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CANADA / JUDGMENT

## Keefer Laundry Ltd. v. Pellerin Milnor Corporation

2007 BCSC 899

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COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 899 Keefer Laundry Ltd. v. Pellerin Milnor Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Keefer Laundry Ltd. v. Pellerin Milnor Corporation,

2007 BCSC 899

Date: 20070620

Docket: S024116

Registry: Vancouver

Between:

Keefer Laundry Ltd.

Plaintiff

And

Pellerin Milnor Corporation and

Tessler G.W. Fabcare Inc.

Defendant

And

Pellerin Milnor Corporation

Third Party

Before: The Honourable Mr. Justice N. Smith

## Ruling

Counsel for Plaintiff

D.G.S. Rae, Q.C.

S. Brooks

Counsel for Defendant Pellerin Milnor Corporation

G.A. Fulton, Q.C.,

H.D. Craig

Date and Place of Trial:

January 16, 17, 22-26, 29-31,

February 1, 2, 5-9, 12-16, 26-28,

March 1, 5-8, May 28-31,

June 1, 4-8, 11-15, 2007

Vancouver, B.C.

- [1] The plaintiff Keefer Laundry Ltd. ("Keefer") objected to the admissibility of three expert opinion reports prepared by David Hendrix, a metallurgical engineer. The plaintiff said the reports contain argument rather than expert opinion, display a lack of objectivity, usurp the role of the Court and fail to clearly set out the facts and assumptions on which they are based. I ruled that two of the three reports are admissible and said I would be providing written reasons for that decision.
- [2] Mr. Hendrix's opinion deals with the cause of rust and corrosion that developed in commercial laundry equipment that was manufactured by the defendant Pellerin Milnor Corporation ("Milnor") and purchased by the plaintiff for use in its business.
- [3] The plaintiff alleges a variety of defects in a number of pieces of equipment, but Mr. Hendrix's opinion deals only with two large machines called "continuous batch washers" or "tunnel washers." Each of these machines consists of a series of washing machines, or modules, linked together to form a long, stainless steel tunnel. Each module performs a different step in the wash or rinse process. Laundry is progressively transferred through the tunnel, with detergent, bleach and other chemicals introduced at specific points along the way. The plaintiff says it began to experience problems with rust and corrosion in the tunnel washers about two years after they were installed.

- [4] Mr. Hendrix visited the plaintiff's plant along with Milnor's representatives in February 2002, before this litigation began. His first report is dated June 15, 2002, which also predates the litigation, and is addressed to Milnor. The other two reports are dated February 9, 2006 and December 12, 2006, well after the litigation began. They are addressed to counsel and are primarily concerned with responding to opinions provided by the experts retained by the plaintiff.
- [5] Before dealing with the specifics of the reports, it is useful to briefly review the principles governing admissibility of expert opinion. In *R. v. Abbey*, [1982] 2 S.C.R. 24, the Supreme Court of Canada said that the function of an expert witness is "to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate." The expert's opinion is usually based on assumed facts and its value depends on the extent to which those facts are proved through other evidence.
- [6] In *R. v. Mohan*, [1994] 2 S.C.R. 9, the Court set out four essential criteria for the admissibility of expert opinion:
- (a) relevance;
  - (b) necessity in assisting the trier of fact;
  - (c) the absence of any exclusionary rule;
  - (d) a properly qualified expert.
- [7] There is no dispute that those threshold criteria are met in this case. The question of what caused the rust in the machines is very much at issue and is one on which I may be required to make a finding of fact. It is clearly a technical and scientific question on which the Court is unable to reach a conclusion without expert assistance. Indeed, the plaintiff has already tendered expert evidence on that issue. There is no suggestion of a general exclusionary rule and there is no issue about Mr. Hendrix's qualifications.
- [8] However, the fact that the Mohan criteria are met does not end the matter. The question here is not whether the Court should be hearing expert evidence, but whether the specific opinions accord with the proper role and function of an expert.
- [9] There are many cases in which this Court has stated what experts can and cannot do. The leading ones include *Emil Andersen Construction v. B.C. Railway Co.* (1987), 15 B.C.L.R. (2d) 28 [Emil Anderson No. 1]; *Emil Andersen Construction v. B.C. Railway Co.* (1987), 17 B.C.L.R. (2d) 357 [Emil Anderson No. 2]; *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* (1988), 29 B.C.L.R. (2d) 127; and *Surrey Credit Union v. Wilson et al* (1990), 45 B.C.L.R. (2d) 310 at 315 (S.C.), *aff'd* (1990), 47 B.C.L.R. (2d) 242 (C.A.). In *Quintette*, Spencer J. set out eight guidelines. Restated in terms relevant to this case, those are:
1. An expert may give evidence on the proper methods and tests necessary to determine the cause of rust in industrial equipment.

