

CANADA / JUDGMENT

Ross Land Mushroom Farm Ltd. v. Ferro Building Systems Ltd.

2023 BCSC 66

COURT

Supreme Court of British Columbia

DECIDED

16 January 2023

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2023 BCSC 66 Ross Land Mushroom Farm Ltd. v. Ferro Building Systems Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ross Land Mushroom Farm Ltd. v. Ferro Building Systems Ltd.,

2023 BCSC 66

Date: 20230116

Docket: S194600

Registry: New Westminster

Between:

Ross Land Mushroom Farm Ltd.

Plaintiff

And

Ferro Building Systems Ltd.

Defendants

And

Dynacor Coatings (2004) Ltd., Stobbe Construction Ltd.,

Pottinger Gaherty Environmental Consultants Ltd., and

RPM Canada Company/Compagnie RPM Canada and

RPM Canada Investment Company, a partnership doing business as a proprietorship known as RPM Canada doing business as a sole proprietorship known as Carboline

Third Parties

Before: The Honourable Justice Lamb

Reasons for Judgment

Counsel for the Defendants:

K. Orr

Counsel for Attendees, Neale Engineering:

C.B.P. Elder

L. Salmi

No other appearances

Place and Date of Hearing:

New Westminster, B.C.

December 5, 2022

Place and Date of Judgment:

New Westminster, B.C.

January 16, 2023

Introduction

- [1] The defendant, Ferro Building Systems Ltd. ("Ferro"), applies to add Neale Engineering Ltd. ("Neale Engineering") as a third party. Neale Engineering opposes the application. No other party takes a position.
- [2] The outcome of this application turns on whether or not the limitation period for bringing a third party claim has expired. During oral submissions, Neale Engineering conceded that I am bound by the Court of Appeal's interpretation of s. 16(a) of the Limitation Act, SBC 2012, c. 13, found in *Sohal v. Lezama*, 2021 BCCA 40, which effectively determines the outcome of this application. On the other hand, Neale Engineering says the limitation period for a potential third party claim against it would have expired if the discoverability rule under s. 16(b) of the Limitation Act applied.

Background

- [3] According to the amended notice of civil claim, the plaintiff is in the business of growing mushrooms, and it operates a mushroom composting facility at 3555 Ross Road, Abbotsford, British Columbia (the "Building"). The plaintiff contracted with Ferro to install the Building. The plaintiff alleges that the steel beams in the Building were not coated properly for use as a composting facility. The steel beams allegedly corroded within the first few months of use. The plaintiff alleges that Ferro breached its contract or was negligent because the Building is not fit for its purpose. The plaintiff also alleges that Ferro negligently represented that it was qualified to construct the Building.
- [4] In terms of the limitation period for bringing a third party claim, the following dates are relevant:
- a) The Building was completed either in the spring or fall of 2015;
 - b) By January 2016, the plaintiff observed rust and notified Ferro;
 - c) On September 19, 2017, the plaintiff filed this action;
 - d) On December 29, 2017, the plaintiff filed a separate action (New Westminster Registry, Action No. 197572) ("NW 197572") against RPM Canada Company/Compagnie RPM Canada and RPM Canada Investment Company, A Partnership doing business as a Proprietorship known as RPM Canada doing business as a Sole Proprietorship known as Carboline ("RPM");
 - e) On May 15, 2018, Ferro was served with the notice of civil claim in this action;
 - f) On September 4, 2018, Ferro filed a response to civil claim;
 - g) On October 28, 2019, the plaintiff filed an amended notice of civil claim;
 - h) On February 21, 2020, Ferro filed a third party notice claiming contribution and indemnity from various parties including RPM and Stobbe Construction Ltd.;
 - i) On November 25, 2021, RPM conducted an examination for discovery of Stobbe Construction Ltd. in NW 197572;
 - j) On December 3, 2021, Neale Engineering was added as a third party to NW 197572;
 - k) On February 17, 2022, Ferro filed an application to add Neale Engineering as a third party to this action.
- [5] There is an order that the trial of this action be heard at the same time as the trial in NW 197572. The trial was set to be heard starting January 30, 2023, but it has been adjourned with no confirmed start date as of the hearing of this application.

- [6] Ferro's proposed third party notice against Neale Engineering advances a claim for contribution and indemnity. Ferro alleges that Neale Engineering was the civil engineering and primary consultant in respect of design and construction of the Building. Ferro alleges that Neale Engineering breached its contract with the plaintiff and was negligent by representing that a certain coating on the steel beams would be suitable given the Building's intended use.

