

CANADA / JUDGMENT

Boake v. Blair

2019 BCSC 830

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 830 Boake v. Blair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boake v. Blair,

2019 BCSC 830

Date: 20190528

Docket: S111667

Registry: Kelowna

Between:

Thomas Robbie Boake, Carolyn Margaret Witt,

Aviva Insurance Company of Canada and

National Home Warranty Group Inc.

Plaintiffs

And

Ian Curtis Blair dba Braylin Contracting, Exp Services Inc.,

Les Services Exp Inc., The City of Kamloops, ABC Company #1,

ABC Company #2 and ABC Company #3

Defendants

And

Robert Wagner also known as Rob Wagner

Third Party

And

Tracy Wagner, Thomas Robbie Boake, Carolyn Margaret Witt

and Exp Services Inc. Les Services Exp Inc.

Third Parties

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiffs:

S.J. Gares

Counsel for the Defendant Ian Curtis:

L.G. Bergerman

Counsel for the Defendant City of Kamloops:

D. Buchanan

Counsel for the Third Party:

J.M. Hogg, Q.C.

Place and Date of Hearing:

Kelowna, B.C.

December 5, 2018

Place and Date of Judgment:

Kelowna, B.C.

May 28, 2019

- [1] In or around 2009, Robert and Tracy Wagner built a house at 1097 Quail Dr., Kamloops, B.C. (the "House"). Robert Wagner managed the construction and Tracy Wagner was the owner.
- [2] In March 2008 Mr. Wagner made an agreement with Braylin Contracting Ltd. ("BCL") to supply him with a New Home Warranty ("NHW") for the house. Under their agreement with BCL, BCL agreed to obtain the home warranty insurance on Mr. Wagner's behalf as owner-builder. It was a term of the agreement that Mr. Wagner would be fully responsible for the building the House and for any damages, defects and deficiencies that might occur due to the construction. He agreed to indemnify BCL and Mr. Curtis for any loss, damage, costs or expenses it might incur as a result of obtaining the home warranty insurance on his behalf. BCL also agreed to inspect the construction of the home to ensure it met BC Building Code

Standards.

- [3] In July 2008, the plaintiff Aviva was the underwriter of warranty programs for new residential construction in B.C. It was represented by its agent National Home Warranty Group Inc. ("NHWG"). The plaintiffs entered into a builder agreement with BCL incorporating the provisions of the customary home warranty insurance program. The builder agreement included an indemnity clause requiring BCL to indemnify the plaintiff Aviva against any cost or expense it incurred under the NHW.
- [4] The defendant Curtis (identified by the surname Blair in the style of cause as it currently reads) entered into a personal guarantee with the plaintiff to assure Braylin Contracting Ltd.'s responsibilities as builder of the home under the NHW program.
- [5] In 2012 the Tracy Wagner sold the house to Tim Boake and Carolyn Witt, (the "new owners"). In 2014 the new owners learned that the House was experiencing structural defects that could require repair or remediation. They approached the plaintiffs with a view to making a claim under the NHW that had been issued by the plaintiff Aviva Insurance Company of Canada through its agent NHWG at the time of construction.
- [6] In August 2015 the plaintiff Aviva commissioned an engineering report that report confirmed to the plaintiff the extent of the deficiencies in the home construction, most notably an underlying geo-technical support issue and structural failure of the foundation.
- [7] This action was commenced by the plaintiffs, for a declaration of indemnity for costs they incurred, or might incur to remedy or repair structural defects in the house under the NHW, the Homeowner Protection Act and Homeowner Protection Act Regulations. The plaintiff also claims recovery for new owner's damages under their subrogated rights to clause in the NHW.

Relief Sought

- [8] This application concerns the plaintiffs request and to amend their pleadings and to:
 - a. substitute Braylin Contracting Ltd. for Ian Curtis Blair, dba Braylin Contracting;
 - b. substitute the defendant, Ian Curtis Blair with Ian Blair Curtis;
 - c. add Robert Wagner as a defendant; and
 - d. in the alternative, add Braylin Contracting Ltd. and Ian Blair Curtis as defendants .

Background

- [9] When Robert and Tracy Wagner built the House, Mr. Wagner assisted in the general contractor's role in building the House and retained various sub-trades including the defendant EXP Services Inc. to perform geotechnical assessments on the property and the suitability of the property to support the proposed house.

- [10] Ms. Wagner sold the house to the new owners, Mr. Boake and Ms. Witt, in 2012. The new owners detected structural defects in the House and on July 4, 2014, notified the plaintiff that there were cracks in their foundation amongst other problems, likely from deficiencies in the construction of the House. In August 2014 the plaintiff responded noting the policy number, claim number and reference to "builder: Braylin Contracting Ltd.".
- [11] The plaintiffs say notice of these defects was sent to Ian Curtis on March 7, 2016 notifying him that he had failed to fulfil his obligations under the builder agreement with NHW and as imposed by the Home Protection Office and the plaintiff intended to hire contractors to correct the workable defects. This letter references Braylin Contracting Ltd., as the builder. The plaintiff alleged it had incurred expenses for the investigation of the claim and "will incur further expense in repairing the deficiencies and structural defects".
- [12] On June 30, 2016 this action was commenced. In the notice of civil claim ("NOCC") the plaintiff did not sue Braylin Contracting Ltd. or Robert Wagner. Mr. Wagner was named as a third-party in the third party notice filed June 23, 2017 by Ian Curtis Blair dba Braylin Contracting.
- [13] When this litigation started, the plaintiff's solicitor did not identify Braylin Contracting Ltd. as a party to the builder agreement with obligations to indemnify the plaintiff for expenses. The claim was only against Ian Curtis Blair dba Braylin Contracting.
- [14] The notices of civil claim in this proceeding were not served on all parties until May 2017. On June 8, 2017 Mr. Curtis' counsel informed plaintiffs' counsel of the error in the NOCC to the extent that Mr. Curtis had never done business as a sole proprietor and that his limited company had been involved in the House construction.
- [15] Mr. Curtis responded to the plaintiffs' NOCC on June 23, 2017 and filed his third party notice against Mr. Wagner also on June 23, 2017. In October 2017, Mr. Wagner was also named a third party in the proceeding at the behest of EXP Services Inc.
- [16] The plaintiffs incurred expenses and paid funds to address some of the new owners' deficiency claims. The plaintiffs claimed a subrogated right to recover their costs from Mr. Curtis, a right to indemnity under the builder agreement and indemnity under Mr. Curtis' personal guarantee.
- [17] The plaintiff proposes adding Robert Wagner as a defendant and adding or substituting Braylin Contracting Ltd. for Braylin Contracting (the sole proprietorship).
- [18] When this action was started, the plaintiffs mis-described Mr. Curtis (referring to him as Blair) in the NOCC and did not include the proposed defendants in their claims. Counsel was alerted to these errors by counsel for Mr. Curtis and on further investigation learned that Braylin Contracting Ltd. was the proper defendant, but that it had been dissolved December 22, 2014.

