

CANADA / JUDGMENT

Lovelock v. 0459478 B.C. Ltd.

2025 BCSC 361

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Supreme Court of British Columbia

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2025 BCSC 361 Lovelock v. 0459478 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lovelock v. 0459478 B.C. Ltd.,

2025 BCSC 361

Date: 20250214

Docket: S205412

Registry: New Westminster

Between:

Jacqueline Kimberly Lovelock

Plaintiff

And:

0459478 B.C. Ltd., formerly known as Angel Restoration Inc., dba Paul Davis Systems of Greater Vancouver, and David Lawrence McLeod

Defendants

Before: The Honourable Justice Jones

Oral Reasons for Judgment

Re Application to Further Amend the Notice of Civil Claim

Counsel for the Plaintiff:

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Place and Date of Hearing:

New Westminster, B.C.

October 28-31, 2024

November 4-6, 2024

Place and Date of Judgment:

New Westminster, B.C.

February 14, 2025

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Introduction

- [1] These are my oral reasons on the first of two applications heard during the first six and a half days of trial, pending the scheduling of dates to continue and conclude the trial.
- [2] The first application is the plaintiff's application to amend the further amended notice of civil claim ("FANOCC").
- [3] I have edited the transcript of these reasons to correct errors and for clarity, but the substance of the decision has not changed.

Background

- [4] The plaintiff claims against the defendant for damages relating to the theft of jewellery, the plaintiff alleging that the defendant is liable for the loss of the jewellery because the defendant was in possession of, and responsible for the safekeeping of the jewellery when it was stolen from a container behind the defendant's business premises in North Vancouver.
- [5] The defendant came into possession of the jewellery after the plaintiff's house in North Vancouver (the "Property") was damaged by fire on February 6, 2017 (the "Fire").
- [6] After the Fire was extinguished by the fire department and it was safe to enter the house, the plaintiff removed the jewellery from the house. A representative of the defendant took possession of the jewellery from the plaintiff and took the jewellery to the defendant's business premises where the jewellery was placed in a container behind the defendant's premises.
- [7] On the evening of February 21, 2017, the jewellery was stolen from the container.
- [8] The issue with the plaintiff amending her claim arose within the first hour of the first day of trial when the defendant objected to the plaintiff giving evidence about the circumstances of her signing a work authorization (the "Work Authorization") , specifically her evidence that she did not have her glasses on at the time the Work Authorization was presented to her to be signed.
- [9] A voir dire was held to hear the plaintiff's evidence regarding further circumstances about the plaintiff's signing the Work Authorization, pending the plaintiff bringing an application to amend her claim.

Parties' Positions

- [10] The plaintiff's proposed amendments to her claim are focused on a further particularization of the plaintiff's denial of the defendant's reliance on a release of a liability clause (the "Release Clause") in the Work Authorization.
- [11] The plaintiff submits that the Work Authorization and the applicability of the Release Clause were plead by both the plaintiff and the defendant in their initial claim and response, respectively.
- [12] The plaintiff submits that the amendments sought are not a new cause of action, they are not inconsistent with the plaintiff's existing pleadings, and there is no prejudice to the defendants because the amendments were raised on the first day of trial, and pursued by a notice of application filed on the second day of trial.

- [13] The defendant opposes the plaintiff's application, submitting that the defendant is prejudiced since it prepared its case on the underlying assumption that the plaintiff, from the pleadings in her notice of civil claim ("NOCC"), merely wished to confine the interpretation of the Work Authorization to the defendant's work performed at the plaintiff's home where the Fire occurred, and the plaintiff plead no other basis for resisting the Work Authorization.
- [14] Further, the defendant submits that the plaintiff's proposed amendments plead new causes of action of fraudulent and negligent misrepresentations, and being "under the power of the defendant", and unconscionability, beyond the limitation period.

