
CANADA / JUDGMENT

Jaholkowski v. Gascoyne

2012 BCSC 2241

COURT

Supreme Court of British Columbia

DECIDED

18 April 2012

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2012 BCSC 2241 Jaholkowski v. Gascoyne

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jaholkowski v. Gascoyne,

2012 BCSC 2241

Date: 20120418

Docket: S092652

Registry: Vancouver

Between:

Karol Jaholkowski by his litigation guardian, Joanna Jaholkowski

Plaintiff

And:

Ryan Gascoyne

DKE University Scholarship, Bursary and Housing Association and

The University of British Columbia

Defendants

Before: The Honourable Mr. Justice Greyell

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff

Robyn L. Wishart

Appearing for Polygon Westbury Land Development Ltd., Polygon Homes Ltd., Polygon Construction Management Ltd.

Geoffrey Bowman

Appearing for Edward Michael Leflufy d.b.a. Edward LeFlufy Urban Design and Architecture

Stephen P. Coyle

Appearing for Thomas Leung Structural Engineering Inc.

Melissa Bryden

Appearing for GHIL Consultants Ltd.

Christopher M. Rusnak

Place and Date of Hearing:

Vancouver, B.C.

April 2, 2012

Place and Date of Judgment:

Vancouver, B.C.

April 18, 2012

- [1] THE COURT: Counsel, these are my reasons in this matter. Thank you for attending this morning.
- [2] This is an application by the plaintiff pursuant to Rule 6-2(7)(c) of the Rules of Court to add a number of parties to this action.
- [3] The plaintiff also relies on Rules 1-3, 3-2, 8-1 and 24-1.
- [4] By way of brief background, the plaintiff sustained serious head and brain injuries when he fell from a flat roof at 2880 Westbrook Mall (the premises) during a fraternity event on April 12, 2007. He was a student at the University of British Columbia (UBC) at the time. The premises at which the accident occurred are part of a collection of student housing known as Fraternity Village located at or near UBC.
- [5] The plaintiff commenced this action on April 7, 2009, against Mr. Gascoyne, a fellow student who was involved in the accident; UBC, the owner of the premises; and DKE University Scholarship, Bursary and Housing Association (DKE), the lessee and occupier of the premises.
- [6] Each of the existing defendants has filed a statement of defence in which they deny liability for the accident.

- [7] Subsequent to the issuing of the writ and statement of claim, there have been several changes in counsel representing the plaintiff. The plaintiff's current counsel was retained in January 2010. Shortly after he was retained, he decided there were a number of parties he thought should have been named as defendants to the action. I should note, as may be obvious, that at the time plaintiff's counsel was retained the limitation period for service of the writ was close at hand.
- [8] Plaintiff's counsel sought to add the following entities: UBC Properties Trust (Properties), which was responsible for overseeing the development of the premises; The Owners Strata Plan BCS 571 (the Strata Corporation), which managed the common property of the premises and ensured tenants adhered to the corporation's by-laws; the Interfraternity Council of B.C., in these proceedings represented by the Alma Mater Society (AMS), which is asserted to have been responsible for supervising and monitoring the use of the premises at social gathering and parties; and the architects, engineers, contractors, subcontractors and other parties involved in the planning, designing, engineering and constructing of the premises.
- [9] Shortly after new counsel was retained, interrogatories were issued to the existing defendants requesting the names and addresses of the Strata Corporation and the architects, engineers, contractors and others involved in the development or building of the premises. Counsel for the defendant Gascoyne identified the name of the Strata Corporation; DKE and UBC did not respond to the interrogatories at that time.
- [10] Plaintiff's counsel, through various Internet searches, determined the following: Polygon Construction Management (Polygon) designed, engineered and constructed the premises; Properties was responsible for overseeing the development of the premises; AMS was responsible for monitoring the use of the premises; and Ramsay Worden Architects Limited (Ramsay Worden) acted as architects for the premises and was responsible for the planning, designing and engineering of the premises.
- [11] As plaintiff's counsel was concerned the limitation period had by now expired, although not the time for service of the writ, he issued a notice of motion dated April 9, 2010. He served it on the defendants and on the parties he sought to add as proposed defendants, namely, the Strata Corporation, Polygon, Properties, AMS and Ramsay Worden. UBC subsequently provided a list of additional parties involved in the planning, designing, engineering and constructing of the premises. Plaintiff's counsel served a second notice of motion dated April 22, 2010, seeking to add as defendants the newly discovered parties GHL Consultants Ltd. (GHL) and Thomas Leung Structural Engineering (Thomas Leung).
- [12] After further inquiry, plaintiff's counsel issued a third notice of motion seeking to add Edward Michael LeFlufy Urban Design & Architecture (ELUDA) as a defendant.

