
CANADA / JUDGMENT

Hilton Haider et al. v. HMTQ et al.

2007 BCSC 218

COURT

Supreme Court of British Columbia

DECIDED

16 February 2007

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2007 BCSC 218 Hilton Haider et al v. HMTQ et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hilton Haider et al. v. HMTQ et al.,

2007 BCSC 218

Date: 20070216

Docket: S055012

Registry: Vancouver

Between:

Hilton Haider, Lillian Haider, Blake MacLeod, Kerry

MacLeod, Noah MacLeod by his guardian ad

litem Kerry MacLeod, Tim Chad, Kathleen Chad,

Madison Chad by her guardian ad litem Kathleen

Chad. Mary Chad by her guardian ad litem

Kathleen Chad

Plaintiffs

And

Her Majesty The Queen in Right of Canada,

British Columbia Building Corporation,

Lennox Industries (Canada) Ltd. - Les Industries

Lennox (Canada) Ltee., Lennox Industries"Inc., and

Bryant Heating & Cooling Co. Ltd..

Defendants

And

Coast Air Conditioning Ltd., Mountain Air Industries

Ltd. and Toni Morris doing business as Easy Breeze Duct Cleaning

Third Parties

Before: Master G. Taylor

Reasons for Judgment

Counsel for the Plaintiffs:

M.W. Buhler

Counsel for the Carrier Corporation, the Intended Defendant:

C.G. Kelly

Counsel for the Defendants, Lennox Industries (Canada) Ltd. - Les Industries Lennox (Canada) Ltee., Lennox Industries Inc. and Bryant Heating & Cooling Co. Ltd.

S. Margolis

Date and Place of Trial/Hearing:

February 6, 2007

Vancouver, B.C.

- [1] This is an application by the plaintiffs for an order that Carrier Corporation be substituted as a defendant in place of Bryant Heating & Cooling Co. Ltd. with the subsequent necessary amendments to the form of the writ of summons and statement of claim, and for an order that the writ issued on September 9, 2005 be renewed for a further three months from the date of the entry of the order and for costs.
- [2] The plaintiffs' action is for damages suffered as a result of chronic low-level carbon monoxide poisoning. The plaintiffs allege that the poisoning resulted from faulty residential heating systems, including defective furnaces. The plaintiffs claim that it was always their intention to name the manufacturers of the furnaces as defendants and named Bryant Heating & Cooling Co. Ltd. as the manufacturer of the furnace that was in the home of the plaintiffs, Hilton & Lillian Haider.

- [3] As a result of the plaintiffs learning that Bryant Heating & Cooling Co. Ltd. was not the appropriate defendant, this application was brought to add or substitute Carrier Corporation in the place of Bryant Heating & Cooling Co. Ltd.
- [4] Bryant Heating & Cooling Co. Ltd. was represented by Mr. Margolis who at the outset of the hearing made an application to have the action dismissed as against his client. It was conceded by counsel for the plaintiffs that Bryant Heating & Cooling Co. Ltd. was the wrong defendant and it was always their intention to discontinue against it. In fact it was early in September 2006 when the plaintiffs acknowledged that Bryant was improperly named as a defendant.
- [5] I granted Mr. Margolis' application and awarded his clients half their costs at Scale A. The application of the plaintiffs therefore became one to add Carrier Corporation.
- [6] Counsel currently representing the plaintiffs was not original counsel when the writ and statement of claim were drawn.
- [7] In that regard, Mr. Edinger swore an affidavit on February 1, 2007 which outlined his firm's conduct of the plaintiffs' claims for a period of time.
- [8] Mr. Edinger deposed that the writ of summons and statement of claim were issued on September 9, 2005 and that his firm, Heenan Blaikie LLP, continued as solicitors of record for all of the plaintiffs until on or about May 19, 2006 when Messrs. Sugden, McFee & Roos delivered a notice of change of solicitor indicating they had become solicitors of record for all of the plaintiffs except Hilton and Lillian Haider. The law firm of Farber and Folk were solicitors of record for Mr. & Mrs. Haider in the place of the Heenan Blaikie LLP for a short period of time up to July 31, 2006.
- [9] Mr. Edinger further deposed that the original writ of summons and statement of claim named Bryant Heating & Cooling Co. Ltd. ("Bryant") and that it was his intention to name the manufacturer of the furnace which had been located in the residence of the Haider plaintiffs.

