

CANADA / JUDGMENT

Shields v. Strata Plan VIS 5030

2017 BCSC 1913

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1913 Shields v. Strata Plan VIS 5030

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shields v. Strata Plan VIS 5030,

2017 BCSC 1913

Date: 20170117

Docket: S162229

Registry: Vancouver

Between:

Donald Shields and Arlette Baker

Plaintiffs

And

Strata Plan VIS 5030

Defendant

Before: The Honourable Mr. Justice A. Saunders

Mid-Trial Oral Ruling on Voir Dire re: Admissibility of

Expert Opinion Report of Martin Vogel

Counsel for the Plaintiffs:

J.D. Shields

Counsel for the Defendant:

F.R. Cabanos

S.U. Hamilton

Place and Date of Trial:

Vancouver, B.C.

January 9-12, 16-17, 2017

Place and Date of Judgment:

Vancouver, B.C.

January 17, 2017

- [1] THE COURT: This is a ruling as to the admissibility of an expert opinion regarding the quality of the water supplied to the plaintiffs' condominium unit report authored by a chemical engineer, Mr. Vogel.
- [2] First, I find Mr. Vogel is qualified to state opinions in the field in which he is proposed to be allowed to give expert evidence; that is, as a chemical engineer with expertise in water quality assessment and water treatment in the context of water systems. The extent to which his opinions might require more specific qualifications than those is a matter of weight and is a proper subject to be explored on substantive cross-examination.
- [3] In the remainder of this ruling I concentrate on concerns that arise out of the content of the report itself.
- [4] Substantively, the report sets out a list of 33 assumed facts. It then lists 24 separate "documents relied upon"; some are documents of the parties, and some are published guidelines and standards. The opinion of Mr. Vogel is set out in the form of answers to six questions:
 - 1) Are there guidelines or standard protocols for taking water samples for testing of water quality?
 - 2) What are the maximum acceptable levels of minerals, particularly lead and iron that may be present in drinking water?
 - 3) Does non-drinking water (e.g. water used for showering) have the same maximum acceptable levels of minerals?
 - 4) Based on the test results of the samples obtained by Ms. Weick on 6 September 2016, does the water at the apartment comply with the maximum acceptable levels of minerals?
 - 5) If the water in the apartment of the building generally does not comply with the maximum levels of minerals in water, what, if anything, can either the strata of the plaintiffs do to minimize or reduce the amount of minerals in the water?

- 6) In your opinion, what is the source of the water discolouration?
- [5] The plaintiffs object to the answers to the first four of these questions, as they are not opinion evidence. They also object to questions 5 and 6 on the basis that they do not clearly state an expert opinion.
- [6] The first four questions are indisputably matters of fact, not opinion; they are not inferences drawn from the facts on the basis of a specialized body of knowledge possessed by the witness. But that does not make the expert's evidence of those facts inadmissible.
- [7] Discrete facts foundational to an expert's opinion must be either assumed by the expert and proven by other means, or supplied by the expert. The former category of facts are those that are to be disclosed as factual assumptions, under Rule 11-6(1)(f)(i) of the Supreme Court Civil Rules, BC Reg. 241/2010 [Rules]. Ideally, such facts are introduced either by viva voce testimony of other witnesses, or by admissions, or by agreement through an agreed statement of facts.
- [8] However, it is also permissible to introduce foundational factual evidence personally known to an expert witness to be true through that expert witness. There are two subcategories of such factual evidence.
- [9] The first subcategory is where the expert has obtained personal knowledge of foundational facts through research they have conducted. Rule 11-6(1)(f)(iii) of the Rules requires such evidence to be disclosed in the expert report. "Research" in this case can mean reading or reviewing literature, visual inspection, testing, or experimentation.
- [10] In the present case, Mr. Vogel describes the analysis of the test samples referred to in question (4), in his answer to that question. This is information that Rule 11-6(1) requires to be stated in the report. In my view it is implicit in the rule that the expert's description in the report of the research conducted, although a matter of fact, becomes admissible for its truth without viva voce testimony from the expert being required, so long as that factual evidence of the research is foundational to the opinions being expressed.
- [11] The other subcategory of factual knowledge that is commonly supplied by an expert witness is technical information known by the expert because of their experience in a technical field. A common example of this is knowledge of guidelines, practices, and standards used in a particular industry; such facts may be so commonplace, for those who work in a specialized field, that no particular "research" is required. Rule 11-6(1) does not formally require such factual evidence to be stated. But if such evidence is foundational to the opinion, it can hardly be objectionable to have the evidence clearly stated in the expert's report. To the contrary, trial fairness would militate in favour of such evidence being disclosed in advance of trial.