[13] I will refer to Polygon, GHL, Thomas Leung, Ramsay Worden and ELUDA as the "proposed development defendants". For reasons that will become apparent in this decision, I also include Properties in this category.

[14] The various applications to add defendants did not come on for hearing until April 2, 2012, because of scheduling conflicts in various counsels' calendars. Appropriately, no party takes issue with the length of time it has taken to bring this matter on for hearing as a result of such delay.

[15] None of the existing defendants oppose the plaintiff's application. The proposed defendants Properties and Strata Corporation do not oppose the application. The balance of the proposed defendants do oppose the application.

[16] Rule 6-2(7)(c), the rule under which this application is brought, reads:

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),

...

(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] Rule 6-2(7)(c) replicates Rule 15(5)(a)(iii) of the former Rules of Court.

[18] The plaintiff acknowledges the limitation period for issuing the action against the proposed defendants has now expired. He relies on s. 4(1)(d) of the Limitation Act, R.S.B.C. 1996, c. 266, as well as the provisions of Rule 6-2(7)(c) in support of his application. Section 4(1)(d) states:

Counterclaim or other claim or proceeding

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

...

(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.

- [19] An application under Rule 6-2(7)(c) to add parties after the expiration of the limitation period is subject to a two-part test as set out in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 [Strata Plan VIS3578]. At paras. 45 - 46, the court stated:
- [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.
- [20] Let me turn to the first requirement discussed above in *Strata Plan VIS3578*: Is the matter between the plaintiff and the proposed defendants related to or connected with the relief, remedy or subject matter of the original proceeding?
- [21] As discussed in *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578, as well as in *Forde v. Interior Health Authority*, 2007 BCSC 1706, in order to demonstrate a possible cause of action against a proposed defendant the plaintiff "must plead those facts which are material to a viable cause of action": *Forde*, at para. 14. See also *Strata Plan LMS 1816*, at para. 14. Pleadings must be "specific enough to show on what grounds the proposed defendant is being sued": *Forde*, at para. 15.

- [22] I agree with and adopt the reasoning of Madam Justice Russell in *Forde* that it is not sufficient to "lump defendants together and make blanket allegations against them, unless those defendants ... [are] in an identical relationship to the plaintiff": at para. 16. Madam Justice Russell's analysis in *Forde* was approved by the Court of Appeal in *Strata Plan VIS3578*, at paras. 58, 72-75.
- [23] In the matter before me, at paragraphs 21-25 of the present proposed amended notice of civil claim the plaintiff has described each of the proposed development defendants in these terms:
21. The Defendant Polygon Construction was responsible for the planning, designing, engineering and construction of the Premises.
 22. The Defendant Ramsay Architects was responsible for the planning, designing, engineering and construction of the Premises.
 23. The Defendant GHJ Consultants was responsible for the planning, designing, engineering and construction of the Premises.
 24. The Defendant Leung was responsible for the planning, designing, engineering and construction of the Premises.
 25. The Defendant ELUDA was responsible for the planning, designing, engineering and construction of the Premises.
- [24] The allegation against Properties, in paragraph 26 of the amended notice of civil claim, is that Properties was responsible for overseeing the development of the premises and the Fraternity Village.
- [25] In those paragraphs of the amended notice of civil claim setting out the "Legal Basis" of the claim (paragraphs 5-10), the plaintiff has set out some 11 identical particulars of the negligence alleged against each of the proposed development defendants. Each is alleged to have been negligent by:
- (a) failing to provide for or install railings or guards on the overhang;
 - (b) failing to provide for or install any window safety restrictors including but not limited to window limiters and/or window restraints;
 - (c) failing to take action to physically block or prohibit access through the windows to the overhang;
 - (d) failing to erect a warning sign to residents not to access the overhang;
 - (e) failing to erect a warning sign to warn residents that access through the window opening is unsafe;

