

CANADA / JUDGMENT

Shields v. Strata Plan VIS 5030

2017 BCSC 1914

COURT

Supreme Court of British Columbia

DECIDED

18 January 2017

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2017 BCSC 1914 Shields v. Strata Plan VIS 5030

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shields v. Strata Plan VIS 5030,

2017 BCSC 1914

Date: 20170118

Docket: S162229

Registry: Vancouver

Between:

Donald Shields and Arlette Baker

Plaintiffs

And

Strata Plan VIS 5030

Defendant

Before: The Honourable Mr. Justice A. Saunders

Oral Ruling on Admissibility of Previously Undisclosed Evidence

Re: Phase II and Phase III Water Quality

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 8-12, 16-18, 2017

Place and Date of Ruling:

Vancouver, B.C.

January 18, 2017

[1] THE COURT: The plaintiff has objected to evidence given by the defendant's witness Roger Palmer, of "brown water" coming from hot water pipes in the Phase II portion of the defendant's strata complex. This objection is made in the ongoing trial of an action in which the plaintiff Donald Shields, a unit owner in Phase I of the strata, alleges that he has for years suffered a problem with brown water containing excessive levels of sediment and metals coming out of his taps. The precise allegation is made at para. 5 of the notice of civil claim ("NCC"):

The Apartment has, however, had extensive problems for years with dirty brown water in the water pipes, water containing unsightly and potentially hazardous levels of lead, copper and iron.

[2] The response to civil claim ("RCC") filed by the defendant sets out a general denial. As to matters of fact, the remainder of the defendant's pleas are phrased in the alternative. There is no averment as to any particular condition relevant to the plaintiff's claim existing in the defendant's water system, nor as to any similar conditions being experienced by other unit owners. The defendant's position in this action generally is that while the documents disclosed in this action and other evidence does confirm that the plaintiff has reported such incidents of brown water over the years and that other owners in Phase I have made similar complaints from time to time, the defendant's response to those complaints has been reasonable and has been at all times as required by law.

[3] The plaintiff's counsel submits, and I accept, that the plaintiff's case has been premised on there being no such history of brown water in units in Phases II and III of the complex and that, therefore, brown water problems, such as they are, are unique to Phase I. That premise is based on evidence that was given on examination for discovery by the defendant's representative, Mr. Dwight Mueller, an employee of the professional strata management company retained by the defendant; in particular, his discovery evidence that Phases II and III have "clean, hot water". There were other words of similar effect used by Mr. Mueller with respect to Phases II and III. The plaintiff Mr. Shields, relying on that evidence, stated in his examination-in-chief at trial that one alternative solution he would like to see the defendant ordered to pursue would be to plumb a new connection to his suite from the clean water in

Phases II and III.

- [4] It emerged on the morning of the fourth day of trial, during the course of Mr. Mueller's cross-examination, that after his examination for discovery had been held, Mr. Mueller obtained knowledge that units in Phases II and III do not, in fact, always have clean water if an owner has been absent from their unit for some time, although to his knowledge, this is not a problem in Phases II and III to the same extent as in Phase I. He told the court that this information was based on a personal conversation he had had with a strata council member, Ms. Lynn Zeidler. Ms. Zeidler is, I understand, the current chair or president of the strata council. Ms. Zeidler has been present in court throughout the trial as the defendant's representative. She is scheduled to testify later in the defendant's case.
- [5] Mr. Mueller explained, in answer to questions from plaintiff's counsel, that he did not have that information regarding brown water in Phases II and III passed on to the plaintiff's counsel when he learned of it, because he was not aware of his obligation to do so.
- [6] That evidence of Mr. Mueller as to the Phase II and III water condition was, of course, hearsay and was not admissible for its truth. Had that evidence been disclosed to plaintiff's counsel prior to trial as an amendment to Mr. Mueller's discovery evidence, plaintiff's counsel may of course have been able to take steps to have it treated as an admission, or may have decided to use that information for other purposes. That hearsay evidence on its own, however, cannot be treated as true and used in a manner detrimental to the plaintiff's case.
- [7] I asked defence counsel when he had obtained knowledge of this evidence of Mr. Mueller. My question was prompted by the fact that defence counsel, in his cross-examination of the plaintiff Mr. Shields, had challenged the plaintiff as to whether his proposal to re-plumb with a new clean water supply from Phases II and III would work if, in fact, there were similar problems being experienced in Phase II. That question suggested to me the possibility that defence counsel had been apprised of evidence that was contrary to the facts deposed to by Mr. Mueller's on his examination for discovery. Defence counsel confirmed that this was the case; that he had learned of this evidence in the course of trial preparation. However, counsel advised that though he had read Mr. Mueller's discovery transcript, he was not counsel at the examination for discovery. He did not "put two and two together" and realize there was a conflict in the evidence. Accordingly, the plaintiff's counsel was not notified of this change in the evidence prior to trial.
- [8] Later on the fourth day of trial, the defence called its second witness, Roger Palmer, a former unit owner in Phase II and former member of the defendant's strata council and its building committee. At the conclusion of his examination-in-chief, Mr. Palmer was asked by defence counsel if he had personally observed brown water in his own suite. He answered in the affirmative. Defence counsel then concluded his examination. I followed that question up with a question as to whether these observations that Mr. Palmer had made were on the hot or cold lines. His answer was, both; that his habit after being away for some months at a