[10] Mr. Edinger went on to depose that:

When it became time to prepare the writ of summons and statement of claim in this matter, I conducted an investigation to determine the name of the manufacturer of the Bryant furnace. My clients were unable to tell me the name of the manufacturer of the Bryant furnace.

I conducted some corporate name searches.

I also conducted a number of searches on the Internet. I was unable to discover the identity of the manufacturer of the Bryant furnace. I did not locate any information which directed me to Carrier Corporation.

From my investigation I drew the conclusion that Bryant Heating & Cooling Co. Ltd. was in the business of providing heating and cooling devices under the name Bryant and was likely the manufacturer or seller of the Bryant furnace referred to in the R.C.M.P. report. I therefore named Bryant Heating & Cooling Co. Ltd. as a defendant in the writ of summons and statement of claim. I believed I had named the correct entity.

[11] In the last paragraph of his affidavit, Mr. Edinger says:

Following the date of service on Bryant Heating & Cooling Co. Ltd. (November 18, 2005) until the date I ceased to be counsel for the plaintiffs, I was not advised by any party to this action that Bryant Heating & Cooling Co. Ltd. was not the manufacturer of the Bryant furnace.

[12] It is interesting to note from Mr. Edinger's affidavit that he does not specify the time when his firm was retained by the plaintiffs nor does he indicate the time when he was working on the drafting of the writ of summons and statement of claim. It should also be noted that he does depose in his affidavit it was impossible to inspect the furnace as it had been destroyed sometime in November 2003 shortly after it was removed from the Haider residence.

[13] Messrs. Sugden, McFee & Roos filed a notice of change of solicitor for Mr. & Mrs. Haider on July 31, 2006. Sometime later they were advised by counsel for the defendants Lennox Industries Inc. that Bryant Heating & Cooling Co. Ltd. was incorrectly named as a defendant and that the defendant should be Carrier Corporation.

[14] The plaintiffs' notice of motion in this matter is dated November 2nd, 2006. The intended defendants have conceded that there is no prejudice from delay beyond that date as it was their request for some time to obtain instructions and do some preparation before the hearing on February 6, 2007.

[15] As part of the factual matrix it is important to know that the male plaintiffs in this action were at the relevant times, members of the Royal Canadian Mounted Police. The other plaintiffs are wives and children of those members.

[16] The plaintiffs allege that in or about the years 2000 through 2003 they were exposed to carbon monoxide which leaked from the heating systems in their houses and, in particular from the furnaces installed in those houses.

[17] This particular application concerns Mr. & Mrs. Haider and the manufacturer of the furnace that was installed in the house in which they lived.

[18] The following is excerpted from an internal R.C.M.P. memorandum dated May 26, 2004:

In September 2003, the annual furnace cleaning at the married quarter housing units in Whistler was commenced. At the first residence, it was discovered that the furnace would not start. Further examination of the unit's heat exchanger found the furnace [to] [sic] be defective and leaking. As a result, the unit was red-tagged and shut down.

Similar testing was ordered on all the Whistler furnaces. As a result of this, three other furnaces (all Lennox Pulse furnaces) were found to be defective and leaking. Eventually all the affected furnaces were replaced. During the course of these furnace inspections, it was learned that in September of 1997, a consumer update notice was issued indicating Lennox Pulse furnaces model numbers G14 and GSR14 have a manufacturer's defect in the heat exchangers installed in residences. The consumer update notice indicated that Lennox Industries had set up a free program to inspect their furnaces installed from 1982 to 1989 to check for carbon monoxide leaks. This is the time frame in which the affected Whistler furnaces were installed. For whatever reason, the consumer notice was not caught and the Whistler furnaces were never inspected for the potential leaks.