- (f) failing to take action to address safety concerns with respect to the window opening and access to the overhang through the window opening in the consultation and planning phase of the design of fraternity village both before and after occupancy by the student residents;
- (g) failing to provide and/or ensure the premises were safe for the plaintiff;
- (h) failing to institute a safety initiative with respect to the window opening and access to the overhang through the window opening in the consultation and planning phase of the design of fraternity village both before and after occupancy by the student residents;
- (i) violating the British Columbia Building Code 2006 and/or the National Building Code and amendments thereto, including, but not limited to, the design and installation of guards, railings and suitable window openings given the quality and nature of the premises;
- (j) violating the British Columbia Fire Code 2006 and amendments thereto, including, but not limited to, the design and installation of emergency exit systems and emergency egress pathways, given the quality and nature of the premises; and
- (k) failing to plan, design and/or install guards, railings and safe window openings, exposing the plaintiff to unacceptable safety risks.

[26] The facts before the court establish Polygon was responsible for the construction of the premises; Ramsay Worden for certain aspects of the architectural design of the premises; GHL for aspects of fire safety design; Thomas Leung for aspects of structural engineering design; and ELUDA for design work done in or about 1998. Properties was responsible for the overall development of the premises. In other words, the facts before the court establish that each of the proposed development defendants had a separate and distinct role to play in the development of the premises. I will return to this issue again shortly when I consider whether it is just and convenient to permit the addition of certain of these parties.

[27] As Madam Justice Russell observed in *Forde*, in that case the plaintiff had particularized 11 allegations of negligence that were "applicable to one, several, or all of the defendants": at para. 17. She found the plaintiff had "improperly made blanket allegations against the proposed defendants": at para. 17. As she stated at para. 15:

[15] ... [A]lthough pleadings may be general [in nature], they must be specific enough to show what grounds the proposed defendant is being sued. ...

[Citations omitted.]

I find her comments applicable in this case insofar as the allegations against the proposed development defendants are concerned.

[28] Affidavit evidence is admissible on an application such as this. In that regard, the following statement from *Letvad v. Fenwick*, 2000 BCCA 630 at para. 35 is applicable to the case before me as well:

- [35] ... [T]he plaintiff has produced nothing to put any flesh on the bones of the negligence allegations, there still is no way of knowing what case, if any, may be advanced. ...
- [29] Accordingly, I am of the view the proposed amended notice of civil claim does not set out with sufficient particularity a cause of action against each of the proposed development defendants, including Properties, and that the plaintiff's application to add these defendants must be dismissed for that reason.
- [30] The same considerations do not apply to AMS or Strata Corporation as the pleadings concerning these proposed defendants are, in my view, more specific and are sufficient to put each of these defendants on notice of the claim asserted against it.
- [31] The claim against AMS is set out in paragraph 27 of the amended notice of civil claim. It asserts that AMS was responsible for supervising, monitoring and restricting the use of the premises by tenants and/or members of the fraternities, particularly for social gatherings and parties.
- [32] Paragraph 28 asserts against the Strata Corporation that it was responsible for managing the common property and for ensuring tenants adhere to the strata bylaws and rules.
- [33] In the event I am wrong in concluding the pleadings against the proposed development defendants are boilerplate pleadings and do not with sufficient particularity plead a cause of action against the proposed development defendants, I am further of the view the claims set out in the amended notice of civil claim against the proposed development defendants are not sufficiently connected to the original cause of action commenced by the plaintiff. Accordingly, the plaintiff's application in relation to those defendants must also fail under the second requirement of the test outlined in Strata Plan VIS3578.
- [34] The original action against UBC and DKE was founded on allegations these two defendants, as the owners and landlords of the premises, were negligent and in breach of the Occupiers Liability Act, R.S.B.C. 1996, c. 337. Paragraph 12 of the statement of claim alleges they were negligent or in breach for:
- (a) failing to recognize the dangerous premises;
 - (b) failing to providing railings on the roof;
 - (c) failing to prohibit the improper use of the roof;
 - (d) failing to enact and enforce adequate safety practices with regard to any use of the roof, proper or improper, allowed or prohibited; and
 - (e) such further particulars as may be discovered.