2. He may state an opinion as to whether and to what extent various conditions known or assumed to exist in the equipment or the plaintiff's plant would be expected to cause or contribute to rusting.
3. He may give both opinion evidence and factual evidence based on his experience as to the proper precautions to be taken in order to reduce or eliminate the risk of rust in such equipment.
4. He may not give an opinion which amounts to legal interpretation on the contracts or alleged contracts in issue.
5. Where rival experts have presented or are expected to present differing opinions, he may descend to argument to show why his opinion should be accepted in preference to the others', but the argument should be restricted to the technical reasons why he says his opinion is preferable.
6. He may not make conclusive findings of fact on issues disputed between the parties, but he may state certain facts as the hypothesis upon which he reaches an opinion or refer to matters which are already put in evidence. In each case, he should make clear which hypotheses or evidence he relies upon. It will be for the court to decide eventually whether that hypothesis is made out or whether the appropriate facts are found from that evidence.
7. He may not assess the value or justifiability of the plaintiff's claim.
8. He may not assign blame to any party, but he may give his opinion as to cause and effect.

[10] In *Quintette*, the Court rejected an expert report, saying:

A great deal of the report records findings of fact, allocations of blame and conclusions of law made by the witness. In some cases the findings and conclusions are overt, but in others they are implied. In all of that, the witness trespasses upon the task which the parties have assigned to this court.

[At p. 128]

[11] Similar findings were made in two separate decisions in *Emil Anderson*. In the first decision, Macdonald J. rejected an engineering report, saying:

It is a document such as an engineer might provide to an owner faced with a claim by a contractor for extra work or damages. It is an "assessment" of the claims of W.T.C. in this action. In the course of that assessment, opinions are expressed. However, those opinions are so mixed with evidence which is inadmissible that they are themselves not admissible in their present form.

[At p. 32]

[12] In the second decision, MacDonald J. rejected two more reports on similar grounds:

In summary, I regard the opinions of both Codville and Dixon as not "scientific" or "technical" but directed in substance to the legal or general merits of the case. Viewed in their totality they are more appropriate as argument than they are as evidence.

[At p. 363]

[13] However, another report with some of the same shortcomings was found to be admissible.

There is some force to the plaintiff's arguments that Mr. Brawner purports to interpret the contract and draw inferences from the facts. For reasons expressed earlier in connection with the other two reports, these may be objectionable but are not fatal in the case of Mr. Brawner. In contrast to the Codville and Dixon reports, the essence of Mr. Brawner's opinion is the utility of shotcrete as interim tunnel support for safety during construction. That is a scientific or technical question in respect of which an expert opinion may be helpful and which is not upon a "subject-matter within ... the common stock of knowledge."

I am more prepared, as a judge sitting alone without a jury, to overlook any shortcomings in the style of Mr. Brawner's report than I would be in a jury trial (See *Mazur v. Moody* (1987), 14 B.C.L.R. (2d) 240 at 244 (S.C.)).