The Legal Framework

- [15] Amendments to pleadings are referenced in Rule 6-1(b)(i) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR], which provide as follows:
- (1) Subject to Rules 6-2(7) and (10) and 7-7(5), a party may amend the whole or any part of a pleading filed by the party, other than to change parties or withdraw an admission,
 - (a) once without leave of the court, at any time before service of the notice of trial, or
 - (b) after the notice of trial is served, only with
 - (i) leave of the court, or
 - (ii) written consent of the parties.
- [16] Rule 6-1(8) of the SCCR provides:

Amendment at trial

- (8) Unless the court otherwise orders, if an amendment is granted during a trial or hearing, an order need not be taken out and the amended pleading need not be filed or served.
- [17] Amendments can be made with leave of the court. The plaintiff's submissions cite *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 1141, for the applicable principles relating to amending a claim, generally, and specifically at trial, summarized as follows:
- [26] With respect to the amendments in dispute, the court's authority to permit amendments to pleadings is discretionary with the overriding concern being whether the amendments are "just and convenient" (*Chouinard v. O'Connor*, 2011 BCCA 161, at para. 21). As reflected in the cases, applications to amend pleadings can take place before, during or after a trial. Here the application is during the trial, after about 100 days of hearing, still during the plaintiffs' case and with a large number of days of trial to come.

[27] The general principles that apply to applications to amend pleadings (irrespective of the time at which the application is brought) are as follows (*Howell v. Machi*, 2017 BCSC 1806, at para. 31; citing *Chouinard*, at para. 10):

1. Amendments should be permitted as necessary to determine the real issues between the parties;
2. A party is not required to adduce evidence in support of a pleading before trial;
3. On an application to amend, the facts alleged are taken as established; and
4. The discretion to grant leave to amend is to be exercised judicially in accordance with the evidence adduced and the guidelines of the authorities.

[28] An application for an amendment of the pleadings during a trial, as here, can be permitted in the following circumstances (*Diamond Willow Ranch Ltd. v. Oliver (City)*, [1988] B.C.J. No. 880 (S.C.); citing *Arrow Services Ltd. v. Wedge* (1964), 1964 CanLII 331 (SK KB), 49 W.W.R. 65):

1. it is not inconsistent with the pleadings already filed by the party seeking the amendment;
2. it is not inconsistent with the evidence already tendered by that party and his witnesses at trial and on discovery;
3. If, had they been sought at the outset of trial, it would not have changed the whole course of the trial;
4. to allow it would not be unfair to the opposite party; and
5. it can be shown that it is necessary for the purpose of determining the real issues raised or depending upon the proceedings.

[31] In addition, it is worth bearing in mind some general requirements of pleadings. For example, a notice of civil claim must, among other things, "set out a concise statement of the material facts giving rise to the claim" and must "otherwise comply with Rule 3-7" (Rules of Court, 3-1). Rule 3-7 includes requirements that pleadings "must not contain evidence by which the facts in it are to be proved" and "[c]onclusions of law must not be plead unless the material facts supporting them are plead" (Rules of Court, 3-7 (1), (9)).

[Emphasis added.]

[18] The plaintiff also cites *0742848 BC Ltd. v. Squamish (District)*, 2018 BCSC 1046, as follows:

[17] The court should take a generous approach to the question of amendments to ensure that, so far as possible, all matters in controversy between the parties may be completely and finally determined. The court will not allow useless amendments or amendments that are in violation of the rules that govern pleadings. These rules include the requirements relating to conciseness, material facts and particulars and the prohibition against pleadings that disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious: *Navarro v. Doig River First Nation*, 2016 BCSC 2006, at para. 62.

[18] Nonetheless, any doubt on the facts or the law should favour allowing the amendments and allowing those doubts to be resolved at trial. Amendments should be permitted unless actual prejudice can be shown by the opposing party, which cannot not be compensated for by costs: *Gill v. Gill*, 2003 BCSC 801, at para. 18; *Jace Holdings Ltd. v. Trademark Property Group Ltd.*, 2010 BCSC 1575, at para. 9; *Morriss v. British Columbia*, 2010 BCCA 95, at para. 17; and *Gardner v. Viridis Energy Inc.*, 2014 BCSC 204, at paras. 76-77.

[Emphasis added.]

[19] The defendant cites *G.A.D. v. BC Children's Hospital*, 2003 BCSC 443, for the similar principles set out as addressed above, and including the general principle that:

[17]

(e) the discretion is to be exercised judicially, in accordance with the evidence adduced and the guidelines of the authorities. Factors to be considered include: the extent of delay, the reasons for delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, the extent of the connection between the existing claims and a proposed new cause of action. The over-riding consideration is what is just and convenient, see *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 1996 CanLII 3033 (BC CA), 19 B.C.L.R. (3d) 282 (C.A.).