- [12] The only formal stricture on the admissibility of that subcategory of factual evidence is that Rule 11-6 does not make provision, explicitly or implicitly, for such evidence to be admitted through the expert report. Formally, therefore, an expert witness may be required to give viva voce testimony as to such facts.
- [13] Mr. Vogel's answers to questions (1) to (3) appear to fall into the subcategories of either factual knowledge known to him personally by virtue of his training and experience, or factual knowledge obtained through research. Mr. Vogel is being produced for cross-examination on his report, so the question of the admissibility of statements of his personal factual knowledge are not really germane.
- [14] The factual answers to questions (1) to (4) appear to be foundational to the opinions expressed in the answers to questions (5) and (6). I do not see any basis for excluding those first four answers from the evidence, so long as the latter two answers are admissible opinion evidence.
- [15] I turn now to the objections to answers (5) and (6). I will say, first, that even if I were to sustain the objection, there are elements of those answers which would I find admissible and I would, at least, allow the admission of Mr. Vogel's report in a redacted form to allow these specific passages. They are, first, in the answer to question (5), two paragraphs from page 14:

One description of water sampled collected in the past makes reference to "sediment" and it would normally be expected that these constituents are mainly present in precipitated form. Water quality issues at the Apartment have mainly been reported for the hot water system.

Precipitates of both metals are capable of adsorbing other metals including copper and lead i.e., the presumed small stream of water supplied to the Apartment also supplies dissolved copper and lead a portion of which would be absorbed onto the accumulated iron and manganese precipitates.

And, from the answer to question 6, at page 16:

Elevated aluminum, copper, and lead concentrations in water samples collected seem to be due to corrosion. . A concentration increase (HW Recirculation sample compared to the Supply sample) was also observed for lead, although on a much lower scale (by a factor of about 1.7 to 0.66 to 1.09 ug/L for total lead concentrations).

Iron and manganese precipitates are capable of adsorbing heavy metals such as copper and lead. This phenomenon may have contributed to the relatively high copper and lead concentrations in some of the 3 August 2016 samples.

- [16] The plaintiffs object to answers (5) and (6) in their entirety, on the grounds that no expert opinion is clearly stated. Instead, the plaintiffs say, the answers are "replete with repeated inadmissible conjecture, speculation and ambiguity". They say there is no clearly stated logical analysis linking the assumed facts and Mr. Vogel's specialized expert knowledge to

his conclusions. Mr. Vogel's opinions as to conditions in the subject water system, the plaintiffs say, are not based on any independent analysis, or testing, or even a site visit, but are simply "speculation, beliefs and musing". "We don't allow evidence", the plaintiffs submit, "by way of Ouija Board or Crystal Ball".

- [17] There are, in my view, two significant difficulties with the opinions expressed in these answers. Whether these are matters of form only, or matters of substance, is difficult to say.
- [18] First, the report does not clearly distinguish between, on the one hand, the facts that are being assumed, and on the other hand, conclusions of the expert based on inferences arising out of the writer applying his expert knowledge to those facts. The answers given to questions (5) and (6) do not positively link up the 33 listed assumed facts, or the materials found in the listed documents relied upon, or any unstated body of knowledge, to the opinion stated. The logic of the opinion is not easy to follow.
- [19] The second and related difficulty is with the great extent to which the report uses language that does appear at first blush possibly to be suppositional or conjectural. Some examples of such statements made in the report, without any explicit reference to the factual basis - assumed or otherwise - being given, are as follows (with emphasis added, in underlining):

It appears that an accumulation of metallic contaminants can take place in the hot water piping when the Apartment is not occupied for extended periods of time. At least some of the contaminants seem to be present in particulate form.