- [19] The plaintiff's solicitor had conducted a B.C. company search and determined that Braylin Contracting was a registered proprietorship of a business carried on by Mr. Curtis and thus named that entity only. Due to inadvertence, counsel did not search the company registry to ascertain if there was a limited company by the name Braylin Contracting Ltd. at the time. It does not appear she was alive to the distinction between the proprietorship and limited company with similar names.
- [20] The plaintiffs' solicitor in her affidavit said "the plaintiffs were not aware that Mr. Wagner was involved in the construction of the house" before receiving a copy of the Curtis third-party notice.

The Claims

- [21] The plaintiffs' claims against Braylin Contracting Ltd., Mr. Curtis, and Mr. Wagner arise from the NHW and the assignment of new owner's rights to damages under the subrogation clause in the warranty.
- [22] The plaintiff has two claims against Braylin Contracting Ltd.; one claim alleges breaches of duty of care in the construction of the House and failure to ensure the property was constructed in a good and workmanlike manner, free of defects. This claim is based on the plaintiff's subrogation rights under the Insurance Act, R.S.B.C. 2012, c. 1, s. 36.

Subrogation

36 (1) The insurer, on making a payment or assuming liability under a contract, is subrogated to all rights of recovery of the insured against any person, and may bring an action in the name of the insured to enforce those rights.

- (2) If the net amount recovered after deducting the costs of recovery is not sufficient to provide a complete indemnity for the loss or damage suffered, that amount must be divided between the insurer and the insured in the proportions in which the loss or damage has been borne by them respectively.

- [23] The second claim is based on the terms of the NHW requiring BCL to indemnify the plaintiff Aviva for any costs or expenses incurred by reason of a builder's breach of any obligation to a purchaser of the House. This claim is also addressed in the Insurance Act:

Permitted warranty terms

9 A warranty provider may include any of the following provisions in home warranty insurance:

- (a) if the warranty provider makes a payment or assumes liability for any payment or repair under home warranty insurance,
- (i) the warranty provider is subrogated to all rights of recovery of an owner against any person or persons who may have caused or contributed to the requirement for the payment or repair under home warranty insurance,

(ii) the warranty provider may bring an action at its own expense, in the name of the owner or of the warranty provider, to enforce such rights, and

(iii) the owner must fully support and assist the warranty provider in the pursuit of those rights if the warranty provider pursues such subrogated rights;

[24] The warranty provides that all NHW benefits automatically transfer to new owners of insured property and the plaintiff is subrogated to all rights of recovery of new owners against any persons who may have caused or contributed to the deficiency in the House construction.

[25] The plaintiff seeks an order amending the NOCC to substitute BCL for the proprietorship, Braylin Contracting. The plaintiff contends any claims for deficiencies and any loss, damage and expense suffered by the owners in relation to the deficiencies were a result of breaches of Braylin Contracting Ltd.'s duty to the owners and the plaintiff's are entitled to pursue a subrogated claim for those damages.

[26] The plaintiff's second claim against BCL is for indemnity under its builder agreement with the plaintiff Aviva and collateral to the NHW. In addition to the NHW and the builder's agreement, Mr. Curtis personally guaranteed the obligations of BCL to the plaintiff Aviva. The plaintiffs contend that both Mr. Wagner and BCL are liable for the expenses or payments it incurred under the NHW including the cost of investigations, negotiations, litigation or settlement of the new owners' claims for coverage under the under the NHW.

[27] The plaintiffs also seek to add Mr. Wagner as a defendant based on a claim he failed to use reasonable care and skill in design and construction of the house. They contend his negligence, breach of contract and breach of duty caused or contributed to structural damage that has resulted in the plaintiffs expending money to investigate the alleged deficiencies and make the necessary repairs.

Analysis

[28] The first issue to be resolved is whether the plaintiff's application is a proper application for substitution rather than the correction of a misnomer. This is significant because if either application is to substitute a defendant, then any accrued limitation periods must be addressed. If the application is to correct a misnomer, no question concerning the limitation period arises.

Misnomer

[29] The plaintiff contends that the names used on the NOCC were misnomers that could be readily corrected by substituting the proper names of Braylin Contracting Ltd. for Ian Curtis Blair dba Braylin Contracting and Ian Blair Curtis for Ian Curtis Blair. The plaintiff relies on principles discussed in *Jackson v. Bubela* (1972), 28 D.L.R. (3d) 500 (B.C.C.A.), in which the Court of Appeal said:

Although "misnomer" usually has reference to a wrong naming by mistake, whereas the wrong naming here was deliberate, I think the tests above set out with respect to misnomer generically have full application in this case. I can see no compelling reason why an inadvertent misnaming of a clearly identified person should be any less subject to the test relative to misnomer than an inadvertent one. This is particularly so when the conduct of that person has caused or contributed to the situation. I therefore conclude that the application was one of amendment to correct a misnomer and not for the addition or substitution of a new or different party.