[18] Where the amendments would introduce a new cause of action after the expiration of a limitation period, there are additional considerations. Section 4(4) of the Limitation Act R.S.B.C. 1996, c. 266 provides:

Counterclaim or other claim or proceeding

In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, even if between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

[19] In considering whether amendments to plead a new cause of action should be allowed where a limitation period has expired, the court, in exercising its discretion pursuant to Rule 24(1) of the Rules of Court and s. 4(4) of the Limitation Act, is required to balance the interests of justice and convenience in relation to all of the parties. All relevant factors should be considered, but no one single factor is necessarily determinative: *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*, *supra*.

[20] One issue in relation to the consideration of amendments which plead a new cause of action after the expiration of a limitation period is whether prejudice to the respondents is to be presumed. Such a presumption was found in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 1993 CanLII 1428 (BC CA), 79 B.C.L.R. (2d) 222 (C.A.). Some doubt was cast upon the issue in subsequent decision, including that of *Teal Cedar Products*, *supra*. However in a subsequent decision in the case *Letvad v. Fenwick*, 2000 BCCA 630 (CanLII), 2000 B.C.C.A.

630, Mr. Justice Esson, speaking for the Court, after reviewing the decision in Teal Cedar, stated at para. 30:

I return to the reasons of the chambers judge. She correctly stated that at law there is a presumption of prejudice to the proposed defendants if the limitation period for the claims made against them has expired. She found that the limitation period had "probably expired." In my view, the evidence requires the conclusion that it had expired.

[21] I conclude therefore that where a limitation period has expired and a new cause of action is sought to be pleaded, prejudice will be presumed. The presumption of prejudice is not, however, in any way conclusive to the question of the application. Rather, as was stated in Teal Cedar, supra, all relevant factors must be considered in light of what is just and convenient.

[20] With these principles in mind, I will review the specific amendments proposed by the plaintiff.

Proposed Amendments to the FANOCC

[21] The progression of the NOCC through amendment and further amendment is summarized as follows.

NOCC filed August 30, 2018

[22] In the original NOCC filed August 30, 2018, the factual references to the Work Authorization are as follows:

20. The plaintiff signed a "Work Authorization Agreement" on February 7, 2017, which includes, inter alia, the following language:

"5. I/We acknowledge and agree that certain dangers and hazards exist on a work site. I/We hereby waive, release and discharge Paul Davis and its' directors, officers, employees, agents and sub trades from any liability for property damage, personal injury, death or any other loss or damage whenever or however caused."

21. The defendant PDS of Greater Vancouver at its own initiative took sole custody of the jewellery, removed it from the work site, and assured the plaintiff that it would be kept safe and returned to her.

[23] The legal basis reference to the Work Authorization in the original NOCC states as follows:

1. The terms of the Work Authorization and Agreement are confined to the work site and do not extend to release the defendant from liability.

[24] The cause of action in the NOCC is negligence for failing to adequately secure the jewellery.

[25] The defendant's response to civil claim filed November 9, 2018, admits the facts alleged in para. 20 of the NOCC regarding the Work Authorization, and pleads that clause 5 of the Work Authorization, the Release Clause, relieves the defendant of any liability for the loss of the jewellery.

ANOCC filed November 28, 2018

[26] The amended notice of civil claim ("ANOCC") was filed November 28, 2018, which simply changed the name of the defendant to Paul Davis Greater Vancouver.

FANOCC filed November 19, 2019

[27] The further amended NOCC ("FANOCC") was filed November 19, 2019, adding bailment as a cause of action.

Proposed FFANOCC

[28] The amendments to the plaintiff's claim in the proposed further further amended NOCC ("FFANOC") are contained in part 1 - Statement of Facts, and part 3 Legal Basis, focusing on the Work Authorization.

[29] The proposed factual allegations are summarized as follows:

- a) The plaintiff was unaware of the Release Clause in the Work Authorization (para. 7);
- b) The defendant represented that the Work Authorization was to allow the defendant to secure the property (para. 8);
- c) The defendant did not bring the Release Clause to the attention of the plaintiff (para. 9);
- d) The plaintiff was emotionally distraught when she signed the Work Authorization (para. 10);
- e) Due to the circumstances, the plaintiff was incapable of assenting to the Release Clause (para. 11);
- f) When the plaintiff signed the Work Authorization, the defendant knew, or ought to have known the plaintiff was mistaken about the contents and/or significance of the Work Authorization (para. 12);
- g) At no time was the Release Clause intended to shelter the defendant from liability and negligence (para. 13);
- h) In the alternative, the Release Clause was only to apply to restoration work carried out the Property (para. 14).

