

CANADA / JUDGMENT

Smithe Residences Ltd. v. 4 Corners Properties Ltd.

2020 BCCA 227

COURT

British Columbia Court of Appeal

DECIDED

11 August 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 227 Smithe Residences Ltd. v. 4 Corners Properties Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Smithe Residences Ltd. v. 4 Corners Properties Ltd.,

2020 BCCA 227

Date: 20200811

Docket: CA46636; CA46633

Docket: CA46636

Between:

Smithe Residences Ltd. and Brendan James Schouw

Respondents

(Plaintiffs)

And

4 Corners Properties Ltd.

Appellant

(Plaintiff)

And

Homer Street Residences Ltd., Boffo Investment Corp.,

Boffo Developments (Smithe) Ltd., Boffo Developments (Hornby) Ltd.,

and Boffo Developments (Homer) Ltd.

Respondents

(Defendants)

- and -

Docket: CA46633

Between:

Smithe Residences Ltd. and Brendan James Schouw

Respondents

(Petitioners)

And

4 Corners Properties Ltd.

Appellant

(Respondent)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated December 17, 2019
(Smithe Residences Ltd. v. Boffo Investment Corp.,

2019 BCSC 2185, Vancouver Dockets S180362, S1711962 and S188491).

Counsel for the Appellant:

(via video conference)

C. Dennis, Q.C.

R. Power

Counsel for the Respondents

Homer Street Residences Ltd., B. Schouw, Smithe Residences Ltd.:

(via video conference)

S. Schachter, Q.C.

J. Lockhart

Counsel for the Respondents

Boffo Developments (Homer) Ltd.,

Boffo Developments (Hornby) Ltd.,

Boffo Developments (Smithe) Ltd.,

Boffo Investments Corp.:

(via video conference)

D. Gruber

R. Arora

Place and Date of Hearing:

Vancouver, British Columbia

July 10, 2020

Place and Date of Judgment:

Vancouver, British Columbia

August 11, 2020

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

In the court below, 4 Corners sought to alter an existing claim to add Smithe and Schouw as defendants so that it could claim for a debt it alleges they owe, even though the limitation period for starting a court-based proceeding to collect this debt had passed. In the existing claim, 4 Corners is suing the Boffo Group, both in its own name and on behalf of Smithe and Schouw, for performance of certain agreements between Boffo, Smithe, and Schouw relating to the development of real estate. 4 Corners says its security agreement with Smithe and Schouw, which secures the debt, gives it standing to make the existing claim. The judge concluded the existing claim and the debt claim were not sufficiently related to allow 4 Corners to pursue the debt, and also granted a petition to release the security interest. Held: Appeals allowed. The debt owed by Smithe and Schouw, and the security agreement allowing 4 Corners to collect on it, is the basis on which 4 Corners brought the existing action against the Boffo Group. The judge misunderstood

the relationship between the proposed claim and the existing claim, and erred in determining the two claims were not sufficiently connected. The addition of Schouw and Smithe as defendants is just and convenient in the circumstances, and the security interest should not have been released.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Overview

- [1] This appeal raises novel issues involving the interplay between the Supreme Court Civil Rules, B.C. Reg. 168/2009, for adding parties and amending pleadings (specifically Rule 6-2(7)) in the face of an expired limitation period (permitted by s. 22 of the Limitation Act, S.B.C. 2012, c. 13) and the extinguishing effect, if any, of ss. 6 and 27 of the Limitation Act.
- [2] In two proceedings below, a judge of the Supreme Court refused the application of 4 Corners Properties Ltd. ("4 Corners") to add Smithe Residences Ltd. ("Smithe") and Brendan James Schouw as defendants to extant litigation in which 4 Corners, Schouw, and Smithe were already plaintiffs (the source of much of the proceedings' novelty). 4 Corners sought to claim for a debt against Schouw and Smithe by means of this addition, even though the limitation period for commencing an independent claim on the debt had expired. The judge concluded it would not be just and convenient to allow the addition. After doing so, he granted Schouw and Smithe's petition to have the security interest--which secured the time-barred debt--discharged.
- [3] In my view, the chambers judge erred in his approach to the application and petition. I would allow the appeals for reasons I will now develop.

II. Background

A. The Initial Agreements

- [4] The proceedings primarily involve the development of a high-rise residential/commercial project referred to as the Smithe Project. Other development projects (the Hornby Project and the Homer Project) are peripherally involved. At the centre of the controversy is Brendan James Schouw, former principal of companies that include Smithe, Hornby Residences Ltd., and Homer Residences Ltd. ("Homer") (collectively, the "Schouw Group"), each associated with a different proposed development.
- [5] In 2011, the lands underlying the proposed developments (the "Development Lands") were encumbered by a number of mortgages and a number of foreclosure proceedings were underway.