The married quarters at Whistler were managed and maintained by R.C.M.P. property management at the time the safety notice was issued. B.C.B.C. was hired shortly thereafter and took over the maintenance of the Whistler homes in November of 1997.

In addition to the defective furnaces, some health issues have surfaced with members and their families that could possibly be associated to carbon monoxide poisoning from the faulty furnaces. Medical testing for the affected members and their families is ongoing.

[19] From reading further into the lengthy memorandum regarding the furnaces in the Whistler homes, it is clear that the Lennox furnaces were installed in the residences occupied by the plaintiffs Blake McLeod and his family and Tim Chad and his family. The furnace described as a Bryant furnace was installed in the residence occupied by Staff Sgt. Hilton Haider and his wife.

[20] The memo of May 26, 2004 reads in considerably more detail as follows:

During the annual furnace servicing (which consists of a cleaning, filter change, start up and function test) in the MQ's in Whistler, it was noted by the contractor, Easy Breeze Duct Cleaning, that the furnace at 6463 Balsam Way would not start. B.C.B.C. instructed Mountain Air Industries (M.A.I.) to investigate further. Initial investigation indicated a faulty circuit board and a replacement unit was ordered. B.C.B.C. also authorized at that time, at the recommendation of M.A.I., that a leak test be performed on the unit's heat exchanger to test for further damage or cracking. The furnace was found to be defective and leaking, the unit was red tagged and shut down. This furnace unit was replaced September 24, 2003. R.C.M.P. Asset Management Unit was notified by B.C.B.C. and immediately authorized B.C.B.C. to have M.A.I. check all remaining R.C.M.P. houses on September 24, 2003.

[21] A previous paragraph refers to the residence occupied by the Haider plaintiffs as the one located at 6463 Balsam Way in Whistler. Very shortly after the furnace was removed from the Haider residence it was destroyed.

[22] On behalf of the Haider plaintiffs, it is argued that since it was always the intention of these plaintiffs to maintain a claim against the manufacturer of the furnace installed in their residence and since the incorrect party was named as the manufacturer of the furnace, the

court should add Carrier Corporation as a defendant in place of Bryant Heating & Cooling Co. Ltd. The plaintiffs rely upon s.4(1) of the Limitation Act and Rule 15(5)(a)(iii) of the Rules of Court and submit that it is just and convenient to add Carrier Corporation as a defendant. In response, counsel for the intended defendant, Carrier Corporation, argues there is prejudice to his client through delay and that due to other factors such as the destruction of the furnace and the lack of notice of this intended action until well after the limitation period had expired extreme prejudice is caused to his client. Accordingly, he argues, it is not just and convenient in all the circumstances to add Carrier Corporation as a defendant.

[23] The applicable statutes and Rules of Court are as follows:

Limitation Act

4(1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

- (a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim,
- (b) third party proceedings,
- (c) claims by way of set off, or
- (d) adding or substituting a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

[24] Rule 15(5)(a)(iii) of the Rules of Court provides:

- (5) (a) At any stage of a proceeding, the court on application by any person may
 - (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
 - (A) with any relief claimed in the proceeding, or
 - (B) with the subject matter of the proceeding,

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

[25] It is clear that the court has a discretion in applying Rule 15(5)(a)(iii) but that discretion is modified to the extent that the court must find it just and convenient to add that person to the action, otherwise the discretion is unfettered subject only to the general rule that all such discretion is to be exercised judicially, per *Finch J.A.* (as he then was) in *Teal Cedar Products (1977) Ltd. v Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 at page 291.