[30] The proposed amendments to the legal basis of the pleading are summarized as follows:

- a) The Work Authorization release clause does not limit the defendant's liability because:
 - i. It does not extend to loss of chattels, which the defendant removed from the site (para. 1).

- ii. Does not refer to liability in negligence (para. 2) or bailment (para. 3).
- iii. The plaintiff signed it when she was in extremely distress and effectively in the power of the defendant. The term is unfair to the plaintiff and thereby void for unconscionability (para.4).
- iv. She was unable to read the Work Authorization because she did not have her glasses and relies on the doctrine of non est factum (para. 5).
- b) The defendant fraudulently or in the alternative negligently misrepresented to her that the Work Authorization was for the defendant to secure the premises (para. 6).
- c) The Release Clause is onerous, and her attention was not drawn to it (para. 7).
- d) The defendant knew or should have known the plaintiff was not consenting to release the defendant from liability (para. 8).
- e) The Work Authorization does not release the defendant from liability because it is contrary to public policy (para. 9).

Analysis

- [31] The decision to amend pleadings during a trial is a discretionary one.
- [32] In Cambie Surgeries case, regarding the factors to be considered on an application to amend pleadings, amendments should be permitted as necessary to determine the real issues between the parties.
- [33] Here, that principle favours granting the application for the amendment because an issue in this matter from the outset has been the Work Authorization, its interpretation, and its effect on the relationship between the parties, if any.
- [34] In the plaintiff's original NOCC, she admitted signing the Work Authorization in her original NOCC, she acknowledged the existence of the Release Clause, and she pleads that the terms of the Work Authorization are confined to the work site and does not extend to release the defendant of liability.
- [35] The plaintiff is not required to adduce evidence in support of a pleading before trial, but a party is required to set out a concise statement of the material facts giving rise to the claim.
- [36] For an application to amend, the facts are taken as established.
- [37] The discretion to grant leave to amend is to be exercised judicially in accordance with the evidence adduced and the guidelines of the authorities.
- [38] Further factors to be considered from Cambie Surgeries regarding an application for an amendment of the pleadings during a trial, include the proposed amendment pleading is not inconsistent with the pleadings already filed by the party seeking the amendment .

- [39] Here, the plaintiff's original NOCC admits to having signed the Work Authorization, acknowledges the existence of the Release Clause, but denies the defendant is entitled to liability on the base terms of the Work Authorization. To that extent, the proposed amendments are connected to the original pleadings, but there is some inconsistency in having acknowledged the Release Clause and now seeking to deny she was aware of it; however, the two pleadings can be read consistently in that the NOCC acknowledges she signed the Work Authorization which included the Release Clause, with the proposed amendment including that pleading and adding that at the time she signed the Work Authorization she was not aware of the Release Clause.
- [40] Without deciding the issue, the plaintiff's denial of the application of the Work Authorization and Release Clause may be interpreted as arising from the Release Clause being restricted to "the work site" being the Property only, and also, by the expansive use of the word "extend", to possibly a more general submission that the defendant cannot rely on the Work Authorization to deny liability to the plaintiff for the loss of the jewellery.
- [41] The plaintiff's proposed amendments, as summarized above, seek to particularize the circumstances of the plaintiff signing the Work Authorization, alleging that she should not be held to the terms of the Work Authorization because she was emotionally distraught at the time she signed the document, she could not read the document because she did not have her glasses, and the defendant's representative advised her the document was for the purpose of the defendant securing the Property. The plaintiff alleges that the defendant's representations to the plaintiff constituted fraudulent or negligent misrepresentations.
- [42] Other reasons given by the plaintiff why the defendant cannot rely on the Release Clause is that the document does not mention negligence or bailment, it is unfair and unconscionable.
- [43] The proposed amendments are not a model form of pleading. For example, the alleged material fact the plaintiff did not have glasses is in the legal basis section of the proposed FFANOC, and not the statement of facts, however, ultimately, taken as a whole, the amendments are not inconsistent with the existing pleading because the proposed amendments are consistent with her admission she signed the Work Authorization, she acknowledges the existence of the Release Clause in the Work Authorization, and she denies the defendant is entitled to rely on the terms of the Work Authorization to deny liability for the loss of the jewellery.
- [44] Although the plaintiff's denial of the defendant's right to rely on the terms of the Work Authorization in defence of the claim is logically the plaintiff's reply to the defendant's assertion of what it says is a contractual defence to the claim, ultimately it was not inappropriate for the plaintiff admitting in the NOCC that she had signed a Work Authorization and then denying that the defendant is entitled to rely on the liability waiver in the Work Authorization. While logically such a response to the defendant's defence could have been filed in a Reply, a formal reply is not required. Rule 3-6(3) of the Supreme Court

Civil Rules provides that if no reply to a response to civil claim is served, a joinder of issue on that response to civil claim is implied.