[At p. 364]

[14] In *Surrey Credit Union, McColl J.* stressed the need for expert testimony to be given in "an objective and impartial manner so the court can place some reliance upon it." He added that:

Expert opinions will be rendered inadmissible when they are nothing more than the reworking of the argument of counsel participating in the case. Where an argument clothed in the guise of an expert's opinion is tendered it will be rejected for what it is.

[At p. 315]

[15] These principles are often encapsulated with the statement that an expert should not be an advocate. However, that statement is sometimes misunderstood. There is a difference between an expert who advocates for a party and one who advocates for his or her opinion. By that I mean that an expert opinion should be confined to the expert's field of expertise and to the question within that field that is at issue. It should be the result of careful and objective consideration of all relevant facts and scientific principles and not based on extraneous considerations.

[16] In short, the Court should be able to approach the opinion with some confidence that the expert would have rendered the same opinion if he or she had been consulted by the opposite party. However, once an expert has formed an opinion through that process, he or she may be firm, emphatic or even strident in the way he or she expresses the opinion or defends it against contrary opinions.

- [17] It is also apparent from the foregoing authorities that when an objection is raised to the admissibility of an expert opinion, the opinion must be considered in its entirety. The experts who provide opinions in this Court come from many fields, but they are not expected to be experts in the law of evidence. It is almost always possible to isolate passages or phrases in a report that can be said to violate one or other of the rules that have been set out. In many cases, those passages can be excised or, in a case without a jury, simply ignored. Conversely, a report may be so permeated by improper considerations that excision of the most blatantly offending passages can not save it.
- [18] In each case, the question is whether the report, taken as a whole, is capable of providing the court with the assistance that is required. Of course, objections or criticisms that are not sufficient to render a report inadmissible may still be the subject of cross-examination and argument going to the weight the court should ultimately give to the opinion.
- [19] At the heart of all these considerations is a concern for the integrity and fairness of the trial process. In *Mohan*, the Court said:

There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

[At p. 21]

- [20] Just as the admission of expert evidence will, in some cases, distort the trial process, there are circumstances where its exclusion could have the same effect. That concern must be kept in mind where, as here, a party who has already introduced expert evidence seeks to exclude expert evidence from the opposite party. Of course that does not mean that a completely inappropriate opinion can be made admissible merely by the fact that other expert evidence has been admitted.
- [21] With those general principles in mind, I now turn to the specific reports at issue.
- [22] Mr. Hendrix's first report is dated June 15, 2002, shortly before this action started. It sets out a number of observations made during a visit to the plaintiff's plant, followed by a discussion section in which Mr. Hendrix sets out his opinion as to the causes of the rust and the relative importance of various causative factors. A further section of the report contains Mr. Hendrix's comments in response to opinions that had been provided by Craig Reid, the engineering expert retained by the plaintiff.
- [23] The first objection raised is that the authorship of the observations and opinions is not clear. In the section setting out observations, Mr. Hendrix says that "this writer and Pellerin Milnor personnel recorded observations" and that the discussion that follows is "a summary of composite observations."

- [24] It is fundamental that an expert opinion sets out the facts and assumptions on which it is based. The weight that can be given to the opinion depends on the extent to which the party who tenders the opinion is able to prove the truth of those facts and assumptions, but that evidence may come from sources other than the expert. In many cases, however, the opinion will be based in whole or in part on the expert's own observations. Where that is the case, the accuracy and reliability of those observations may be tested on cross-examination in the same way as the evidence of any other witness.
- [25] I agree that it is not always possible to know from Mr. Hendrix's report where he is relying upon his own direct observations and where he is assuming the accuracy of observations reported to him by others. Counsel must be in a position to challenge the factual foundations of the expert opinion. To that end, counsel should be able to prepare cross-examination of the expert knowing which facts the expert should be cross-examined on and which facts can be safely left to cross-examination of other witnesses.
- [26] However, I do not agree that there is any uncertainty about the authorship of the opinions. The plaintiff relies on *Heidebrecht v. Fraser Burrard Hospital Society* (1995), 15 B.C.L.R. (3d) 189 (S.C.). In that case, a plaintiff was assessed by a "clinical management team." The report contained opinions by members of the team other than the report's author. Henderson J. said:

In my view, a document is not a written statement setting out the opinion of an expert unless it appears clearly from the face of that document that the opinions in it are those of the individual expert who prepared and signed the statement. Our rules make no provision for the entry in evidence of joint or corporate opinions. The opinion must be that of an individual expert and it must fall, of course, within the scope of her own expertise. The opinion cannot simply be a reporting of the opinions of others. The statement, to be admissible, must show clearly that this is the case.