[26] Teal Cedar was applied by Esson, J.A. (as he then was) in *Letvad v. Finley* (2000) 82 B.C.L.R. (3d) 296 when he said this at page 307:

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 the delay; and
- the extent of the connection, if any, between the existing claims and the proposed new cause of action.

[27] The reasons for the delay and the explanation for it have already been mentioned such that previous counsel was not able to find the correct name of the manufacturer of the Bryant furnace in the time he allowed himself to research the matter. I do not view this explanation by Mr. Edinger as providing sufficient evidence about the delay so as to fulfill the burden on the plaintiff to justify the delay. There are serious gaps in the evidence offered in Mr. Edinger's affidavit.

[28] It is conceded by both counsel that the central issue here is the degree of prejudice caused by the delay.

[29] Mr. Buhler for the plaintiffs submits it is the proposed defendant who bears the burden of proving any actual prejudice it claims as a result of the delay in seeking to substitute it as a defendant and cites *Weinlich v. Campbell* (2005) 32 C.P.C. (6th) 18, a decision of Martinson, J. at paragraphs 56 & 57 to assist:

With respect to actual prejudice, the onus is on the proposed added party to show actual prejudice: *West Fraser Mills Ltd. v. Chouinard* (1993), 79 B.C.L.R. (2d) 321, 15 C.P.C. (3d) 1, 27 B.C.A.C. 311 (B.C.C.A.), citing *Daco Developments Ltd. v. Norman Lewis Co.*, [1982] 2 W.W.R. 277, 33 B.C.L.R. 273 (B.C.C.A.); *Endale v. Peters* (1997), 47 C.C.L.I. (2d) 307 (B.C.S.C. [in chambers]) at para. 12; *Sun* at para 26.

This is because the facts or circumstances that make it either unjust or inconvenient to add a potential defendant are within the knowledge of that defendant, and he or she is in a position to advance them. See, for example, *Endale* at para. 16.

[30] Martinson, J. went on to discuss how prejudice must affect the intended defendant's ability to respond to the claim at para. 58 of *Weinlich* where she stated:

Prejudice means prejudice associated with the delay itself. The fact that an opposing party is affected negatively by such an amendment does not mean that he or she is prejudiced. The prejudice must affect the party's ability to respond to the amended claim: *Bel Mar Developments Inc. v. North Shore Credit Union*, 2001 BCSC 388 (B.C.S.C.) at para. 9.

- [31] In the case at bar, the intended defendant had no knowledge of the action or allegations against it until such time as this application was brought and after the limitation period had expired. This is to be distinguished from some of the cases relied on by the plaintiffs where the intended defendants had notice of a possible claim being made before the limitation period expired and were able to make enquiries about their possible liability on an ongoing basis. I find this fact alone to be extremely prejudicial to the intended defendant which would affect its ability to respond to the claim.
- [32] Mr. Kelly argues that the plaintiffs must show there is some evidence, any evidence in the facts before the court which would suggest some fault on the part of the alleged manufacturer, the proposed defendant, Carrier Corporation. Mr. Kelly also submits the plaintiffs must prove that the furnace leaked and that the leak was due to fault on the part of Carrier Corporation.
- [33] In my view, the fact the furnace was found to be defective and leaking in 2003 is not sufficient to meet the evidentiary burden on the plaintiff. Remembering that the furnace in question had been installed somewhere in or around 1989 and the plaintiffs claim they were subject to a leaking furnace somewhere between 2000 and 2003, I am of the view that there has to be some further evidence which would link the leak found in 2003 to some negligence on the part of the intended defendant. At best, in my view, the link is speculative only. There is no admission of liability from Carrier Corporation as there was from Lennox Industries.
- [34] It would not, therefore, in my judgment, be just and convenient to add Carrier Corporation as a defendant in these proceedings. Accordingly, the plaintiff's application must be dismissed. The intended defendant is entitled to its costs.

"Master G. Taylor"

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