Legal framework

- [7] Ferro applies for leave to file a third party notice pursuant to Rule 3-5(4)(a) of the Supreme Court Civil Rules.
- [8] In determining whether or not to exercise my discretion to grant leave, I may consider the following factors, as summarized in para. 21 of *The Owners, Strata Plan 4249 v. Travelers Insurance Company of Canada*, 2015 BCSC 172:
- a) Prejudice to the parties;
 - b) Expiration of a limitation period;
 - c) The merits of the proposed claim;
 - d) Any delay in the proceedings; and
 - e) The timeliness of the application.
- [9] The court does not have discretion to grant leave for a party to issue a third party claim for contribution and indemnity after the limitation period has expired: s. 22(2) of the Limitation Act; *Sohal v. Lezama*, 2021 BCCA 40 at para. 115. Neale Engineering argues that the limitation period for bringing a third party claim has expired. Neale Engineering does not rely on any other factor to say that leave ought not to be granted.
- [10] The basic limitation period for bringing a third party claim against Neale Engineering is two years from the day on which the claim is discovered: s. 6, Limitation Act. Section 16 of the Limitation Act provides specific discovery rules for claims for contribution or indemnity:
- s. 16 A claim for contribution or indemnity is discovered on the later of the following:
- (a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;
 - (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.
- [11] To be clear, s. 16 provides that the claim is discovered on the later of the days determined by 16(a) or 16(b).

When did Ferro discover the claim against Neale Engineering pursuant to s. 16(a) of the Limitation Act?

- [12] For the reasons that follow, the claim against Neale Engineering has not, as of yet, been "discovered" pursuant to s. 16(a) of the Limitation Act.
- [13] The Court of Appeal in *Sohal* found that the limitation period under s. 16(a) of the Limitation Act does not start to run until a pleading alleging damage caused by the fault of two or more defendants has been served: *Sohal* at para. 111.
- [14] In *Sharma v. Mohammad*, 2022 BCSC 270, the plaintiff was injured in two separate motor vehicle accident and started two separate actions claiming injuries from each accident. The defendant in the first action sought to add the defendant from the second action as a third party, claiming contribution and indemnity for damages caused by an indivisible injury. As here, the plaintiff did not add the proposed third party as a defendant in the first action.
- [15] In *Sharma*, the proposed third party argued that the limitation period would potentially never be triggered under s. 16(a) if the plaintiff declined to add the proposed third party as a defendant in the first action. The proposed third party argued this would be contrary to legislature's intent as recognized in *Dhanda v. Gill*, 2019 BCSC 1500 at para. 48. Justice *Kirchner* found considerable merit to the proposed third party's argument but felt bound by *Sohal* at para. 111 and 0782484 B.C. Ltd. v. E-Pro Enterprises Inc., 2021 BCSC 1509 at para. 109. As a result, Justice *Kirchner* determined that time had not started to run under s. 16(a) of the Limitation Act because the plaintiff had not filed a pleading alleging that his injuries had been caused by the fault of two or more defendants. I understand that *Sharma* is under appeal.
- [16] As in *Sharma*, I find that the time for bringing a claim for contribution and indemnity has not begun to run in this case under s. 16(a) of the Limitation Act. In the case at bar, the plaintiff has not added Neale Engineering as a defendant in this action. More specifically, the notice of civil claim does not allege that damage was caused by the fault of two or more defendants. For the reasons outlined in *Sharma*, I am bound by the Court of Appeal's finding in *Sohal* and the decisions in *Sharma* and 0782484 B.C. Ltd. As a result, Ferro's claim for contribution and indemnity against Neale Engineering has not been discovered under s. 16(a) of the Limitation Act.
- [17] In the event that I am mistaken about how *Sohal* applies in these circumstances or alternatively that *Sharma* is overturned, I will consider when Ferro discovered the claim under s. 16(b) of the Limitation Act.

When did Ferro discover the claim against Neale Engineering pursuant to s. 16(b) of the Limitation Act?

- [18] Pursuant to 16(b) of the Limitation Act, Ferro discovered the claim against Neale Engineering when Ferro "knew or reasonably ought to have known that a claim for contribution or indemnity may be made" against Neale Engineering. I accept the submissions of Neale Engineering that Ferro knew or ought to have known that it may make a claim for contribution and indemnity against Neale Engineering when Ferro was served with the original notice of claim, i.e. May 15, 2018.
- [19] The Court of Appeal in *Roberts v. E. Sands & Associates*, 2014 BCCA 122 at para. 34 reviewed the principles of discoverability:
- [34] The two operative concepts in this case are diligence and the knowledge of facts supporting a cause of action. According to the doctrine of discoverability, a limitation period does not begin to run until the claimant knows the material facts upon which a cause of action is founded. The claimant must be diligent in discovering those facts. The judge understood the doctrine; his discussion on the topic correctly summarizes the law:
- [44] The concept of discoverability was discussed by the learned author of *The Law of Limitations* (2nd Ed.) (LexisNexis Butterworths) 2004:

In all cases where the discoverability rule is invoked, the claimant must have exercised reasonable diligence in discovering the material facts upon which to found an action. It has been clear for some time now that wilful blindness to the existence of damages will not be an effective answer to a limitation defence.