- [45] In simple terms, the proposed amendments to particularize the reasons why the plaintiff pleads the defendant is not entitled to rely on the Work Authorization, specifically the Release Clause, because of the circumstances of her signing the document, and unconscionability.
- [46] Regarding the further factor of the amendments not being inconsistent with the evidence already tendered by that party and his witness at trial, the issue arose at trial specifically because the plaintiff, in giving her evidence, specifically referred to what she alleges in the proposed amendments, that is, that she was emotionally distraught was unable to read the Work Authorization because she did not have her glasses.
- [47] Regarding the timing of the plaintiff's application, the issue arose on the first day of trial when the plaintiff was giving her evidence, the notice of civil claim was filed on the second day of trial, and the application was argued on the seventh day of trial before the plaintiff closed her case, and before a continuation of the trial as scheduled.
- [48] Consequently, the whole course of the trial has not been changed by the proposed amendments, other than the defendant submits that it had prepared for trial without notice of the plaintiff's intent to argue that she was not bound by the Release Clause in the Work Authorization because of the circumstances of her signing the Work Authorization.
- [49] The timing of the application is a factor to be considered, including the questions of the extended delay, the reasons for the delay, and any explanation put forward to account for the delay.
- [50] Here, the delay is not explained other than the issue was raised very early at trial during the plaintiff's testimony when the defendant objected to the plaintiff giving evidence about the circumstances of the signing of the Work Authorization to support what the defendant submitted was allegations the defendant could not rely on the Release Clause in the Work Authorization on account of the circumstance of the plaintiff's signing of the Work Authorization, including the plaintiff being emotionally distraught and not having her glasses on at the time she signed the Work Authorization, and the defendant representative's representations to her about the purpose of the Work Authorization at the time she signed it.
- [51] The defendant also submits that the amendments pleading fraudulent or negligent misrepresentations, the plaintiff being "under the power of the defendant" in signing the Work Authorization, and unconscionability, are all "new causes of action" sought to be advanced beyond the limitation period. The defendant submits the new allegations are, in fact, defences to an action to enforce an agreement, not a pleading in a notice of civil claim as part of a cause of action.

- [52] I agree that the pleas of fraudulent or negligent misrepresentation have the appearance of causes of action, however, as pled by the plaintiff, they are not causes of action for which damages are claimed, they are, as the defendant rightly asserts, the plaintiff's defences to the defendant's reliance on the Release Clause in the Work Authorization, as are the pleas of the plaintiff being under the power of the defendant in support of the plaintiff's submission that the Release Clause is unfair and unconscionable.
- [53] If the plaintiff were to assert a new "claim" arising from an alleged fraudulent or negligent misrepresentation, then that claim would be barred by the Limitation Act, S.B.C. 2012, c.13 and subject to the analysis of a proposed amendment commenced after the expiry of a limitation period, however, "claim" is defined in s. 1 of the Limitation Act as meaning a claim to remedy an injury, loss, or damage that occurred as a result of an act or omission, and here, the plaintiff does not assert a claim arising from a new cause of action, the plaintiff is particularizing her existing allegation that the defendant is not entitled to rely on the terms of the Work Authorization, specifically the Release Clause to protect itself from liability for the loss of the jewellery.
- [54] The same is true of the pleas of the plaintiff being under the power of the defendant, and unconscionability.
- [55] Ultimately, the plaintiff pleads the defendant's representative fraudulently or negligently misrepresented the Work Authorization as being for the purpose of securing the Property, while the plaintiff was in a state of distress by the circumstances of the Fire, and it would be unfair and unconscionable for the defendant to now be allowed to assert that it is absolved of all liability for the loss of the jewellery on the basis of the Release Clause.
- [56] That is the plaintiff's response to the defendant's pleading that it is not entitled to rely on the Release Clause to deny liability, not a new cause of action.
- [57] Although the proposed amendments are arguably not artfully drafted, in my view they do not rise to the level of offence of the principle that pleadings will be struck if "unintelligible, confusing, and difficult to understand" as referenced in *Squamish (District)*, supra citing *Kent v. Translink*, 2016 BCSC 224 at para. 8; quoting *Dempsey et al. v. Envision Credit Union et al.*, 2006 BCSC 750 at para. 13.
- [58] The defendant also submits it is prejudiced and it would be unfair to allow the plaintiff to amend her claim at this late date since the defendant prepared its case on the underlying assumption that the plaintiff merely wished to confine the interpretation of the Work Authorization to the defendant's work performed at the Property, and until now, no other basis for resisting the Work Authorization was raised.
- [59] The test of whether there has been prejudice created by a proposed amendment is whether the amendment would cause actual and meaningful prejudice that cannot otherwise be dealt with in costs: see *Fengyun v. He*, 2017 BCSC 110 at para. 81, citing *Continental Steel Ltd. v. CTL Steel Ltd.*, 2014 BCSC 104 at para. 26.