- [30] This case is similar to *Jackson* which dealt with the naming of an unidentified motorist as John Doe "at a time when the identity of that person was not known to the plaintiff". In *Jackson*, the court, referring to *Davies v. Elsby Bros. Ltd.*, [1960] 3 All E.R. 672 (C.A.) described the test differently; it said if the person receiving the document cannot tell whether it refers to the recipient or not, and has to make inquiries on that point, the case is beyond the realm of misnomer. The court in *Davies* at 676 said "one of the factors which operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer".
- [31] A different perspective on the application was articulated in *Sperling v. "Queen of Nanaimo" (The)*, 2014 BCSC 326 at para. 23, the court cited *Broom v. Royal Centre*, 2005 BCSC 1630, describing the difference between misnomer, and how the court should exercise discretion:
- [8] In *Oldridge* the important distinction between misnomer and an application to substitute a correct defendant is discussed at p.340. It is noted that the distinction is often vital because a limitation period may have accrued in favour of a defendant sought to be added, which would not apply in the case of misnomer, where a defendant has been mis-described. An amendment to the style of cause to correct a misnomer of one of the parties will be allowed after the expiration of the limitation period. The correction of the misnomer does not prejudice the other party because he was an identifiable party in the pleadings at the time that the action was commenced. The amendment simply corrects the misnomer by setting out his actual name.
- ...
- [37] It seems to me, on the basis of *Jackson*, that in the case of an advertent misnaming of a party as John Doe, an amendment substituting the correct name should be almost automatic, provided, of course, that John Doe is sufficiently described in the pleading as an identifiable person or corporation, although not by name; for example, the driver of a motor vehicle involved in a particular accident, or a corporation responsible for the cleaning and maintaining of particular premises at the time that a person was injured allegedly as a result of the condition of those premises; provided also that the other party is not substantially prejudiced or injured, a situation which generally speaking is difficult to envisage. This Court has always considered misnomer to be an irregularity only, not a nullity, and has always allowed amendments which could be made without injustice to the other side. See

for example B.C. Furniture Company v. Tugwell (1900), 7 B.C. Law Reports 361 (C.A.).

- [32] Although the plaintiff in this case was deliberate in naming Mr. Curtis "dba Braylin Contracting" it is significant that BCL had been struck off the Company registry and could not be sued at the time. When Mr. Curtis received the NOCC which described him as "dba Braylin Contracting" he quickly denied ever doing business under the named proprietorship that had been formed in 2004 which named him as proprietor.
- [33] When Mr. Curtis filed his response to the civil claim denying that he had ever carried on business as Braylin Contracting a sole proprietorship, he identified Braylin Contracting Ltd. as his company incorporated in B.C. but dissolved in 2009. He said that neither himself nor BCL built the House.
- [34] Plaintiff's counsel contends they inadvertently failed to conduct a historical company search for BCL before they inadvertently named Ian Blair Curtis as "Ian Curtis Blair" dba Braylin Contracting. She did not explain why she drafted the NOCC referring to "Braylin" without searching BCL, performing a historical company search or reviewing the builder's agreement and the correspondence. Any of these steps would have disclosed the error.
- [35] The plaintiff concedes that the lawyer cannot explain how they became aware of the sole proprietorship which was deliberately named as a defendant (based on a registry search) in the proceedings but ignored BCL described in the NHW. This inadvertence must have happened because counsel did not read or understand the documents.
- [36] Although the lawyer said the failure to name BCL as a defendant was "inadvertent", it appears to me the choice to a name the proprietorship and not the limited company may have been deliberate in the face of the search results describing Mr. Curtis's role with the sole proprietorship that induced them to conclude the contract was with the proprietorship and not the limited company. This error could have been avoided by paying attention to the documents setting out the contractual relationship and correspondence between the parties.
- [37] I conclude that at all relevant times plaintiff's counsel should have been aware that the proper defendant regarding claims under the NHW was a limited company because the indemnity agreement clearly described the parties as Aviva, NHWG and BCL. All of the correspondence between the plaintiff, the new owners and Ian Curtis reflect that the builder's agreement was between BCL and the plaintiff.
- [38] Although, consistent with the principle in Davies, there was another entity to whom the description on the NOCC might refer and I accept that Mr. Curtis knew at the time, that BCL was the intended defendant. The test is whether a reasonable person would look at the pleadings and say "of course that is me, but they got my name wrong": see *Strata Plan LMS 1564 v. Odyssey Tower Properties Ltd.*, 2010 BCSC 1134 at paras. 37-38; *MOBE Ltd. v. Loudon*, 2017 BCSC 2668 at paras. 23-24 per Choi J.; *Sperling v. "Queen of Nanaimo" (The)*, 2014 BCSC 326.

- [39] In this case, the party receiving the NOCC immediately said he never did business as Braylin Contracting as a proprietorship; he carried on business in the corporate name, BCL. This response suggests it was obvious to Mr. Curtis that the pleadings were naming himself and/or BCL.
- [40] The facts in this case are similar to a John Doe pleading in a car accident claim when the driver of one vehicle is unknown to the plaintiff. Here, BCL did not exist, having been struck from the Company registry. Although a company search might have revealed the prior existence of the limited company, I am satisfied that Mr. Curtis knew that the proprietorship named in the NOCC was in fact meant to be BCL and that he had allowed BCL to be struck.
- [41] Thus, I am satisfied this application is more appropriately considered as a misnomer change and not a case of substituting a party; the proper and correct approach is to correct the misnomer and I grant the order to name BCL on that basis.
- [42] The next issue is the application to change the name of the NOCC to reflect the actual name Ian Blair Curtis because the original description was simply a misnomer or misdescription.
- [43] In the notice of application, the plaintiff asks for an order to substitute the defendant Ian Curtis Blair with Ian Blair Curtis. Again, in my view, this is not a case of substitution because the plaintiffs are not seeking to substitute a different person as a party; they simply want to correct the name of the person that was misstated. Mr. Curtis concedes that the correction of his name to Ian Blair Curtis instead of Ian Curtis Blair is a proper misnomer application and does not oppose the granting of the order amending the style of cause from "the defendant, Ian Curtis Blair to the defendant, Ian Blair Curtis". I will make that order.