- [6] Enter the respondent Boffo Investment Corp. Through the other Boffo respondents (collectively, the "Boffo Group"), Boffo Investment Corp. entered into an arrangement to acquire the Development Lands. It was intended that the Boffo Group would develop them with the assistance of Schouw and his companies, which would earn a minority share of the profits for their work. The arrangement was evidenced in a document referred to as the 2011 Joint Venture Agreement.
- [7] The Smithe Project was later subsumed in a new agreement between Smithe and Boffo Developments (Smithe) Ltd. that I will refer to as the Smithe Consulting Agreement.
- [8] Unbeknownst to the Boffo Group, before it agreed to acquire the Development Lands, Smithe (as vendor, with Schouw as covenantor) had entered into a purchase and sale agreement with 4 Corners where Smithe had agreed to develop the lands underlying the Smithe Project, and 4 Corners agreed to purchase the commercial portion of the development for \$6.675 million (the "2010 PSA").

B. The Settlement, 962 Action, and 362 Action

- [9] After the Boffo Group agreed to acquire and develop the lands in 2012, 4 Corners commenced litigation against the Schouw Group and the Boffo Group, along with others, concerning the 2010 PSA and the \$6.675 million advanced by 4 Corners under the 2010 PSA.
- [10] The claim against the Boffo Group was dismissed in October 2013, and in 2015 the litigation against Schouw and Smithe (along with other parties not relevant to this appeal) was apparently settled.
- [11] Two of the documents evidencing that settlement are a promissory note, dated 10 April 2015, from Schouw and Smithe to 4 Corners, in which they vowed to repay the \$6.675 million advanced by 4 Corners under the 2010 PSA along with 8% interest per annum (\$840.95 per day) beginning 1 June 2010 (the "Promissory Note"); and a General Security Agreement (the "GSA"), also dated 10 April 2015, securing the Promissory Note by granting 4 Corners a general and continuing collateral security over the real and personal property of Smithe and Schouw.
- [12] In 2016, 4 Corners alleged that Schouw and Smithe had committed an act of default under the settlement documents, entitling it to demand payment under the Promissory Note. It gave notice of this default by letter to Schouw and Smithe dated 11 April 2016, and demanded that the debt be paid in another letter dated 26 April 2016.
- [13] 4 Corners then turned to its enforcement rights under the GSA. Clause 4.2 of the GSA provides in part:

4.2 Remedies

Upon an Event of Default that is continuing in accordance with Section 4.1 above, all of the Secured Obligations will immediately become due and payable without any demand or any notice of any kind to the Debtors [Schouw] or either of them, and the Secured Party [4 Corners] shall have the following rights, powers and remedies by law:

- (d) to preserve, protect and maintain the Collateral and make such replacements thereof and additions thereto as the Secured Party [4 Corners] shall deem advisable;
- (i) to commence, continue or defend proceedings in any court of competent jurisdiction in the name of the Secured Party [4 Corners], the Receiver or the Debtors or either of them for the purpose of exercising any of the rights, powers and remedies set out in this Section 4.2, including the institution of proceedings for the appointment of a Receiver of the Collateral.

[14] Schouw and Smithe's interest in the 2011 Joint Venture Agreement and the Smithe Consulting Agreement offered 4 Corners the possibility of some recovery against those two parties.

[15] In December 2017, 4 Corners, purporting to exercise its right under clause 4.2(i) of the GSA, commenced an action in its name and that of Schouw and Smithe against the Boffo Group and Homer claiming any monies due to Schouw and Smithe under the 2011 Joint Venture Agreement and the Smithe Consulting Agreement (Docket No. S1711962, the "962 Action"). In the 962 Action, 4 Corners sought a declaration that the noted agreements were valid and enforceable according to their terms.

[16] I will discuss the pleadings in the 962 Action in more detail below, but I note here that the Boffo Group's statement of defence relies on Schouw and Smithe's alleged repudiation of the agreements (and the Boffo Group's acceptance thereof). The Boffo Group also put in issue 4 Corners' "standing" to bring the 962 Action.

[17] In January 2018, Schouw, Smithe, and Homer commenced an action against the Boffo Group seeking (as did 4 Corners in the 962 Action) to enforce the 2011 Joint Venture Agreement and the Smithe Consulting Agreement (Docket No. S180362, the "362 Action").

C. The Application and Petition in the Court Below

[18] It will be recalled that 4 Corners' demand under the Promissory Note was made on 26 April 2016. While disputed in the court below, it is generally accepted on appeal that the two-year limitation period in which 4 Corners could commence an action based on that demand began 26 April 2016, and had expired by the time this matter came before the chambers judge.