time was to open his taps in the middle allowing a flow of hot and cold water. He said that after these extended absences, he had begun to notice brown water coming out of the taps, sometimes immediately upon opening them, sometimes after a few seconds, and so he developed this habit of opening the taps upon his return.

- [9] It is this evidence that is the subject of the objection made by the plaintiff's counsel. The objection is made on three bases:
- (a) that it is contrary, as I have already indicated, to Mr. Mueller's admission made on examination for discovery and, further, elicited with no notice of this contrary evidence of Mr. Palmer having been given to plaintiff's counsel after the problem with Mr. Mueller's evidence emerged during the course of Mr. Mueller's testimony;
 - (b) that it is contrary to the pleadings, which contain a general denial of the plaintiff's allegations and set out no averment as to water conditions in Phases II and III; and
 - (c) that it is not included in a will-say statement.
- [10] I held that by reason of either the lack of disclosure in the will-say statement or the failure to plead a material fact, the evidence is inadmissible.
- [11] I indicated at trial that more extensive written reasons for that ruling might be produced. Those reasons are as follows.
- [12] The plaintiff's objection requires the court to balance the truth-finding function that is at the heart of all litigation, with fundamental concept of trial fairness.
- [13] There is no doubt that there is some prejudice to the plaintiff in Mr. Palmer's evidence on this point, which was contrary to the position stated in the defendant's examination. It will have a bearing on the viability of one of the remedies proposed by the plaintiff. To the extent that there may be features of the plumbing system in Phase I that may have been understood to be unique, it may have a bearing on the issue of the cause of the discolouration. Furthermore, the evidence, if disclosed, may have also had a bearing on the whole of the plaintiff's trial strategy, in terms of the evidence they expected they would have to marshal to prove their case.
- [14] The point that Mr. Palmer's evidence is inconsistent with Mr. Mueller's discovery evidence is not insignificant. However, it does not appear that the "new" evidence was intentionally withheld. Mr. Mueller was unaware of his obligation to pass on new evidence. It appears that the non-disclosure arose through a combination of defence counsel not having done what ought to have been done to alert their client to the obligation of ongoing disclosure, and present counsel being new to the file since the examination took place. Although current defence counsel did obtain knowledge of this evidence at some point in his trial preparation, its significance in relation to the discovery evidence apparently eluded him. Given these circumstances, the factor of the inconsistency in the evidence, in isolation, might not be sufficient to rule against the admission of the evidence.