[At para. 11]

- [27] In this case, while there is some uncertainty about the source of the observations on which the opinion is based, there is nothing on the face of the report to suggest the opinions derived from those observations are the opinions of anyone other than Mr. Hendrix.
- [28] Plaintiff's counsel also says that opinions in the report are intertwined with and can not be separated from the observations. The plaintiff refers to a number of passages as examples of that problem. Two of them are as follows.

P.4: "In module 7, the injection tube was observed laying on the bottom of the outer shell adjacent the suspected perforation. This suggests that the perforations in modules 7 and 12 were due to extended exposure to concentrated bleach and the souring agent.

P.4: "Rust staining on the 304SS filter elements on the module 5-6 filter was more pronounced than on the module 10 filter, suggesting an influence of differential residual bleach concentration in the wash water at the two locations.

- [29] I do not agree that those passages, or others like them, present any difficulty in understanding the report. In each case, there is a statement of observed or assumed fact, followed by an opinion derived from that fact. It might have been preferable to put the facts and the opinions in separate sections of the report, but in the context of this case that is a matter of style, not substance. I do not regard the facts and opinions to be inseparably interwoven in the way that made the reports at issue in *Emil Anderson* inadmissible.
- [30] Counsel for the plaintiff also says the tone of the report is argumentative and attempts to usurp the Court's function by commenting on credibility. He points to passages where Mr. Hendrix refers to "allegations" made by Keefer and suggests factual assertions made by Keefer are not correct or not accurate. While an expert may not comment on the credibility of other evidence, he may point out that his own observations or the facts that he has been asked to assume differ from those relied upon by other experts. In the context of the entire report, and without yet having had the benefit of cross-examination, the passages complained of may be open to either interpretation and do not provide a basis to exclude the entire report.
- [31] After stating his opinion on the causes of the rust, Mr. Hendrix devotes a section of his report to disputing some statements made in three reports by Mr. Reid. Plaintiff's counsel says this section of the report repeatedly oversteps the bounds of expert opinion and attempts to argue the defendant's case. Only two of the three Reid reports referred to have been put into evidence and some portions of those were deleted. Defence counsel agrees that where Mr. Hendrix comments on statements by Mr. Reid that are not before the Court, those passages should be deleted and it appears to me they can be deleted without any significant impact on what remains.
- [32] In one of the remaining passages objected to, Mr. Hendrix quotes an opinion by Mr. Reid on the major source of iron in the system, and says:

In fact, it has been shown that many other sources of iron have been documented.

- [33] Plaintiff's counsel says that statements like that amount to argument and/or purported findings of fact. Again, I think it is necessary to focus on substance and context rather than perhaps inelegant phrasing. In the context of the report, Mr. Hendrix is pointing out technical issues which he says Mr. Reid has failed to consider. As such, it falls within what Spencer J. in *Quintette* referred to as acceptable technical argument, or what I refer to as "advocacy for the opinion" as opposed to "advocacy for the party".
- [34] With the deletions agreed to by Mr. Fulton, the first report is admissible but for the difficulty created by the fact that it does not always make clear which facts are assumed and which are based on Mr. Hendrix's own observations. However, that problem can be easily remedied.

Before Mr. Hendrix takes the stand, he will advise Mr. Rae, through defence counsel, which of the observations reported at pages 4-6 of the report, were observations that he personally made. If Mr. Rae needs a reasonable amount of time to consider that information in light of his planned cross-examination before the witness takes the stand, he may speak to that.