- [19] Schouw and Smithe on 2 August 2018 launched a petition proceeding in the Supreme Court. In it Schouw and Smithe seized on the expiration of the two-year limitation period in respect of the Promissory Note (ending April 2018) as the basis for a declaration that they were entitled to a discharge of the interest secured by the GSA, as enforcement of the Promissory Note was barred by effluxion of time. Schouw and Smithe also sought a declaration that 4 Corners was not entitled to instruct counsel on their behalf in the 962 Action.
- [20] This prompted 4 Corners to bring the application at issue here: 4 Corners was faced with a limitations challenge in respect of its efforts to enforce the Promissory Note. 4 Corners thus argues the Promissory Note and the GSA securing it in turn found a right for it to pursue whatever the Boffo Group may owe Schouw and Smithe as a result of the Boffo Group's alleged breach of the 2011 Joint Venture Agreement and the Smithe Consulting Agreement. In other words, 4 Corners sought to shield its enforcement of the Promissory Note from the limitations argument by making this claim part of the 962 Action.
- [21] 4 Corners' application in the 962 Action was brought on 31 August 2018.
- [22] The application initially sought to add Smithe and Schouw as defendants (removing them as plaintiffs) and to amend the claim in the 962 Action. The amendments to the claim recited the Promissory Note, 4 Corners' demand for its payment, and Schouw and Smithe's failure to honour it. 4 Corners sought, among other orders, a declaration that the Promissory Note was in default and judgment on it against Schouw and Smithe.
- [23] Schouw and Smithe's response asserted the applicability of the limitation period in respect of the Promissory Note (and hence the unenforceability of the GSA securing it). The Boffo Group's response somewhat revelled in the prospect that Schouw and Smithe would be removed as plaintiffs, as this undercut completely, in its view, the claim against it.
- [24] In likely response to the conundrum raised by deleting Schouw and Smithe as plaintiffs in the 962 Action, 4 Corners regrouped and amended its application. It now sought as its primary position to retain both as plaintiffs "By Way of Assignment of Certain Rights" and again add Schouw and Smithe as defendants. In its preferred pleading amendments (it had earlier pursued this construct in the alternative), 4 Corners purported to bring the proceeding:
- (a) in its own right with respect to claims against the Defendants Brendan James Schouw ("Schouw") and Smithe Residences Ltd. ("Smithe Residences") to enforce a debt obligation; and
 - (b) as assignee of certain limited rights from Schouw and Smithe Residences solely with respect to claims against the Defendants, Boffo Investment Corp., Boffo Developments (Smithe) Ltd., Boffo Developments (Hornby) Ltd. and Boffo Developments (Homer) Ltd. (collectively, the "Boffo Group"). 4 Corners, as assignee, is entitled to bring these proceedings in the name of Schouw but does not represent Schouw in any manner whatsoever.

[25] I note that while Homer is a party to the 962 Action and related application, it has taken no independent stance in these proceedings and I will make little reference to it throughout.

[26] That is the general background of the matter before the chambers judge. I have left out some details that I do not believe figure in the analysis. I turn now to the decision of the judge.

III. The Judgment Below

[27] Both the petition and the amended application in the 962 Action came before the chambers judge. His reasons are indexed as 2019 BCSC 2185.

[28] After setting out the background, the issues, and the parties' respective positions, the judge concluded that it would not be just and convenient to add Smithe and Schouw as defendants to the 962 Action. He then granted the release of security interest sought by Schouw and Smithe's petition.

[29] On the limitations issue, the judge dealt with two arguments advanced by 4 Corners in support of its initial position that time had not run out to bar the claim on the Promissory Note. The judge rejected these submissions. As I stated above, 4 Corners has not appealed this aspect of his determination. The judge's treatment of this aspect of the limitations issue is thus not the subject of the appeal before this Court so I will say no more in this regard.

[30] The judge concluded that (at para. 60):

(1) the Limitation Act applies to 4 Corners' Promissory Note debt claim; and (2) the limitation period for commencing an action on that debt has expired.

[31] Without further analysis, the judge at the end of his reasons made the declarations requested in the petition, entitling Schouw and Smithe to a release and discharge of the security interest granted by the GSA (at para. 86).

[32] The judge then turned to 4 Corners' application to add Schouw and Smithe as defendants and amend the pleadings in the 962 Action.

[33] He began by noting 4 Corners' reliance on both subsections (b) and (c) of Rule 6-2(7). They provide:

Adding, removing or substituting parties by order

(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

(b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
- (i) any relief claimed in the proceeding, or
- (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[34] The judge also noted the relevance of s. 22(1)(d) of the Limitation Act, which explicitly provides that despite the other provisions of the statute, certain actions may be taken for a claim "related to or connected with" the existing claim, including adding new parties:

Counterclaim or other claim or proceeding

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (d) new parties may be added or substituted as plaintiffs or defendants.