Adding/Substituting a Party

Adding Braylin Contracting Ltd. as a Defendant

- [44] I have addressed the application to correct the misnomers of BCL and Mr. Curtis in the original NOCC. If it were necessary, I would also have ordered BCL to be added as a defendant in the proceedings for the following reasons.
- [45] The plaintiff applied to add Braylin Contracting Ltd. as defendant if it was not substituted for Braylin Contracting, the sole proprietorship. Mr. Curtis opposed the granting of this order for substitution under Rule 6-2(7) in part because he argues the limitation period has expired.
- [46] Similarly, the plaintiffs wanted to add Mr. Curtis as a defendant as guarantor of BCL's obligations under the builder agreement.
- [47] The Rule concerning this relief is Rule 6-2(7):

Adding, removing or substituting parties by order

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
- (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
 - (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
 - (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

- [48] The test governing addition and substitution of parties under Rule 6-2(7)(b)(i) and (ii) is whether a person ought to have been joined as a party or whose participation in the proceedings is necessary to ensure that all matters in the proceeding are effectually adjudicated. Use of the term "ought" in Rule 6-2(7)(b)(i) encompasses all those cases in which joining the person is a necessity and may even be broader, as noted by Madam Justice Smith in *Lawrence Construction Ltd. v. Fong* (2001), 18 C.P.C. (5th) 377 (B.C.S.C.), to include situations in which joining the person may be more than mere convenience but less than a necessity": see *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 at para. 29 [Kitimat].
- [49] A party's participation will be "necessary" within the meaning of Rule 6-2(7)(b)(ii) where it has a direct interest in the precise outcome of the particular action between the certain parties: *Kitimat* at para. 31, citing *Canadian Labour Congress v. Bhindi* (1985), 61 B.C.L.R. 85 at 94. If neither of those conditions are satisfied then there is no discretion to make an order under that subsection: see *Alexis v. Duncan*, 2015 BCCA 135 at para. 15 [Alexis].
- [50] Under Rule 6-2(7)(c) an order adding a party may be made if there is an issue related or connected with the relief claimed or subject matter in the original proceeding and, in the court's opinion, it would be just and convenient to do so. An order made under Rule 6-2(7)(c) is within the discretion of the court because it would be just and convenient in the case: see *Alexis* at para. 17.

- [51] An applicant to add a party must show there is a question or issue between it and the proposed defendant that relates to the relief, remedy or subject of the action. The low threshold is measured on the basis of a possibility that the cause of action is not a frivolous proceeding. There is no weighing of the evidence at this stage; the only question is whether the pleadings or evidence demonstrates an issue between the parties: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 [Neilson] at para. 45.
- [52] Consideration of the "just and convenient" basis for adding a party must be exercised judicially in accord with the evidence and the authorities. The court should consider the extent of any delay, the reasons and explanation for delay, prejudice arising from the delay and the degree of connection between the existing action and the new parties.
- [53] In regard to an application to add a defendant, expiry of limitation periods are relevant but not determinative. There is a three-step process in the analysis of limitation defences engaged in applications to add parties articulated by the Court of Appeal in *Anonson v. North Vancouver (City)*, 2017 BCCA 205 at paras. 13-14 [Anonson], citing Neilson:

13 It is settled law that the addition of a party to an action pursuant to R. 6-2(7) of the SCCR on the basis that it is "just and convenient" to do so generally will engage s. 4(1) of the Limitation Act and eliminate a party's accrued limitation defence: *Lui v. West Granville Manor Ltd.* (1987), 11 B.C.L.R. (2d) 273 (B.C. C.A.) at 295; *Letvad v. Finley*, 2000 BCCA 630 (B.C. C.A.) at para. 17; and *Kerpan v. Higginbotham*, 2003 BCSC 1220 (B.C. S.C.) at paras. 58 -- 64.

14 The approach to determining whether a party having an accrued limitation defence should be added to an action was summarized in *Strata Plan No. VIS3578 v. Canan Investment Group Ltd.*, 2010 BCCA 329 (B.C. C.A.) [Neilson] as follows:

- [47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the Limitation Act is to extinguish such a defence if the proposed defendant is added. In *Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this court in *Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:
1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
 2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.

3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation Act.
- [48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.*, [1987] W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. 1086 (S.C.) [Shaw] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, 83 B.C.L.R. (4th) 138.
- [54] In this case, there are direct issues and questions between the plaintiff and BCL that relate to the subject matter of the proceeding. The test involves a low threshold and can be established on the basis of the NOCC or affidavit evidence from the parties. In this regard, I am satisfied that there is a direct claim available to the plaintiff against BCL under indemnity clause in the NHW and the plaintiff's subrogated claim. Thus, I find the first requirement set out in *Neilson* is met.
- [55] The second question is whether the addition of BCL as a defendant would be just and convenient in deciding the issues between all of the parties in the proceeding. This analysis takes into account the extent of any delay, the reasons for any delay, explanations put forward to account for delay and the degree of prejudice caused by the delay: see *Letvad v. Fenwick*, 2000 BCCA 630 at para. 29.
- [56] It is clear from the pleadings and the evidence that the plaintiff has a contractual claim against BCL under the NHW and has the subrogated right to bring any claims that might have been made by the owners or the new owners. It is neither plain or obvious that claims against BCL cannot succeed.
- [57] On the question of delay, the plaintiffs argued that they had always intended to include BCL as a defendant but named Mr. Curtis as a defendant doing business as Braylin Contracting inadvertently. She did not explain why she named Mr. Curtis dba as Braylin Contracting alone without referring to him in his personal capacity as guarantor under his personal guarantee. Counsel said they named the operating business, Braylin Contracting based on her search performed the day before the NOCC was filed.

- [58] Braylin Contracting Ltd. was dissolved in December 2014 and was not revitalized by the plaintiff until August 9, 2017.
- [59] The plaintiff's claim against Braylin Contracting Ltd. under the NHW and its indemnity claim is on a different footing. The NHW required Braylin Contracting Ltd. to maintain certain conditions during the term of the agreement; a failure to maintain the company was a default by Mr. Curtis and Braylin Contracting Ltd. under paras. 8(g) or (h) because the company was dissolved in 2014.
- [60] Braylin Contracting Ltd. also promised to indemnify and save the plaintiff harmless from any expense it incurred under the agreement to remedy defects in the House. In the case of structural defects, the indemnification is payable if the BCL was in breach of any obligation to a purchaser of the House and the plaintiff had made demand for payment. On April 6, 2018 the plaintiff demanded reimbursement of expenses it had paid in the amount of \$23,840.31.
- [61] The delay in bringing this application is compounded in my view by BCL's breach of several covenants in the insurance contract. It is a default under the agreement if BCL ceases to carry on business and if it materially changes its financial condition. Both of these requirements would have been important to the plaintiff because of the ongoing burden of the NHW that could bind the plaintiff for up to 20 years and might result in a call on BCL's indemnity agreement.
- [62] It should be noted that the parties were permitted to give notice to one another at the address set out in the insuring agreement which in the case of Braylin Contracting Ltd. was 230-1210 Summit Dr., Kamloops, BC. That was the address to which the plaintiff sent notice to Braylin Contracting Ltd. in March 2016; according to Mr. Curtis, this notice was never received. Mr. Curtis included a corporate registry search showing an address for Braylin Contracting Ltd. at 243 Seymour St., Kamloops, BC. When the notice was sent to Braylin Contracting Ltd., it was already dissolved and likely, did not receive the notice because of the company was dissolved and no longer carrying on business.
- [63] I am satisfied Mr. Curtis and Braylin Contracting Ltd. bear some responsibility for the delays and confusion related to the plaintiff's failure to name Braylin Contracting Ltd. in the original and NOCC. Contrary to its obligations under the contract, the company was dissolved and did not maintain an address where it was intended to receive notices.
- [64] As noted, there was also an apparent failure on the plaintiff's lawyer to read and understand the insurance contract but this failure was not the only reason the plaintiff did not act in a more timely way. It is significant that Ian Curtis and Braylin Contracting Ltd. (although the latter is not a third-party) filed a June 23, 2017 third party notice seeking contribution and indemnity from Robert Wagner on the basis of his agreement to indemnify and save harmless Braylin Contracting Ltd. from any claims relating to the construction and his responsibility under the NHW.