- [35] In his second report, dated February 9, 2006, Mr. Hendrix re-affirms his initial opinion and offers further comments on the opinion of Mr. Reid, including opinions contained in reports prepared after June, 2002. Plaintiff's counsel again argues that Mr. Hendrix is usurping the role of counsel and the Court. Although I rejected that argument in relation to Mr. Hendrix's first report, I think it has much more substance in relation to the second.
- [36] At more than one point in the report, Mr. Hendrix makes statements to the effect that the defendant has been making tunnel washers in a similar manner, of the same material, for many years without customer complaint. In my view, the defendant's past experience has nothing to do with the technical question of what caused the rust on these machines. It may be a fact that I can consider in deciding which technical explanation is more likely and it is certainly an argument that will be open to counsel, but it is not a matter that the expert should be addressing or using as a basis for his opinion.
- [37] Other sections of the report deal with the operational effect that rust had on the plaintiff's business, which is a question for me to decide on all of the evidence and which may or may not be relevant, depending on the nature of the contractual relationship, if any, that I find to have existed.
- [38] At various points in the report, Mr. Hendrix dismisses comments by Mr. Reid as "speculation not supported by the facts." If Mr. Hendrix is able to advance specific technical reasons to refute Mr. Reid's statements, or is drawing attention to differences in the assumed or observed facts, he can and should do so. But, if his point is simply that there is no evidentiary foundation for Mr. Reid's opinion, that is the job of counsel.
- [39] Another passage comments on whether or not Keefer requested certain fabrication practices be used and whether they were required in the absence of a specific request. That is primarily a question of contract and not a matter for engineering opinion.
- [40] Taken as a whole, the report reads like a memorandum to counsel suggesting avenues for cross-examination, rather than a report to the Court. Unlike the first report, written almost four years earlier, Mr. Hendrix's second report, in my view, crosses the line between appropriately arguing the merits of his scientific opinion and inappropriately attempting to argue the entire case.
- [41] Counsel for the defendant has agreed that some passages of the report, including some of those I have already referred to, should be removed because they are inappropriately argumentative, or because they comment on specific opinions of Mr. Reid that are not in evidence. I agreed that the first report could be admitted with some deletions, but the proposed deletions from the second report are so extensive, leaving hardly a page of the

report untouched, that they would make what is left very difficult to follow and of limited usefulness.

- [42] In any event, some of the offending comments that defence counsel agrees can be deleted from the report are repeated as part of the express assumptions on which the report is said to be based. I refer specifically to the assumption that the defendant has a long and successful "track record" in making machines of this kind and to the assumption that the rust problem didn't render the machines unfit for service.
- [43] As said above, these assumptions are irrelevant to the technical question of what caused the rust in these particular machines. They are matters of argument relevant to the case, as a whole, and do not properly form a proper basis for expert opinion.
- [44] The second report also includes a list of documents that were relied on, including "selected pages" from the examination for the discovery of Mr. Wong, the president of the plaintiff company. This is material that Mr. Hendrix could not have had at the time of his first report, which predated the litigation. It is not clear what information Mr. Hendrix derived from that discovery evidence or what use he made of it in offering a further opinion.
- [45] The practice of providing expert witnesses with complete or partial discovery transcripts, although common, was criticized by Lowry J., as he then was, in *Croutch v. B. C. Women's Hospital*, 2001 BCSC 995.

In my view, expert witnesses should not base their opinions on discovery evidence which may or may not be read in at trial. Indeed, as a general rule, I do not consider they should be given access to discovery transcripts. The assessment of evidence is not their function, and there is no place for the delivery of an expert's opinion when it is based on facts drawn by the expert from what was said on discovery. The facts underlying an opinion are within the purview of counsel. It is counsel who must be satisfied they are facts that can be proven, and it is for counsel to settle with an expert witness the facts that are to be assumed for the purpose of the opinion. It is those facts that must then be set out clearly in the statement that is to be delivered in compliance with the Rules.

