

CANADA / JUDGMENT

Gingrich v. 0775606 B.C. Ltd.

2021 BCSC 2306

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2306 Gingrich v. 0775606 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gingrich v. 0775606 B.C. Ltd.,

2021 BCSC 2306

Date: 20211126

Docket: S213308

Registry: Vancouver

Between:

David Gingrich, Barbara Gingrich, Dave Kustra, Jeffrey Paterson,

Marie Paterson, Peter Cishecki, and Royal & Sun Alliance Insurance Company of Canada as
represented by their agent WBI Home Warranty Ltd.

Plaintiffs

And

0775606 B.C. Ltd., TMC Development Ltd., Joso Lepur,

Debbie Woods and ABC Company #1

Defendants

Before: Master Elwood

Reasons for Judgment

Counsel for the Plaintiffs:

S. Shuchat

Counsel for the Defendant Debbie Woods:

S.K. Patro

Counsel for the proposed Defendant Spratt Emanuel Engineering Ltd.

C. Seo

Place and Date of Hearing:

Vancouver, B.C.

October 26, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 26, 2021

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I. INTRODUCTION

- [1] The plaintiffs apply to add two additional plaintiffs and a defendant, and to amend the notice of civil claim accordingly.
- [2] The action is a claim in damages for design and construction deficiencies arising from building envelope and water penetration issues with five neighbouring, newly-built homes on Victoria Avenue in White Rock (the "Victoria Avenue Properties").
- [3] The existing plaintiffs are the owners of four of the Victoria Avenue Properties and the new home warranty provider and insurer for the development. The existing defendants are the builder, developer, construction manager, general contractor, a subtrade, and two principals of the developer.

- [4] The proposed plaintiffs, Edward Sang and Rhonda Sang, are the owners of the fifth Victoria Avenue Property. Their addition is unopposed.
- [5] The proposed defendant is Spratt Emanuel Engineering Ltd. ("Spratt"). Spratt is a building envelope consultant. Spratt provided professional engineering services on the project. The plaintiffs seek to advance a claim against Spratt for negligence and breach of contract. The only defendant to have filed a response to civil claim takes no position on Spratt's addition. Spratt opposes the application.
- [6] For the reasons that follow, I have concluded that Spratt may be added as a defendant.

II. BACKGROUND

- [7] The Victoria Avenue Properties were designed and constructed by 0775606 B.C. Ltd. (the "Builder") and TMC Development Inc. (the "Developer") between 2013 and 2015.
- [8] The Builder and Developer entered into a builder agreement and indemnity agreement with WBI Home Warranty Ltd. ("WBI") on behalf of Royal & Sun Insurance Company of Canada, pursuant to which WBI agreed to provide new home warranty coverage for the Victoria Avenue Properties.
- [9] The completed homes were purchased by: David and Barbara Gingrich, Dave Kustra, Jeffrey and Marie Paterson, Peter Cishecki, and Edmond and Rhonda Sang (collectively, the "Homeowners").
- [10] The Homeowners made claims under their new home warranties for various construction deficiencies, including water ingress issues:
- a) Mr. Kustra notified WBI of a claim on August 3, 2017;
 - b) The Patersons notified WBI of a claim on January 19, 2018;
 - c) The Gingrichs notified WBI of a claim on October 5, 2018;
 - d) Mr. Cishecki notified WBI of a claim on June 26, 2020; and
 - e) The Sangs notified WBI of a claim on July 1, 2021 (after the notice of civil claim was filed).
- [11] WBI put the Builder on notice of the claims. The Builder did not remedy the deficiencies to the satisfaction of the Homeowners. WBI engaged various parties to further investigate and repair the defects.
- [12] On November 13, 2020, the Builder commenced an action against Spratt for damages and indemnity relating to deficiencies with the Gingrich and Paterson properties.
- [13] The plaintiffs commenced this action on March 18, 2021, for deficiencies with respect to the Gingrich, Paterson, Kustra and Cishecki properties. They did not name Spratt as a defendant.

[14] The action is in part a subrogated claim in the names of the Homeowners, and in part claims that the Builder and Developer assigned to WBI pursuant to the builder agreement.