- [65] It is clear from Mr. Curtis' third party notice that, at all times he believed Braylin Contracting Ltd. was the party responsible under the NHW with a right to claim contribution and indemnity against Mr. Wagner for any claims made against him or Braylin Contracting Ltd. for work performed on the House.
- [66] Although the NOCC was issued in June 2016 it was not served until 2017 and the error in describing Braylin Contracting in contrast to BCL was not pointed out until counsel was informed on June 8, 2017 of the discrepancy. BCL had been struck from the company registry since 2009 and the plaintiffs took steps to restore the company; restoration happened on August 9, 2017.
- [67] A demand to BCL and Mr. Curtis to pay amounts owing under the NHW was made August 6, 2018.
- [68] Under Rule 6-2(7)(2) a person may be added or substituted as a party if the person "ought to have been joined as a party" or that "person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, "
- [69] In the circumstances, I am satisfied the plaintiff intended to join BCL, as the party that obtained the NHW on Mr. Wagner's behalf. The principal thrust of the plaintiff's claims are against BCL under the NHW and under the personal guarantee given by Mr. Curtis in February 2009. The evidence and the pleadings underscore the importance of BCL to these proceedings.
- [70] Further, Braylin Contracting, the proprietorship, has commenced third-party proceedings against Robert Wagner that focus on the relationship and role BCL had in assisting in the construction of the House. I anticipate that BCL will also advance a third-party claim against Mr. Wagner. Overall, I am satisfied there are questions and issues relating to the relationship between BCL and Mr. Wagner and the subject matter of this proceeding, being the NHW and the owners claims against BCL, NHW and Mr. Wagner.
- [71] In this case, Mr. Curtis' application response focused on the expiry of the limitation period in any claim against BCL and the prejudice BCL will suffer if added as a defendant. He contends that BCL was not given timely notice that would have enabled it to contend it was not given notice of any deficiencies and failing the communication of such notice actual prejudice occurred.
- [72] It also contends the "cause of action crystallized on July 4, 2014 when the homeowners notified them of deficiencies with the home and the application to add BCL as a defendant was not begun until July 16, 2018. BCL contends that there is a presumption of prejudice due to the expiry of the limitation period and the "substantial dilatoriness smacks of voluntary delay I think the factor can weigh large in the scale of justice": see *Bank of Montréal v. Ricketts*, [1990] B.C.J. No. 487 (B.C.C.A.)
- [73] The Limitation Act, S.B.C. 2012, c. 13 [Limitation Act], addresses transitional cases:

Basic limitation period

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

(2) The 2 year limitation period established under subsection (1) of this section does not apply to a court proceeding referred to in section 7.

General discovery rules

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

Transition

30 (1) In this section:

"effective date" means the day on which this section comes into force;

"former Act" means the Limitation Act, R.S.B.C. 1996, c. 266, as that Act read immediately before the effective date;

"former limitation period" means, with respect to a pre-existing claim, a limitation period that applied to the pre-existing claim before the effective date;

"pre-existing claim" means a claim

- (a) that is based on an act or omission that took place before the effective date, and
 - (b) with respect to which no court proceeding has been commenced before the effective date.
- (2) A court proceeding must not be commenced with respect to a pre-existing claim if
- (a) a former limitation period applied to that claim before the effective date, and
 - (b) that former limitation period expired before the effective date.
- (3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.
- (4) Subject to subsection (2), if a pre-existing claim was not discovered before the effective date,

- (a) in the case of a pre-existing claim referred to in section 3 of this Act, that section applies to the pre-existing claim,
- (b) subject to paragraph (a) of this subsection, in the case of a pre-existing claim referred to in section 8 (1) (a) or (b) of the former Act, Part 2 of this Act and section 8 of the former Act apply to the pre-existing claim, or
- (c) in the case of any other pre-existing claim,
 - (i) subject to subparagraph (ii) of this paragraph, this Act applies to the pre-existing claim, and
 - (ii) Part 3 of this Act applies to the pre-existing claim as if the act or omission on which the pre-existing claim is based occurred on the later of
 - (A) the effective date, and
 - (B) the day the act or omission takes place under section 21 (2) of this Act.

[74] There is an issue concerning the commencement of the running of the limitation in this case. BCL contends the limitation began to run from July 4, 2014, the date the owners notified the plaintiff of its concerns regarding structural damage to their house. The plaintiff responded to the owners concerns of, among other things, cracks in the foundation on the right side of the basement exterior. They said that the first crack was a red flag for possible structural failure. On August 12, 2015 the plaintiffs received an engineering report confirming that the foundation had undergone a structural failure.

[75] Section 8 of the Limitation Act stipulates that discovery of a claim occurs on the first day on which a person knew or reasonably ought to have known that loss or damage had occurred and was caused or contributed to by the acts or omissions of the person against whom the claim is or may be made, and that a court proceedings would be appropriate means to seek a remedy.

[76] It is apparent from the plaintiff's letter in 2014 and the engineering report from 2015, that there was sufficient information in the possession of the owners in 2014 that damage had occurred to their House and that court proceeding would be appropriate to seek remedy for any loss.