[At para. 17]

- [46] I agree that is the approach that should be followed in most cases. There may be situations where an expert is asked to comment directly on the conduct of a party, as in a case alleging professional negligence, and it is more convenient for counsel to simply provide an expert with portions of a discovery transcript, along with instructions to assume the facts contained in that testimony. However, in those cases the expert must clearly identify the facts and assumptions he or she has drawn from the discovery transcript. There should also be no suggestion that the expert has weighed the discovery testimony against other evidence and chosen the facts that will be assumed.

- [47] As this report is presented, I do not know what evidence from Mr. Wong's discovery the expert has relied on, how that evidence compares with the testimony Mr. Wong has given in this trial, or how the factual foundation of the opinion may be affected by the extent to which I eventually accept or reject Mr. Wong's evidence.
- [48] The same comment applies to the statement by the witness that he obtained "background information" in discussions with counsel and with various employees of the defendant. There is nothing in the report to identify what that "background information" might be, what role it played in the formation of the opinion, or the extent to which it is or will be in evidence.
- [49] Taken individually, none of these objections would necessarily make the report inadmissible, but their combined impact on the entire report is substantial and leaves very little that can provide me with the kind of reliable technical opinion that I need. I have, therefore, concluded that Mr. Hendrix's second report is inadmissible. This does not mean, however, that the defendant is entirely precluded from leading evidence on everything that is in the report. In *Kroll v. Eli Lilly* [1995] B.C.J. No. 412, Saunders J, as she then was, said:
- In my view, Rule 40A(3) was not intended to prevent the court's receipt of evidence from expert witnesses which is in response to the opinion of experts presented by other parties to the action. While it will often be desirable that notice of such evidence be provided to a party prior to commencement of trial, and this will often be agreed by parties in litigation in which the action is subject to case management, such notice is not required, in my view, by the new Rule. I consider that the law as enunciated in *Pedersen v. Degelder* is still applicable to response to expert reports, and note that this exception to the requirement for advance written notice of the expert's view, limited strictly to true response evidence, does not permit fresh opinion evidence to masquerade as answer to the other side's reports.
- [50] Therefore, defence counsel may still ask Mr. Hendrix to provide some response to Mr. Reid's opinion, provided that it is a truly responsive opinion as described in *Kroll*.
- [51] Mr. Hendrix's third report, dated December 12, 2006, is a response to the opinion provided by Larry Katchuik, a welding expert retained by the plaintiff. That report has some of the same flaws as the second report, including what I consider to be inappropriate references to a lack of problems with other washers made by the defendant over the years and to the operational impact, or lack of it, on the plaintiff's business. However, I must again consider those objections in the context of the entire report.
- [52] Most of the report consists of very specific technical responses to Mr. Katchuik's equally specific technical comments about welding materials, methods and quality. These are clearly matters on which expert assistance is required. Taken as a whole, the report contains highly relevant, properly admissible expert opinion and I believe that I can disabuse my mind of the inappropriate passages.

- [53] In conclusion, the first report of Mr Hendrix, dated June 15, 2002, is admissible with the deletions that Mr. Fulton conceded during argument and on the condition that, before the witness gives evidence, Mr. Rae is advised of which of the factual observations described on pages 4 to 6 were made personally by Mr. Hendrix. If Mr. Rae considers it necessary, he may request a reasonable period of time to review that information before the witness takes the stand.
- [54] The third report of Mr. Hendrix dated December 12, 2006, is also admissible. However, the second report of Mr. Hendrix dated February 9, 2006, is inadmissible. That does not preclude Mr. Fulton from relying on the decision of Saunders J. in *Kroll v. Ely Lilly* to lead evidence from Mr. Hendrix that is properly characterized as being purely and truly responsive to evidence already given by Mr. Reid.
- [55] I emphasize that this is a ruling on inadmissibility only and does not in any way limit cross examination or argument going to the weight of the opinion.
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N. Smith, J.

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