[15] Debbie Woods has filed a response to civil claim. The Builder, Developer and Joso Lepur have not yet responded. Mr. Lepur passed away on August 6, 2021. He was the sole director of the Builder and Developer.

III. ANALYSIS

A. Governing Law, Adding Parties

[16] The plaintiffs rely on Rule 6-2(7) of the Supreme Court Civil Rules generally, and subrule (c) in particular. Rule 6-2(7)(c) provides:

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) [which are not relevant here],

...

(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.

[17] There are two requirements that an applicant must meet to obtain an order joining a new defendant under Rule 6-2(7)(c): there must be a question or issue relating to or connected with any relief or subject matter of the proceeding; and, it must be just and convenient to determine that question or issue in the existing proceeding. *Smithe Residences Ltd. v. Boffo Investment Corp.*, 2019 BCSC 2185, at paras. 73-75.

[18] The Court of Appeal described these two requirements in more detail in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, referring to the predecessor to Rule 6-2(7)(c), at paras. 45, 46:

[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.).

- [46] If this first requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in this proceeding. This is a discretionary decision, but that discretion is fettered to the extent that it must be exercised judicially, and in accord with the evidence adduced and the guidelines established in the authorities: *Letvad v. Fenwick*, 2000 BCCA 630, 82 B.C.L.R. (3d) 296. At para. 29 of *Letvad*, Esson J.A., writing for the Court, adopted the list of factors to be considered from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161, 19 B.C.L.R. (3d) 282, a decision that dealt with adding further claims under R. 24. These include the extent of the delay, the reasons and any explanation for the delay, any prejudice arising from the delay, and the degree of connection between the existing action and the new parties and claims contemplated. The overriding question is what is just and convenient in the circumstances of the particular case.
- [19] In this case, Spratt concedes the proposed claims raise issues or questions that relate to the subject matter of the existing action. Its opposition to being added as a defendant is based on the second requirement. Spratt argues the plaintiffs have failed to establish that it would be just and convenient for the proposed claims to be tried in this action. In support of that position, Spratt submits that limitation periods for the claims have expired, the plaintiffs have failed to adequately explain their delay, and the delay will cause Spratt prejudice.

B. Have Limitation Periods for Claims Against Spratt Expired?

- [20] The basic limitation in s. 6(1) of the Limitation Act, S.B.C. 2012, c. 13, is that a court proceeding in respect of a claim must not be commenced more than two years after the claim was discovered.
- [21] The plaintiffs argue that the court should take the dates on which the Homeowners notified WBI of claims under the new home warranties as the dates on which they discovered those claims for limitations purposes. If the WBI claims dates are accepted for limitations purposes, the basic limitation period expired, would have expired, or will expire:
- a) with respect to the Kustra property on August 3, 2019;
 - b) with respect to the Paterson property on January 19, 2020;
 - c) with respect to the Gingrich property on October 5, 2021 (extended one year by the suspension of limitation periods due to the outbreak of COVID-19);
 - d) with respect to the Cishecki property on June 26, 2022; and
 - e) with respect to the Sang property on July 1, 2023.

- [22] Spratt argues that the plaintiffs discovered claims against Spratt relating to water penetration issues with the Paterson and Gingrich properties earlier than the dates on which those Homeowners submitted claims to WBI.
- [23] For one thing, Spratt says, its involvement in the project was known well prior to the discovery dates asserted by the plaintiffs. Spratt engineers performed numerous site visits from 2013 to 2016, and delivered more than 50 building envelope field review reports to the parties involved in the construction, including WBI.
- [24] Mark Emanuel, a professional engineer and the principal of Spratt, deposes that water penetration issues with respect to the Gingrich property were discovered as early as July 2016. Spratt was retained by WBI to perform a leak investigation on the Gingrich property. On October 3, 2016, Spratt confirmed a leak in the area of a waterfall feature.
- [25] With respect to the Paterson property, Mr. Emanuel deposes that water penetration issues were discovered as early as late 2016. He does not provide particulars.
- [26] Spratt also points to evidence that WBI communicated with Spratt about its involvement in the project before the notice of civil claim was filed. On December 5, 2018, for example, WBI reached out to a Spratt engineer to discuss a water ingress issue with the Gingrich home. On September 3, 2019, WBI sought professional input from Spratt on a roofing report that raised water ingress issues relating to the Gingrich and Paterson homes.
- [27] The plaintiffs respond that knowledge of Spratt's involvement does not equate to discovery of a claim against Spratt. Further, they argue, the issues in 2016 were localized leaks, rather than the systemic building envelope issues that are the subject matter of this action.
- [28] Section 8 of the Limitation Act provides that a claim is discovered by a person on the first day 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.
- [29] It may not be necessary for the Homeowners to have known about the systemic issues pleaded in the notice of civil claim for the claims to have been discovered. In *Janus v. The Central Park Citizen Society*, 2019 BCCA 173, the Court of Appeal confirmed that a potential plaintiff need not be fully aware of the extent of the damage for a limitation period to begin running. The Court cited the following statement by Mr. Justice Major in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549:

- [18] [A]t common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), at p. 772 per Lord Reid, and *July v. Neal* (1986), 1986 CanLII 149 (ON CA), 57 O.R. (2d) 129 (C.A.)), the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period. (Emphasis added)
- [30] Even assuming knowledge in 2016 of some relevant damage, however, it is not possible on the evidence on this application to fully determine when the plaintiffs discovered their claims against Spratt. What a reasonable people will be taken to know about their claims is highly fact-driven. There is insufficient evidence on this application to decide the discoverability issue, one way or the other.
- [31] If one accepts the WBI claims dates as the dates of discovery, the limitation periods for separate actions against Spratt with respect to the Kustra and Paterson properties, but not the Gingrich property, expired before the original date on which this application was set to be heard, October 4, 2021.
- [32] If one accepts the earlier discovery dates asserted by Spratt, the limitation periods expired with respect to all three claims, Kustra, Paterson and Gingrich. At the very least, therefore, Spratt would have a potential limitation defence against these three claims if they were now brought as separate actions.
- [33] Spratt seems to acknowledge that the claims with respect to the Cishecki and Sang properties are within the limitation period for separate actions.
- [34] Section 22 of the Limitation Act, provides the court with a discretion to permit "related claims" to be brought in an existing action following the expiry of a limitation period for a separate action. Section 22 provides in relevant part that:

Counterclaim or other claim or proceeding

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

...

- (d) new parties may be added or substituted as plaintiffs or defendants.

- [35] The effect of s. 22(1)(d) of the Limitation Act is to extinguish any limitation defence the party who is joined as a defendant could have raised in a separate action: *Kerpan v Higginbotham*, 2003 BCSC 1220, at paras. 58-60.
- [36] The existence of a limitation defence that will or may be lost is a relevant, but not determinative, factor in deciding whether it would be just and convenient to decide the issue between the plaintiff and the proposed defendant in the existing action. The approach to the interplay between a potential limitation defence and the proposed joinder of a defendant was explained by the Court of Appeal in *John A. Neilson Architects*, at para. 47:
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.
- [37] In my view, this case falls within the first category above with respect to the *Cishecki* and *Sang* properties, and the third category with respect to the *Kustra*, *Paterson* and *Gingrich* properties.
- [38] I must proceed, therefore, by assuming that *Spratt* will lose the limitation defences it could plead in separate actions with respect to the *Kustra*, *Paterson* and *Gingrich* properties.
- [39] However, I see no reason why *Spratt* could not plead limitation defences in this action based on the filing date of the original notice of civil claim on March 18, 2021. In my view, 22(1)(d) of the Limitation Act does not extinguish any potential limitation defence in this action, only limitation defences that could be raised in separate actions.
- [40] In other words, as a defendant in this action, *Spratt* may raise a limitation defence based on its assertion that claims relating to the *Paterson* and *Gingrich* properties were discovered by late 2016 (and August 3, 2017 with respect to the *Kustra* property), because the existing notice of civil claim was filed more than two years after those asserted discovery dates.

- [41] However, I must assume Spratt will lose a limitation defence based on the later discovery date asserted by the plaintiffs for the Paterson and Gingrich properties (because, if the plaintiffs are correct with respect to discoverability, the notice of civil claim was filed in time for those claims).
- [42] In short, Spratt's limitation position with respect to the Paterson and Gingrich properties would be compromised, but not extinguished, if it is added as a defendant. Its limitation position with respect to the Kustra, Cishecki, and Sang properties would not be any different than it would be in separate actions.