[77] The owners wrote to Braylin Contracting as early as July 4, 2014 and that letter was also sent to the plaintiff. Presumably, although not set out in the affidavits, the owners were writing to the party they believed constructed the house and provided the original owner with a copy of the NHW issued to BCL. Thus, as early as August 2014 the owners had sufficient information triggering the discovery requirements in s. 8 for them to begin legal proceedings against the builder (Mr. Wagner and his sub trades). There is no way to determine whether the owners were aware of BCL in August 2014. Their letter referred to "Braylin Contracting" but the plaintiff responded to noting the policy number, claim number and reference to "builder: Braylin Contracting Ltd." Thus, I can infer the new owners were writing to the party named in the NHW and were informed that BCL was the actual builder

described on the NHW.

- [78] It is important to note that the plaintiff's potential claims against BCL are in the contract arising from the warranty, indemnity under Mr. Curtis' personal guarantee against BCL in tort. The tort claims arise from the subrogated claim the owners were entitled to make. Any tort claims alone may be subject to a shorter limitation period of two years from discovery by the new owners.
- [79] I am satisfied that the limitation of the owner's claims may have run from sometime in July 2014 and would likely have expired by the end of July 2016.
- [80] Adding parties after a limitation period has expired (plus one year allowed for service under the Rules), leads to a presumption of prejudice to the intended defendant: *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297 at paras. 7-8 [McIntosh].
- [81] For the purposes of considering the impact of a limitation on an application to substitute a party, the time to be considered is one year after the expiry of the limitation date. Thus, by July 2017 the plaintiff's claim under the subrogated tort claim of the owners would have expired resulting in presumed prejudice to Braylin Contracting Ltd.
- [82] Braylin Contracting Ltd. was dissolved in December 2014 and was not revitalized until August 9, 2017.
- [83] Section 346 of the British Columbia Business Corporations Act, S.B.C. 2002, c. 57 [B.C. BCA] provides:

Dissolved companies deemed to continue for litigation purposes

346 (1) Despite the dissolution of a company under this Act,

- (a) a legal proceeding commenced by or against the company before its dissolution may be continued as if the company had not been dissolved, and
- (b) a legal proceeding may be brought against the company within 2 years after its dissolution as if the company had not been dissolved.

- [84] Therefore in this case, the plaintiff would not have been able to commence action against Braylin Contracting Ltd. because more than two years elapsed after dissolution and knowledge of the identity issue had not come to the plaintiff's attention. After that time, the plaintiff was required to restore the company before bringing its application to add Braylin Contracting Ltd. under the restoration and reinstatement provisions contained in Division 11 of the B.C. BCA.
- [85] In my view, limitation periods that expire after a company is dissolved continue to run during any period of dissolution. Thus, a restored company is protected by the Limitation Act notwithstanding that restoration occurs after the limitation has expired. See *602533 Ontario Inc. v. Shell Canada Ltd.* (1998), 37 O.R. (3d) 504 (considering different legislation).

- [86] However, the limitation issue is less significant in the current circumstances because the claim against BCL is made under the NHW and its indemnity clause. The plaintiff's claims for indemnity may be subject to different limitation periods. The NHW required BCL to maintain certain conditions during the term of the agreement; a failure to maintain the company was likely a default by Mr. Curtis and BCL under the paras 8(g) or (h) because the company was dissolved in 2014.
- [87] The NHW also required BCL to indemnify it on demand after the plaintiff had expended to correct deficiencies in the construction. Those monies would not become due until after the remedial work was done and a demand made.
- [88] I conclude the limitation actions for recovery of amounts due under the indemnity expired two years after any payments were made by the plaintiff or became payable. Presumably the debt became due sometime after March 7, 2016 when the plaintiff put Mr. Curtis and BCL on notice that it would have no alternative but to hire a contractor to correct defects and more likely around April 2018 when it demanded indemnification. In this case the limitation period likely remains open until sometime in 2020; it has not expired for the contract claims. There may be a rolling limitation triggered by each payment made by the plaintiff and recovery demanded from BCL.
- [89] I recognize that the limitation period under the new owner's tort claim may have expired but this distinction has not been argued. I accept there may be some prejudice to BCL that must be considered if it is to be added.
- [90] This conundrum was contemplated and an approach adopted in Neilson at para. 47.

If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation Act.

[Emphasis Added.]

- [91] In McIntosh, the Court said there must be close scrutiny of, and balancing of the interests of an existing party and persons sought to be added:
- [10] I would like to add one further point. The question of what is "just and convenient to determine as between the person and that party" within the concluding words of Rule 15(5) (a)(iii) requires a close focus on balancing the interests of the existing parties and the person sought to be added. It is important not to be diverted from the conduct of the parties to the conduct of their lawyers, except to the extent that the conduct of the lawyers may be at the heart of real prejudice to the other side. In this case, the plaintiffs were neither the cause of the failure to add Bavaria in the first instance nor the cause of any of the delays. They should not be prejudiced because of conduct on the part of their lawyer unless that conduct was the

cause of irremediable prejudice to the other side. As I have said, that is not so here.

- [92] These comments are apposite to this case. Here it is clear that the failure to add BCL from the outset was due at least in part to BCL's failure to remain in good standing with the company registry and to keep the plaintiffs apprised of its address for delivery of information.
- [93] When the NOCC was issued June 30, 2016, the limitation faced by the owners and the plaintiffs under the tort claim (and the plaintiff's subrogated interest in the plaintiff's claim) may have expired in March 2016 (or at the latest March 2017). This application was brought July 16, 2018, which is well after either limitation date and plus one year. Thus prejudice to Braylin Contracting Ltd. can be presumed: see McIntosh at paras. 7-8.
- [94] I am satisfied Mr. Curtis and Braylin Contracting Ltd. bear some responsibility for the delays in confusion related to the plaintiff's failure to name Braylin Contracting Ltd. in the original NOCC. Contrary to its obligations under the contract, the company was dissolved and did not maintain an address where it was intended to receive notices.
- [95] Overall, there was a failure on the plaintiff's lawyer to read and understand the insurance contract, but this failure was not the only reason the plaintiff did not act in a more timely way. It is significant that Ian Curtis and Braylin Contracting Ltd. (although the latter is not a third-party) filed a June 23, 2017 third party notice seeking contribution and indemnity from Robert Wagner on the basis of his agreement to indemnify and save harmless Braylin Contracting Ltd. from any claims relating to the construction and his responsibility under the NHW.
- [96] It is clear from Mr. Curtis' third party notice that, at all times he believed Braylin Contracting Ltd. was the party responsible under the NHW with a right to claim contribution and indemnity against Mr. Wagner for any claims made against him or Braylin Contracting Ltd. for work performed on the House.
- [97] If there is a dispute or uncertainty about the running of the limitation period, the court is required to assume the limitation period had expired. Assuming that March 7, 2014, (notice from the new owners) marked the beginning of a limitation period and if the plaintiff was entitled to one additional year to serve the NOCC, when Braylin Contracting Ltd. was restored on August 2017, there was presumed prejudice resulting from the delay. Early in the litigation, Mr. Curtis' response identified Braylin Contracting Ltd. as the party involved in the NHW. Any failure to notify Braylin Contracting Ltd. concerning the potential claims was caused by Braylin Contracting Ltd. in its failure to maintain the address in the NHW and in becoming a dissolved corporation in 2014.
- [98] However, I conclude that the limitation period for indemnity under the NHW has not expired and the addition of Braylin Contracting Ltd. relates to issues closely connected with the claims and subject matter of the proceeding.