- [60] I agree that there is some prejudice to the defendant as a result of the plaintiff applying to amend her claim during the trial, however, I do not consider that prejudice to rise to the level of actual and meaningful prejudice that cannot otherwise be dealt with in costs. The issue arose very early in the trial when the defendant objected to the plaintiff giving evidence that she did not read the Work Authorization because she did not have her glasses when the defendant's representative presented her with the Work Authorization to sign the document.
- [61] The objection was based on the premise that if the evidence was adduced in support of the plaintiff arguing that she was not bound by the Release Clause, that specific plea had not been made by the plaintiff in her NOCC or in a Reply to the defendant's response to civil claim, in which the defendant pleads that the Release Clause absolves the defendant from liability for the loss of the jewellery.
- [62] Because of that objection, the evidence was heard in a voir dire, although the circumstances of the plaintiff's response to the Fire is also relevant as background and admissible on that basis.
- [63] In any event, having heard the plaintiff's evidence, the defendant was in a position to cross-examine her on her evidence of the circumstances of signing the Work Authorization, and with the trial adjourned pending a continuation for further available dates to be scheduled, before the plaintiff's case is closed, the defendant has had additional time to consider and address the issue.
- [64] In addition to having cross-examined the plaintiff, the defendant was able to cross-examine two other witnesses for the plaintiff - her partner at the time, Alvin Epp, and a neighbour, Jeff Donohue - who gave evidence at trial about the circumstances at the Property following the Fire, including the plaintiff being given a document by a representative of the defendant for her to sign.
- [65] The defendant also has the opportunity to adduce evidence about the circumstances of the plaintiff signing the Work Authorization. The plaintiff gave evidence of one of the defendant's representatives was at the Property after the Fire and presented the Work Authorization to the plaintiff for her signature. That representative is on the trial schedule as a possible witness for the defendant.
- [66] As a result, although some of the specifics of the plaintiff's allegations regarding the signing of the Work Authorization may have arisen during trial, I find that it would not be unfair to the defendant for the plaintiff to amend her claim in the form of the proposed FANOC.
- [67] Finally, I consider the evidence necessary for the purpose of determining the real issues raised by the proceedings, the defendant's case, including the applicability of the Release Clause.

- [68] The over-riding consideration is the interests of justice generally and what is just and convenient between the parties.
- [69] Here, having reviewed the factors applicable to an application to amend the pleadings as discussed above, I consider it is in the interests of justice generally, and just and convenient as between the parties, to grant the plaintiff leave to amend her FANOCC as proposed in the draft FFANOCC.

Conclusion

- [70] For these reasons, I order that the plaintiff's application to further amend her FANOCC is granted with orders as follows:
1. The plaintiff is granted leave to further amend her FANOCC in accordance with these reasons, the amending pleading to be filed and served within 15 days of the date of these reasons.
 2. The defendant is also granted leave to amend its amended response to civil claim in response to the plaintiff's FFANOCC, any such amended response to be filed and served within 15 days of the defendant's receipt of the plaintiff's FANOCC.
 3. The parties are directed to contact court scheduling to seek an additional four trial days for the continuation and conclusion of the trial.

(SUBMISSIONS ON COSTS)

- [71] THE COURT: On costs, I agree with the defendant's position that costs should be awarded to the defendant in the cause. The application has arisen and the time required to address the plaintiff's application is a result of the plaintiff having commenced the trial and then requested the amendment during the trial. For these reasons, I consider it appropriate for the defendant to have its costs in the cause.

"Jones J."

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