C. Is the Plaintiffs' Explanation for the Delay Reasonable?

- [43] In *Amezcuca v. Taylor*, 2010 BCCA 128 [Amezcuca], the Court of Appeal adopted the factors in *Teal Cedar Products (1997) v. Dale Intermediaries Ltd. (1996)*, 19 B.C.L.R. (3d) 282 (C.A.) [Teal] from an application to amend pleadings following the expiry of a limitation period. At para. 36 of *Amezcuca*, the Court cited the following passage from *Letvad v. Fenwick*, 2000 BCCA 630:
- [29] My understanding of the phrase "completely unfettered" in this context is that the discretion is not fettered by the relevant legislation, i.e., the Rule and the Limitation Act. It is, however, fettered to the extent that, as was held in *Teal*, it must be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities. It was held in *Teal* that the guidelines to which the chambers judge is required to have regard include these:
- the extent of the delay;
 - the reasons for the delay;
 - any explanation put forward to account for the delay;
 - the degree of prejudice caused by delay; and
 - the extent of the connection, if any, between the existing claims and the proposed new cause of action.

McEachern C.J.B.C. in his concurring reasons said at p. 300:

- [74] Applying the same principles regardless of whether the application is to add new defendants, as in *Ricketts* or new causes of action, as in *Med Finance*, I believe the most important considerations, not necessarily in the following order, are the length of the delay, prejudice to the respondents, and the overriding question of what is just and convenient.
- [44] Applying the *Teal* factors to an application to add a defendant following the expiry of a limitation period, the Court held that the "proper period of delay to consider" is the elapsed time following the expiry of the limitation period plus one year for service of the writ (now the notice of civil claim): *Amezcuca*, at para. 36.

- [45] Until the time for service of a filed notice of civil claim expires, parties connected to the claim can still expect to be sued and should govern themselves accordingly. Until that time, no presumed or actual prejudice to the proposed defendant from the passage of time can be attributed to the plaintiff's delay. This was explained by Lambert J.A. in *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297, at para. 8:
- [8] The prejudice that must be presumed should surely be restricted to situations where the period which has passed since the cause of action arose is the length of the limitation period plus one year for service of the Writ. Because, within that time, a Writ could have been filed within the limitation period and served after the limitation period expired for up to a year, without any prejudice to the defendant. And the same is true, as pointed out by Mr. Justice Macdonald, with respect to actual prejudice by destruction of evidence or failure of recollection. If these occur within the limitation period plus the year allowed for service of the Writ, then any prejudice to the defendant sought to be added is not caused by the plaintiff. The defendant should not have conducted himself, herself, or itself in such a way as to pass the detriment caused by the passage of time on to the plaintiff.
- [46] Put another way, where prejudice is said to arise from the plaintiff's failure to name a proposed defendant sooner, the delay only becomes presumptively prejudicial and necessary for the plaintiff to explain following the expiry of a limitation period plus one year.
- [47] If one accepts the WBI claims dates as the dates of discovery, presumed prejudice arises with respect to the Kustra and Paterson properties, but not the Gingrich property. Applying the "two years plus one" rule, the relevant delay is from August 2020 with respect to the Kustra property, and from January 2021 with respect to the Paterson property.
- [48] On the other hand, if one accepts Spratt's position - and the claims related to the Paterson and Gingrich properties were discovered in 2016 - presumed prejudice arises with respect to all three properties, and the relevant delay with respect to the Paterson and Gingrich properties is from mid and late 2019, respectively.
- [49] However, as stated, Spratt can still raise a limitation defence in this action based on a 2016 discovery date. This is not to say there is no potential prejudice from the plaintiffs' delay in naming Spratt as a defendant, only that the presumed prejudice is mitigated by Spratt's ability to raise the limitation defence.
- [50] The plaintiffs' explanation for their delay is that, from 2018 to 2021, the parties were investigating and attempting to remedy the water ingress issues through the new home warranty process. Throughout this period, the plaintiffs say, the Homeowners were involved in protracted disputes with other parties and dealing with the investigations and repairs to their homes.