- [99] I find Braylin Contracting Ltd. is a party whose participation in the proceedings is necessary to ensure that all matters in the proceedings can be effectually adjudicated on at this time. Pleadings are assumed true and must disclose a cause of action, with amendments liberally allowed: *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16. The issues raised in Mr. Curtis' third party pleadings against Robert Wagner and his reply highlight the allegations that Braylin Contracting Ltd. was responsible for defects or damages or deficiencies associated with the House and breached its contract with Robert Wagner and was liable in of negligence.
- [100] In balancing the interests of the existing parties and the fact the plaintiff is not out of time to commence an action against BCL. I have found that Mr. Curtis was always aware that the claim being made was against BCL and that it suffered no prejudice owing to the possibility of losing a partial limitations defence.
- [101] I find that the delay in seeking this order has been explained and to the extent it was counsel's error the delay does not detract from the justice and convenience of the remedy sought.
- [102] Overall, I have concluded it will be just and convenient to add BCL notwithstanding the impact on limitations defence: see e.g., *Isman v. New Westminster (City)*, 2012 BCSC 774 at para. 15. This is a discretionary decision that must be exercised judicially in accordance with the evidence and the guidelines in other authorities. Although one limitation may have expired, the major focus of the plaintiff's claim under the NHW and breaches of their agreement are most likely within the limitation period.

Adding Robert Wagner as a Defendant

- [103] The plaintiff seeks an order adding Mr. Wagner as a defendant. In June 2017 EXP Services Inc. and Mr. Curtis filed third party notices against Robert Wagner claiming contribution and indemnity pursuant to a contractual agreement between Braylin Contracting Ltd. and Robert Wagner.
- [104] The plaintiff said it did not know of the involvement of Mr. Wagner in the construction of the House until receiving a copy of the third party notice filed June 23, 2017 from counsel for Mr. Curtis. Thus, it contends the limitation period should run from the discovery of this information and prejudice to Mr. Wagner cannot be presumed.
- [105] Mr. Wagner argues that there is no evidence in the material to support allegations that he did anything or perform any duties in the construction of the House. In order to show he is a necessary party to the litigation, there must be sufficient facts in the pleadings demonstrating he had a role in the construction; evidence is not necessary. He contends his role stopped at helping out by hiring different contractors to perform work and obtaining the NHW through Braylin Contracting Ltd. He contends the plaintiff's delay in contacting BCL or Mr. Curtis and informing themselves earlier is an unexplained delay and should not be excused by adding him as a defendant at this stage.

[106] Mr. Wagner referred the court to *Byrd v. Cariboo (Regional District)*, 2016 BCCA 69 at para. 23:

[23] With reference to this Court's judgments in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 1996 CanLII 3033 (BC CA), 19 B.C.L.R. (3d) 282, and *Letvad v. Fenwick*, 2000 BCCA 630 (CanLII), 82 B.C.L.R. (3d) 296, the chambers judge summarized the principles that apply to an application to add a party after the expiration of the limitation period as follows (para. 25):

1. The same principles apply regardless of whether the plaintiff seeks to add a new party or add a new cause of action against an existing party.
2. Where the plaintiff has not exercised due diligence in bringing on its application, it is not an automatic bar to the relief sought. All of the relevant circumstances must be considered.
3. The Court must exercise its discretion judicially, in accordance with the evidence adduced and the guidelines established in the authorities.
4. The guidelines to be applied require a consideration of certain factors: (a) "the extent of the delay"; (b) "the reasons for the delay"; (c) "any explanation put forward to account for the delay"; (d) "the degree of prejudice caused by delay"; and (e) "the extent of the connection, if any, between the existing claims and the proposed new cause of action."
5. What is just and convenient is an overriding question.
6. There is a presumption of prejudice to the proposed defendant if the limitation period has expired.

[107] Mr. Wagner contends that he was involved to the extent only of hiring geotechnical expert advice, the contractor for construction and the sub-trades. He relied on Braylin Contracting Ltd. to obtain a NHW and to inspect the construction of his House to ensure it meant B.C. building code standards. He said he played no part in satisfying requirements for soil bearing capacity or compaction of engineered fill. Mr. Wagner contends the plaintiff was a dilatory in not investigating the circumstances of the construction; the plaintiff should have discovered his involvement in building the House in October 2014. He argued that the limitation period expired in August 2016 and now, more than three years from that date the plaintiff seeks to add him as a defendant. He argues that prejudice to him is presumed.

[108] Mr. Wagner did not detail any prejudice he has suffered as a result of the delay in bringing this application. He said he may be forced to declare bankruptcy if he is required to defend the action. Overall he argues there must be some evidence to connect him to building the House and, failing any evidence being adduced, it would not be just or convenient that he be added as a defendant.

[109] Also, Mr. Wagner argues that the plaintiff has not explained the inordinate delay in making this application or in failing to name him as a defendant in the initial NOCC.