The two metals are believed to accumulate as a result of small movement of water through the pipes of the Apartment when unoccupied

It is theorized that precipitated forms of the two metals settle in the piping system of the Apartment when it is no occupied. Further, the two metals are believed to accumulate because a small stream of water is supplied to the Apartment when it is not occupied

- [20] It may be that the author's choice of this rather passive phrasing arises from some uncertainty on his part as to either the facts, or the strength of his opinions. These two possible explanations for this passive language do give rise to some concerns as to the report being conjectural or speculative.
- [21] On the other hand, it may simply be that these and similar statements made by Mr. Vogel in his report are intended to express his conclusion as to what has probably occurred, and that the use of this phrasing is simply an idiosyncratic matter of style. I will come back to these concerns momentarily. I just note that the opposing party should not be in the position of having to guess which of these possible explanations for such language choices is correct, or indeed whether there are other explanations.
- [22] The plaintiffs' objection to the report is more substantive. It is submitted that there is no evidence in this case, and I understand the defence does not intend to tender any evidence, that as a matter of fact such low flows are occurring in the cold water or hot water systems

of the plaintiffs' apartment. There have been no investigations, surveys, or tests conducted by Mr. Vogel. The plaintiffs, therefore, say that there is no factual basis for any deductions; Mr. Vogel's conclusion rests entirely on supposition that there is such a low-flow situation occurring. I am asked to exclude the report on the basis that the fundamental question of the source of the water discolouration arises simply as a matter of conjecture of Mr. Vogel's part.

- [23] Expert opinion evidence, however, is not a matter of deductive logic, where premise "X" linked to premise "Y" leads to conclusion "Z". In such cases, the path of logic is easily followed. Expert opinions, however, are based on inferences, and inferential reasoning is not deductive, but inductive: see the comments of Ducharme J. in *R. v. Alexander*, [2006] OTC 715 (Ont. S.C.J.), at paras. 21-23. As such, an expert's conclusion will always be probabilistic, with some inherent degree of uncertainty.
- [24] It may be the case that Mr. Vogel, in positing that there is a low flow state, is not making an unfounded assumption, but instead is engaged in a process of induction in which the existence of such a flow is itself concluded from the surrounding circumstances, viewed through the lens of his expert knowledge, leading through a path of inductive reasoning to Mr. Vogel believing that to be the mechanism that results in an accumulation of metals that become apparent when the taps are opened after a lengthy absence. If that is what Mr. Vogel is articulating, then the strength of this premise of there being a flow of water, as a link in the chain of inductive reasoning, is something to be explored on cross-examination.
- [25] This report is somewhat unclear and therefore somewhat problematic for the opposing party and for the court. Even if the problematic passages from Mr. Vogel's report are expressions of inductive reasoning, they could have been much more clearly written. However, in this case Mr. Vogel's report is the only expert evidence presented and, as a result, it may, and I stress the word "may" be the only means by which the court can determine fundamental questions regarding the nature and cause of the "problem" of discoloured water, to use the word that appears in the notice of civil claim. It may also be the only evidence available to assist the court in determining what form if relief might address the problem if I do find that there have been breaches of duty on the part of the defendant. As a result, I am going to view the concerns as to the language, the inherent uncertainty as to the precise nature of reasoning engaged in by Mr. Vogel and the precise level of certainty as to his conclusions to be matters capable of being addressed by the plaintiffs in cross examination. Mr. Shields is an experienced counsel and I have every confidence in his ability to explore the nuances of Mr. Vogel's opinion and to make clear any concerns that may arise from a more complete explication of the path of reasoning that Mr. Vogel has undertaken.
- [26] So, for those reasons, I am going to allow the report to be entered in full.
- [27] MR. SHIELDS: Can I just confirm --

[28] THE COURT: Mm-hmm.

[29] MR. SHIELDS: -- that on page 14 --

[30] THE COURT: Yes.

[31] MR. SHIELDS: -- the first and third paras are in?

[32] THE COURT: Everything is in, Mr. Shields.

[33] MR. SHIELDS: Oh, I misunderstood that because you took us to some paragraphs. I misunderstood.

[34] THE COURT: Yes. No, no, I said those would be in even if I was excluding the rest of the report and so --

[35] MR. SHIELDS: Well, I am glad I asked.

[36] THE COURT: -- so whatever the result was on the admissibility, my point was the report would go in in a redacted form, but for the reasons I have stated, I am allowing the entirety of the report in evidence.

[37] MR. SHIELDS: Okay. I am glad I asked. Thank you for clearing that up.

"A. Saunders J."

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