- [15] The other two considerations raised by the plaintiff are more compelling. The first of these is the non-disclosure of a material fact in the pleadings. Pleadings are the responsibility of counsel throughout. It may be understandable that a subtle inconsistency in two bodies of evidence might escape the attention of new counsel. The consistency of the evidence with the facts pleaded is another matter entirely.
- [16] The obligation to state material facts in civil pleadings has been a fundamental component of pleadings in the English common law system since the statutory reforms to civil procedure enacted in England in the mid- and late-1800's. In British Columbia, a requirement that pleadings contain a statement, in summary form, of material facts on which the party relies, can be found at least as far back as the Supreme Court Rules, 1890 (O. 19, r.4), and was carried over into the immediate predecessor to the current Supreme Court Civil Rules, B.C. Reg. 241/2010 [Civil Rules], the Rules of Court (B.C. Reg. 221/90 as amended, Rule 19(1)). The current Civil Rules are even more stringent, with regard to defence pleadings. Rule 3-1(2)(a) requires that a NCC must set out a "concise statement of material facts giving rise to the claim". Under Rule 3-3(2)(a), however, a RCC must:
- (i) indicate, for each fact set out in Part 1 of the notice of civil claim, whether that fact is
 - (A) admitted,
 - (B) denied, or
 - (C) outside the knowledge of the defendant,
 - (ii) for any fact set out in Part 1 of the notice of civil claim that is denied, concisely set out the defendant's version of that fact, and
 - (iii) set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim
- [17] In the present case, the NCC alleges:
- 5. The Apartment has, however, had extensive problems for years with dirty brown water in the water pipes, water containing unsightly and potentially hazardous levels of lead, copper and iron.
- [18] The RCC is in the form of pleading typically made by defendants under the former Rules of Court; it does not meet the requirements of the new Civil Rules. It meets the allegation in paragraph 5 of the NCC with a bare denial. The defendant's version of facts repeats the denial, "unless expressly admitted herein", and then sets out a series of alternative pleas. No version of any of the facts alleged in the NCC is provided. There is no admission of there being any issues with "dirty brown water in the water pipes" - the allegation made by the plaintiffs - in the plaintiffs' unit, or elsewhere.

- [19] Although this ruling is made at a relatively early stage of the defendant's case, it is already apparent that the defendant's pleading is woefully deficient, relative to the evidence admitted to be in the defendant's possession of the plaintiffs and other unit owners in Phase I of the defendant's complex repeatedly experiencing discoloured hot water over a course of years. It is fair to question whether defence counsel who drafted the RCC (not the present trial counsel) made any effort to ascertain the true facts before the pleading was prepared and filed.
- [20] The documents produced through discovery relating to water quality issues, however, so far as can be seen from the trial exhibits, and so far as can be inferred from the witness testimony, were limited to disclosing water quality issues in Phase I. Taking this evidence in tandem with Mr. Mueller's examination for discovery evidence, the defendant's position in respect of the prevalence of the "brown water" issue could only reasonably have been understood to be that the "brown water" was unique to Phase I, and that the extent of the issue was no greater than as disclosed through document discovery.
- [21] It ought to have been apparent to defence counsel prior to trial that this position did not accord with his client's evidence. The new evidence of Mr. Mueller ought to have put defence counsel at least on notice of the necessity of amending the pleadings and notifying plaintiff's counsel that such amendment was required. That disclosure could then reasonably be anticipated to have led to the controverted evidence of Mr. Palmer being revealed prior to trial.
- [22] The second compelling factor in terms of admissibility is the non-disclosure of this evidence of Mr. Palmer in his will-say statement, the evidence being inconsistent with the defendant's position as reasonably understood. More to the point, the relevant consideration is not so much that the evidence was not disclosed in advance, but that it arose only as a result of questioning by the court.
- [23] Separate and apart from the pleadings issue I have just referred to, I do not fault defence counsel for this controverted evidence of Mr. Palmer not having been disclosed. A will-say statement is not intended to serve as comprehensive disclosure of all material evidence in the witness' possession. It is only a reflection of the evidence that counsel has decided to elicit from the witness in support of their client's position. Decisions as to what evidence to elicit are entirely at the discretion of counsel, so long as the evidence is admissible. The controverted evidence did not arise in examination-in-chief, and so any surprise or prejudice to the plaintiff cannot be said to have arisen as a result of any failing on the plaintiff's part.
- [24] Defence counsel asked Mr. Palmer in cross-examination whether he had observed brown water in his own suite. When he replied in the affirmative, plaintiffs' counsel elected to proceed no further. This question potentially opened the door to defence counsel re-examining Mr. Palmer as to what that experience entailed, and but for the issue with the pleadings I might very well have allowed such a line of questioning to be pursued on re-

examination. But defence counsel did not re-examine Mr. Palmer. Instead, I asked those questions of Mr. Palmer, in an effort to understand the potential significance of his experience, what inferences might be drawn from it, and whether his evidence might be consistent with inferences I might be asked to draw from other admissible evidence. It was only then that the controverted evidence emerged. Given the plaintiffs' objection, I should not allow that evidence to be admitted to the potential advantage of the defendant and prejudice to the plaintiffs.

"A. Saunders J."

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