- [110] Further, he argues that prejudice is to be presumed because adding him as a defendant to the proceeding would deprive him of limitations defence. He also contends that, under s. 6-2(7)(b) he is not a person that "ought to have been joined as a party" or a person whose "participation in the proceeding is necessary to ensure that all matters in the proceedings may be effectually adjudicated on". Thus he argues it would be inappropriate to add him because there is no reason that he ought to have been joined.
- [111] Mr. Wagner was never owner of the property and, although he hired sub- trades, did not do any of the physical work himself.
- [112] Further, he argues that the underlying issues are geotechnical soil problems and BCL together with the defendant EXP Services Inc. are the only parties necessary to effectively adjudicate the case. He relies on comments from the Court of Appeal in Kitimat at para. 36.
- [113] If a delay falls within a three year period in which the plaintiff was entitled to bring and serve an action, no explanation of the delay is necessary. The court also accepts that "inadvertence on the part of a lawyer" is an acceptable explanation as an honest error in judgment: see *Ferguson v. Dippenaar*, 2017 BCSC 1290 at para. 41.
- [114] In this case, the plaintiff argues it did not have any knowledge of Mr. Wagner's involvement in the construction process until this information was revealed in the third party notice filed by Mr. Blair on June 23, 2017.
- [115] Mr. Curtis claims contribution and indemnity from Mr. Wagner stemming from a contractual agreement between BCL and himself and in the alternative pursuant to the Negligence Act where he claims contribution to the extent of liability apportioned to Mr. Wagner. Mr. Curtis contends it was an express or implied term of the agreement that Mr. Wagner would be fully responsible for the building of the property and would be responsible for all damages, defects deficiencies and claims related to the construction.
- [116] Importantly, the only question is whether the evidence demonstrates an issue between the parties and the court will not weigh the evidence: Neilson at para. 45.
- [45] Subrule 15(5)(a)(iii) thus establishes two requirements that an applicant must prove to succeed in joining a new defendant. First, it must show that there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy, or subject matter of the proceeding. The threshold is low. It has been expressed as establishing simply that there is a real issue between them that is not frivolous, or that the plaintiff has a possible cause of action against the proposed party. This requirement may be met solely on the basis of proposed amendments to the statement of claim, or the parties may provide affidavit evidence addressing it. If evidence is provided, the court is not to weigh it and assess whether the plaintiff could prove the allegations. It is limited to examining the evidence only to the extent necessary to determine if the required issue between the parties exists: *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578, 33 B.C.L.R. (4th) 69; *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.).

- [117] The plaintiff's evidence is that it had no knowledge of Mr. Wagner before June 2017. Assuming that to be the case, it is reasonable to conclude that the limitation period concerning claims against Mr. Wagner would have begun to run at that time and not before. Mr. Wagner says the plaintiff was dilatory in exploring the claims earlier and that due diligence would have revealed his involvement as early as 2014.
- [118] There is nothing in the evidence or the pleadings suggesting any earlier that Mr. Wagner's role and potential liability in the construction of the House, might have formed the basis or cause of action against him.
- [119] The evidence and pleadings in this case prior to June 2017 did not reflect any involvement of Mr. Wagner. I accept that before the plaintiff received a copy of Mr. Curtis' third party notice, nothing in the circumstances could reasonably have alerted them to his role. On the face of the pleadings up to that time, this action concerned claims against Braylin Contracting, a proprietorship, and other sub-trades and the City of Kamloops without any apparent reference to allegations in Mr. Blair's third party notice that Mr. Wagner was responsible for filling the House and that he would indemnify BCL for loss damage or expense associated with the building.
- [120] The proposed amended NOCC includes a wide range of allegations against Mr. Wagner including failure to take care in selecting design professionals, project manager, and a general contractor and sub-trades.
- [121] The evidence does not support a conclusion that the plaintiff was dilatory in failing to identify Mr. Wagner as a potential cause or contributor to the structural damage to the new owner's house. On the face of the evidence, there was no reason to anticipate that Mr. Wagner had any role in the house construction or that he was in any way involved in the structural work.
- [122] Thus, I conclude the limitation period did not run until after June 2017 and the plaintiff's application in this matter is not outside of the limitation period plus one year. Accordingly, prejudice on this application cannot be presumed.
- [123] As noted, Mr. Wagner does not give any evidence concerning actual prejudice he has suffered in the time between March 2014 and the making of this application.
- [124] I also accept that, if Mr. Wagner's identity had been known to the plaintiff, he was a person who ought to be joined as a party to the proceeding from the outset.
- [125] His participation in the proceeding will be necessary to ensure that all matters will be effectually adjudicated on. He is already a third-party and issues between he and the defendants will be canvassed in the trial.

- [126] This is not a case where Mr. Wagner was overlooked as a defendant or was not named as a defendant due to inadvertence. The sole basis not including him in the original NOCC and the delay in this application since the loss came to the attention of the plaintiff, was the absence of information identifying him as a person who may have had a role in the construction.
- [127] The evidentiary requirement on this application can be satisfied solely on the basis of the proposed NOCC amendment, attached as a Schedule to the plaintiffs' notice of application. I am satisfied that a question or issue between the plaintiff and the proposed defendant relating to the subject matter of the proceeding has been demonstrated on the proposed pleading. While this is a low threshold, it must not be a frivolous claim and on the basis of the pleadings alone I conclude it is possible the plaintiff may succeed in an action against Mr. Wagner: see Neilson at para 45.
- [128] In the circumstances, there is a substantial connection between the proposed claim against Mr. Wagner and the other issues extent in this action. It appears there will be a factual dispute between BCL and Mr. Wagner concerning their respective roles in the construction. The court at para. 29 in Kitimat suggests that the use of the word "ought" in Rule 6-2(7)(b)(i) can be more expensive than simple necessity and may include joining a person that "may be more than mere convenience but less than a necessity."
- [129] Overall, I find it is just and convenient, to add Mr. Wagner as a defendant to the action. I accept his concerns regarding his financial ability to withstand the costs of participating in the litigation but, those concerns do not rise to a level that should prevent his addition to the action.
- [130] I find that because of the late discovery of Mr. Wagner's role in constructing the house in June 2017 that the limitation period for claims against him would not have expired. Taking into account that there is no presumed prejudice in adding Mr. Wagner and no other actual prejudice in the delay in involving him in the proceeding, it is just and convenient that the plaintiff be entitled to add him as a defendant.
- [131] The applicant may amend its pleadings in accordance with Rule 6-2(8).
- [132] In conclusion, the orders are granted as explained above.
- [133] Cost of the application will be to the plaintiffs unless any defendant or proposed defendant makes further submission on this point within 30 days.

"Armstrong J."

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