As to what amounts to "reasonable diligence", the test is a subjective one. In the 1996 decision of *Bourne v. Saunby*, the court declined to apply the discoverability rule because "everything was then and there available to enable the plaintiff and his family and their advisors, exercising due diligence to bring an action". Similar approaches have been taken in more recent cases. It is not adequate, for example, to say that where medical evidence is available but has unreasonably not been obtained, that lack of knowledge of the nature and extent of an injury should trump a limitation defence. A claimant cannot simply wait until he or she has an expert report in hand which supports the claim. [Emphasis added.]

(at p. 54)

- [20] In the case at bar, Bill Barwig, principal of Neale Engineering, made an affidavit in response to Ferro's application to add Neale Engineering as a third party. Mr. Barwig deposed that Neale Engineering was retained by the plaintiff in or around July 2013 to provide consulting engineering and architectural design services in relation to the design and construction of the Building. Mr. Barwig prepared initial structural drawings that included the design of the girts, purlins and beams referenced in the proposed third party notice. According to Mr. Barwig, the plaintiff subsequently retained Ferro to design and erect the steel frame of the Building, effectively removing that component from Neale Engineering's scope of work.

- [21] Mr. Barwig deposed that Ferro knew at all material times that Neale Engineering was the structural engineer of record for the design and construction of the Building. Neale Engineering did not deny this fact.
- [22] Further, there was evidence before me that there was a meeting between representatives of the plaintiff, Ferro, Neale Engineering, RPM and others on May 22, 2014 at which the coating on girts and purlins was discussed. Ferro did not respond to this evidence.
- [23] In my view, there are no specific material facts in the proposed third party notice that were not known or knowable to Ferro when it was served with the notice of civil claim had Ferro exercised due diligence.
- [24] Ferro fails to provide sufficient evidence to establish that it only discovered the potential claim against Neale Engineering on a date later than May 15, 2018. Ferro relies on the affidavit of a legal assistant to argue that it only discovered the potential claim against Neale Engineering on November 25, 2021. The legal assistant deposed that
- a) she was advised by a representative for Ferro "that Neale Engineering Ltd. represented to them that they had no responsibility for the selection of coating for the purlins and beams"; and
 - b) she was advised by counsel for Ferro "that the first time he heard that Neale Engineering Ltd. had a role in the selection of the coating for the purlins and beams was at the examination for discovery of Stobbe Construction Ltd. on November 25, 2021."
- [25] A denial of responsibility by Neale Engineering does not change whether or not Ferro was aware or ought to have been aware of material facts to found a claim for contribution or indemnity. Neale Engineering's denial of responsibility is not evidence that goes to show that Ferro only became aware of the potential claim against Neale Engineering at a later date.
- [26] The hearsay evidence of Ferro's counsel does not assist in determining when Ferro knew or ought to have known of a potential claim against Neale Engineering. Discoverability rests on Ferro's subjective knowledge, not the knowledge of its counsel. Further, Ferro's counsel's statement is too vague to be accorded much weight if any. In particular, Ferro's counsel failed to identify the specific evidence from the examination for discovery of Stobbe Construction Ltd. that was supposedly informative.
- [27] In my view, given that the discoverability test is subjective, it is significant that a representative of Ferro did not provide an affidavit deposing when Ferro knew the material facts alleged in the third party notice and why it would not have had reason to know them by May 15, 2018.
- [28] On the whole of the evidence, I find that Ferro knew or reasonably ought to have known the material facts to support a claim for contribution and indemnity against Neale Engineering on May 15, 2018.

Conclusion

- [29] Section 16 of the Limitation Act provides that a claim for contribution or indemnity is "discovered" on the latest of the days determined under s. 16(a) or (b). In the case at bar, the time for bringing a third party claim has not started to run under s. 16(a), which means the limitation period established by s. 6 of the Limitation Act has not expired.
- [30] Under s. 16(b) of the Limitation Act, the claim against Neale Engineering was discovered on May 15, 2018, the day on which Ferro was served with the notice of civil claim. If s. 16(b) was the operative subsection (which it is not), then the limitation period would have expired on May 15, 2021, due to the effect of Ministerial Order Nos. MO86/2020 and MO98/2020.
- [31] Because the limitation period has not expired, I am prepared to grant leave to Ferro to file the proposed third party notice.

"Lamb J."

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