- [51] Spratt argues that the plaintiffs' explanation is inadequate because they were aware at all times of Spratt's role as the building envelope engineers, and did not require further investigation to identify Spratt as a potential defendant.
- [52] In my view, it was reasonable for the Homeowners and WBI to first seek redress through the new home warranty process.
- [53] However, the plaintiffs' failure to name Spratt as a defendant in the original notice of civil claim filed on March 18, 2021, is unexplained. The delay from March 18 to October 4, 2021, was unreasonable in my view.

D. Did the Plaintiffs' Delay Cause Prejudice to Spratt?

- [54] The plaintiffs argue there will be no actual prejudice to Spratt if it is added as a defendant in this action. The action is in its preliminary stages. Pleadings have not closed. The parties have not exchanged lists of documents or conducted examinations for discovery. There is no trial date.
- [55] Further, the plaintiffs argue, Spratt is already a defendant in the related action commenced by the Builder in November 2020. The allegations in the related action are similar to the proposed allegations against Spratt in this action. As I understand it, WBI could require the Builder to assign its claims in the related action pursuant to the builder's agreement. Thus, the plaintiffs argue, Spratt is in no worse position now than it was in November 2020.
- [56] Spratt argues that it will suffer actual prejudice in this action because Mr. Lepur died on August 6, 2021. As stated, Mr. Lepur was the director of the Builder and Developer. Spratt argues that it will be prejudiced because it will no longer be able to obtain Mr. Lepur's first-hand evidence to mount a full defence in this action.
- [57] Mr. Lepur died after the normal "two years plus one" timeframe for claims with respect to the Kustra and Paterson properties, and possibly, the Gingrich property. However, I am not persuaded that Spratt is prejudiced by his passing.
- [58] I am unable to accept Spratt's argument that, but for the plaintiffs' delay, it would have obtained and preserved Mr. Lepur's evidence in the normal course of discovery. The plaintiffs ought to have named Spratt as a defendant when this action was commenced in March 2021; however, the action was simply not at a stage where examinations for discovery were possible prior to Mr. Lepur's death. In this regard, Spratt is in no worse position than any of the existing parties, including the plaintiffs. None of the parties were able to obtain Mr. Lepur's evidence prior to his untimely death.

[59] The likelihood is higher Mr. Lapur's evidence could have been obtained before he died if one accepts Spratt's position that claims related to the Paterson and Gingrich properties were discovered in 2016 and the plaintiffs ought to have filed and served claims in those actions by late 2019. However, the actual prejudice is still speculative in my view. Spratt would still have faced additional claims by or on behalf of the other Homeowners, with no opportunity to discover Mr. Lapur on those claims prior to his death.

E. Is it Just and Convenient for the Claims to be Tried in This Action?

[60] In my view, it is just and convenient for the plaintiffs' claims against Spratt to be tried in this action.

[61] As stated, Spratt's limitation defences based on a 2016 discovery date for the Paterson and Gingrich properties, and a 2017 discovery date for the Kustra property, will not be extinguished.

[62] The plaintiffs' unexplained delay is relatively short; any prejudice to Spratt from that delay is speculative.

[63] There are no grounds on which to refuse an order to add Spratt as a defendant with respect to the claims relating to the Cishecki or Sang properties. Those claims were commenced within the limitation period for separate actions.

[64] Although the various claims have some factual differences, the issues are closely connected, both between the various Homeowners and Spratt, and between Spratt and the other parties in this action.

[65] It would not be efficient or cost effective to require separate actions for the Paterson, Gingrich and Kustra properties. Separate actions would have overlapping issues of fact and law. Separate actions would cause duplication of evidence, legal fees and court time, and could potentially result in inconsistent results.

[66] In short, it would be just and convenient for the court to determine all the issues between all of the Homeowners and Spratt in a single action.

IV. CONCLUSION

[67] The application to add the Sangs as plaintiffs is allowed without costs.

[68] The application to add Spratt as a defendant and amend the notice of civil claim is allowed with costs to the plaintiffs, payable by Spratt in the cause.

"Master Elwood"

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