. Cassidy*, 2020 BCSC 1658 at para. 22; *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.*, 2020 BCCA 120 at para. 33.
- [43] The defendants' assertions that they are prejudiced because they are out of time to add third parties and if they are, that they should be permitted to join them in any event, are live issues that can be considered and determined when both applications are heard. In their submissions on the hearing of the sequencing application, the defendants confirmed that if this action is certified as a class action, they would seek to add only those parties who are currently third parties in the defect actions. Whether the defendants are time-barred in adding them as third parties is one of the factors that may be taken into account in considering whether justice requires the action to be dismissed. In this respect, some case authorities hold that issues concerning proposed third parties should be considered prior to or at the certification application; others take a contrary view, i.e., that no third party has standing to participate in a certification application: *Stanway v. Wyeth Canada Inc.*, 2010 BCSC 1760 at paras. 19-22; *Ari v. Insurance Corporation of British Columbia*, 2020 BCSC 1087 at paras. 33-35; *Dominguez v. Northland Properties Corporation*, 2012 BCSC 2239 at paras. 22-23; *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158, 36 B.C.L.R. (3d) 350 (S.C.), rev'd in part on other grounds [1998] 9 W.W.R. 136, 106 B.C.A.C. 73; *Cooper v. Hobart*

(1999), 68 B.C.L.R. (3d) 293, 35 C.P.C. (4th) 124 (S.C.), rev'd 2000 BCCA 151.

- [44] In *Stanway*, Madam Justice Gropper said, at para. 19, in respect of sequencing and third party claims, "It is clear that the court enjoys a broad discretion to determine the scheduling and order of proceedings in accordance with section 12 of the [CPA]."
- [45] Further, if the defendants are successful on their application, their dispute with all former owners of strata units will not come to an end, in light of the stated intention of SP 3165 and SP 3602 to seek to convert their actions to class proceedings. Hearing the want of prosecution application first does not promote settlement nor a fair and efficient determination of the dispute between all owners, past and present, of strata units in the Hotel Building.
- [46] Having the applications heard together allows the defendants to consider their approach for their application in light of the plaintiff's objection to the use of transcripts from prior case management conferences (and file further materials if they deem it necessary). It also allows the effect of the defendants' application -- to extinguish the substantive rights of putative class members who are not before the court -- to be considered on a fulsome evidentiary record: *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572 at para. 41; *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 77; *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149 at para. 39, leave to appeal ref'd [2019] S.C.C.A. No. 264.
- [47] Nor will having the applications heard together be the reason the trial date may be lost. From recent case management conferences, it is not clear whether the actions will in fact be ready to proceed to trial in October 2021 in spite of assurances from counsel for all of the plaintiffs that in view of his retainer for SP 3165, the actions will be moved along expeditiously. As I advised counsel at the last case management conference on February 4, 2021, arrangements have been made with Vancouver Trial Scheduling to delay the start of the trial for a short time if necessary.
- [48] As part of the certification application, the question of whether this action should be tried at the same time as the other actions and whether the transcripts from all actions may be used interchangeably in order to promote economy and efficiency will be considered. No party in this action or the defect and insurance warranty actions has suggested that the interlocutory processes in the defect and insurance warranty actions will or could be delayed pending the outcome of the applications.
- [49] Likewise, whether either or both SP 3206 and SP 3165 can convert their actions into class actions is an issue that can be considered at the hearing of both applications.
- [50] The fast-track timeline proposed by the plaintiff for the hearing of the applications acknowledges the need for the status of the case at bar to be determined as soon as possible.

- [51] While I agree with the defendants that success on their want of prosecution application would dispose of this action, this factor alone is insufficient to establish extraordinary circumstances. Dismissal of the action is a final order which gives the plaintiff the right to appeal. One result of a successful appeal is that the case will proceed to a certification motion. Thus, to proceed with the hearing of the want of prosecution application first raises the real spectre of duplication of argument, fact-finding, judicial analysis on the applications and in any further appeals that may be brought, as well as lengthy delays in proceeding with the hearing of the certification application. Neither the plaintiff nor the defendants have confirmed whether they will seek to appeal the outcome of the want of prosecution application if it is heard prior to the certification application (nor have they confirmed whether they will waive their entitlement to an order for costs payable forthwith if successful).
- [52] As to the defendants' stated concerns over costs, if they are correct in their submissions about the merits of their want of prosecution application, they will be entitled to costs of their application when the action is dismissed. If they are correct in their submissions regarding impropriety of the plaintiff's conduct in this action, they may attempt to seek special costs and further, the factors considered for costs awards in s. 37 of the CPA may also be engaged, thereby ameliorating their concern over the costs they will incur to resist the certification application.
- [53] The defendants' complaint that they will be prejudiced in their application because the plaintiff will be seen to have taken a step in the proceeding is answered by appellate authority cited in their written submissions. The question of delay is viewed from the start of the litigation as opposed to the last significant step taken in the action: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 38.

Summary of Orders

- [54] The plaintiff's certification application and the defendants' want of prosecution application shall be heard at the same time.
- [55] The defendants shall file their response to the notice of civil claim in this action together with any further materials they wish to file in support of their want of prosecution application by March 4, 2021.
- [56] The plaintiff shall file and serve its certification application materials and response materials to the defendants' want of prosecution application by April 5, 2021.
- [57] The defendants shall file their response materials to the certification application and to the plaintiff's materials concerning the want of prosecution application materials by May 5, 2021.
- [58] The plaintiff shall file any reply materials to the defendants' certification application materials by May 19, 2021.

- [59] The plaintiff shall forthwith advise the defendants and third parties in the defect and insurance and warranty actions of the terms of this order. The defendants and third parties in those actions shall have liberty to participate in the hearing of the certification application. Any of those parties who intends to participate shall advise of their intention to do so at the case management conference scheduled for March 1, 2021 at 9:00 a.m. and shall file their certification application materials by no later than May 28, 2021.
- [60] The plaintiff and the defendants shall file their response materials to any materials filed by the other parties in the defect and insurance warranty actions by June 9, 2021.
- [61] Vancouver Trial Scheduling has confirmed available dates commencing June 14, 2021. The hearing of the certification application and the want of prosecution application shall be scheduled for five days commencing on that date. The hearing will be conducted virtually by Microsoft TEAMS unless counsel wish to attend in person and the courthouse can accommodate the number of counsel.
- [62] Lastly, in my opinion, the appropriate time to determine the parties' competing claims for costs in respect of this sequencing application is at the hearing of the certification and want of prosecution applications.

"Walker J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/02/2021BCSC0258.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/0790482-b-c-ltd-v-kbk-no-11-ventures-ltd-2021>

Prepared on 27 October 2026 · Esheria