[35] Under the second requirement from Strata Plan VIS3578, a court has a discretion to add a proposed defendant to the action subject to the guidelines set out in the leading case in this area of *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd. (1996)*, 19 B.C.L.R. (3rd) 282 (C.A.). Those guidelines were confirmed and commented on at para. 29 of *Letvad*:

[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.

See also Strata Plan VIS3578, at para. 46.

[36] What is "just and convenient" is, therefore, necessarily dependent upon the degree of connectivity between the existing claim and the proposed claim. In my view, the proposed amended notice of civil claim asserts a cause of action against the proposed development defendants which is not sufficiently connected to that asserted originally against UBC and DKE in negligence and in breach of the Occupiers Liability Act.

[37] As referenced earlier, the proposed cause of action asserts each of the proposed development defendants was negligent in the various aspects of the planning, designing, engineering and constructing of the premises. This proposed claim is essentially different in nature and character from the original claim under the Occupiers Liability Act. It, in essence, raises a different cause of action in negligence. The proposed claim would greatly broaden the scope of the litigation, it would make the litigation considerably more lengthy, much more time-consuming and much more expensive for the parties.

- [38] In *Cementation Co. (Can.) Limited v. American Home Assur. Co.* (1989), 37 B.C.L.R. (2d) 172, Mr. Justice Lambert of the Court of Appeal, in a discussion under "just and convenient", stated at 193:

In my view, if it is "just" to add [the proposed defendant] Chateau, it is also convenient for "convenient" in the context means, I think, "tending to efficiency" or "suitable to the purpose".

- [39] I conclude it would neither tend to the efficient conduct of this lawsuit, nor be suitable to the purpose of litigating the initial lawsuit to have these proposed development defendants added as defendants.
- [40] I accept that the other factors set out in *Letvad and Teal* lean in favour of the plaintiff: the delay was minimal; the reasons for the delay were sufficient; and there was no real prejudice caused by the delay, other than to deprive the proposed defendants of the Limitation Act defence. However, for the reasons outlined above, I do not consider it either just or convenient to join the proposed development defendants as set out in the amended notice of civil claim.
- [41] Further, as the authorities describe, the court may take into account evidence when considering whether it is just and convenient to add a proposed party to an action. In response to this action, several of the proposed development defendants filed affidavits. That material goes to both the specificity of the material facts asserted against each particular proposed development defendant, as I have earlier described, as well as whether it is just and convenient to add that defendant to this action.
- [42] GHL filed an affidavit by its principal Mr. Lai. Mr. Lai deposed GHL was not retained to address, nor was it involved with, issues relating to the railings, guards or windows on the premises as alleged in the amended notice of civil claim. Mr. Lai deposed GHL's services with respect to the project "related solely to selected fire safety aspects of the building's construction and accessibility issues for persons with disabilities." He deposed there were no emergency exit systems or emergency egress pathways in the vicinity of the roof area from which the plaintiff fell.
- [43] The plaintiff's counsel was advised of the position GHL was taking on this application as early as July 2010. Plaintiff's counsel attended the offices of GHL to review GHL's complete copy of project files in July 2010. The plaintiff has filed no materials in response to Mr. Lai's affidavit describing GHL's limited involvement in the construction of the premises, nor has he sought to narrow the scope of his pleadings against GHL.
- [44] Thomas Leung, the principal of Thomas Leung, filed an affidavit in which he deposed Polygon retained Thomas Leung to provide structural engineering for the construction of the premises, which included such services as preliminary sizing of building components, final structural design in accordance with the B.C. Building Code, structural design drawings and structural engineering specifications. Mr. Leung deposed Thomas Leung's role as the structural engineer "did not encompass designing restriction of access to the exterior of the

building" or "the design or installation of railings or guards to any part of the building." Rather, it "was to design a structural system that would safely support the anticipated functions and loads for a given building design in accordance with the building code." Mr. Leung specifically denied Thomas Leung's involvement in the project encompassed responsibility for any of the items outlined in the allegations made against it in the proposed amended notice of civil claim.

- [45] Thomas Leung's position in opposition to this application was made known to plaintiff's counsel in July 2010. Plaintiff's counsel attended at the offices of Thomas Leung's counsel in May 2010 to review Thomas Leung's file. The plaintiff, again, has filed no material in response to Mr. Leung's affidavit, nor has he amended his proposed notice of civil claim to particularize his claims of negligence against Thomas Leung.
- [46] Last, I refer to the affidavit of Mr. Edward LeFlufy, the principal of ELUDA. Mr. LeFlufy filed an affidavit deposing he had been retained in or about November 1998 by UBC to prepare urban design guidelines and to review conceptual designs for "the general arrangement, form and character of the proposed developments in the area in which the premises were subsequently constructed." Mr. LeFlufy deposed he had no direct input into the detailed design of the premises and, in particular, was not retained to consider windows, guards or roofs or safety matters concerning their use. He had no involvement in the project since November 1998 and deposed he had no "discernible recollection" of his involvement in it other than the design guidelines he had prepared pursuant to his retainer with UBC.
- [47] Again, the plaintiff has filed no materials in response to Mr. LeFlufy's description of the role of ELUDA, nor has he sought to narrow his pleadings against ELUDA.
- [48] The affidavits offer further support for my conclusion that the pleadings against the proposed development defendants are improper boilerplate pleadings, as well as support for my conclusion it would not be just or convenient to add the proposed development defendants as parties to the action.
- [49] The same considerations do not, in my view, apply to the proposed defendants Strata Corporation or AMS. The claims in negligence against these proposed defendants relate in the case of AMS, on behalf of IFC, to the alleged responsibility to supervise and monitor the use of the premises and, in the case of the Strata Corporation, to manage the common property to ensure tenants adhere to bylaws and rules. AMS has filed an affidavit denying responsibility for monitoring the particular event in which the plaintiff was injured. AMS says the party at which the plaintiff was injured when he fell from the roof was not an IFC-sanctioned event and, accordingly, it was not involved in the supervision or monitoring of the event. The Strata Corporation, as stated, takes no position on this application.
- [50] The threshold to add a party is not a high one. In my view, the plaintiff has established the criteria set out in *Teal*, *Letvad* and *Strata Plan VIS3578*. There is a connectivity, in my view, to the claim made against IFC, through its representative AMS, and the Strata Corporation to the original action commenced against the defendants Gascoyne, DKE and UBC. It cannot be

said in the case of these defendants the delay was excessive or that either proposed defendant has or will suffer prejudice as a result of being added as defendants. Each has had notice of the claim within the three years allowed for filing and service of the writ. I am of the view it is just and convenient to add these proposed defendants. The claim against them does not excessively broaden the scope of the issues as such issues are related to the claims in the existing action.

[51] It remains open, of course, as it remains open to any party, to AMS and the Strata Council to apply at an appropriate stage of this litigation for summary judgment dismissing the action should the evidence support such an application at that time.

[52] Accordingly, the application to add the proposed development defendants is dismissed; the application to add AMS and the Strata Council is allowed.

[53] Counsel, I would invite any submissions you may have as to costs.

[SUBMISSIONS RE COSTS]

[54] THE COURT: The only comment I would make on that is that, of course, there are a number of parties whom I have found are not to be joined, the majority, and the submissions were shared in many respects, so it would not be appropriate, in my view, for each of the proposed development defendants to be filing separate bills of costs given the sharing of the load, if I can call it that, on argument.

[SUBMISSIONS RE COST CONTINUING]

[55] THE COURT: And if the matter cannot be resolved, it is determined by the registrar. Very well. And the issue with reference to AMS and the Strata Council would simply be costs in the cause, I presume? Yes.

[56] Thank you, counsel.

"GREYELL J."

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