[35] On Rule 6-2(7)(b), the judge quickly concluded that its application is "narrow" with a focus on remedying defects in the pleadings, and that:

[75] . . . The 962 Action, as it stands, is an action to enforce legal rights allegedly owing by the Boffo Group to Mr. Schouw and one of his companies. The proposed additional parties - Mr. Schouw and Smithe Residences, but as defendants - are not necessary parties to ensure all matters relating to the existing contract claim are effectually adjudicated upon, and there is no argument to be made that they ought to have been defendants from the start. Accordingly, I am satisfied that Rule 6-2(7)(b) does not provide a basis on which 4 Corners may add the Schouw Parties as defendants to the 962 Action.

[36] Turning to Rule 6-2(7)(c), the judge cited the guiding jurisprudence including *Cementation Co. (Can.) Ltd. v. American Home Assurance Co.* (1989), 37 B.C.L.R. (2d) 172 (C.A.); *Lui v. West Granville Manor Ltd.* (1985), 61 B.C.L.R. 315 (C.A.) [Lui No. 1]; *Lui v. West Granville Manor Ltd.* (1987), 11 B.C.L.R. (2d) 273 (C.A.) [Lui No. 2]; *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297.

[37] The judge summarized the principles to be taken from *Cementation* and the *Lui* decisions (at para. 64):

- a) a party seeking to add a defendant after a limitation period has expired must establish a "real and substantial connection" between the new cause of action and the original action;

- b) there must be some degree of interrelationship between the new claim and the original claim before a claim that sets up a separate cause of action can be piggy-backed over the limitation period;
- c) the "interrelationship" must still explain why the claim by or against the added party ought to be made in the same proceedings and ought not to have been made in new proceedings;
- d) there should also be an explanation for the delay, such explanation arising from the broad circumstances that explain the interrelationship; and
- e) these factors should be applied as indicators and not as supplanters of the interests of justice and convenience, which must remain paramount.

[38] The judge noted the relevance of Schouw and Smithe's limitations defence in respect of the Promissory Note and this Court's decision in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329.

[39] The judge said of Neilson Architects (at paras. 70 and 71):

[70] The court in Neilson went on to note that where it is clear there is an accrued limitation defence, the question is whether it will be just and convenient to add the party, notwithstanding it will lose that defence, and "the answer to that question will emerge from consideration of the factors set out in *Letvad*" (para. 47), which is a reference to *Letvad v. Fenwick*, 2000 BCCA 630 [*Letvad*].

[71] The factors set out in *Letvad* (which, in turn, derive from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.) [*Teal*]), are as follows:

- a) the extent of the delay;
- b) the reasons for the delay;
- c) any explanation put forward to account for the delay;
- d) the degree of prejudice caused by delay; and
- e) the extent or degree of the connection, if any, between the existing claims and the proposed new cause of action: *Letvad* at para. 29; *Neilson* at para. 46.

[Emphasis added.]

[40] In his analysis of what is "just and convenient", the judge dealt with each of the factors he took from *Cementation/Teal Cedar* and he concluded (at para. 78):

[78] In summary on these factors, I conclude that: (1) the degree of connection between the proposed claim and the existing claim is not very strong; (2) but for the intervening limitation defence, there is no obvious reason why the debt claim ought to be brought in the action against the Boffo Group instead of in a separate action; (3) the several considerations under the rubric of "delay" appear to favour the applicant somewhat; and (4) the elimination

of a limitation defence for the Schouw Parties is a factor favouring the dismissal of 4 Corners' application.

[41] The judge stressed as a "key element" the "degree of connection and "interrelationship" between the claims" (at para. 79). In the judge's view, 4 Corners' claim in respect of the Promissory Note and its claims in the 962 Action are connected in terms of general subject matter, but that connection is not "real and substantive" (at para. 81):

the claims in this case are more independent and distinct than the claims in Lui No. 2 insofar as they involve different parties and different causes of action.

[42] The judge noted "some additional issues" that he included in his consideration (para. 82). These included, in short form:

- (a) the resulting scenario with Schouw and Smithe as both plaintiffs and defendants in the same action;
- (b) the argument (he did not resolve it) that with the expiration of the limitation period in respect of the Promissory Note 4 Corners lacked standing to maintain the 962 Action;
- (c) the argument (again not resolved) that 4 Corners cannot sue as an assignee in the 962 Action; and
- (d) the existence of the 362 Action arguably improperly splitting the cause of action against Boffo and creating "disputes about which set of plaintiffs is dominus litus".

[43] As I have indicated the judge did not resolve all of these issues, he said simply (at para. 83):

[83] There were other points raised, but those suffice to illustrate some of the issues, difficulties or arguments that arise here. Some of those arguments were not fully argued, so all that can be said with certainty is that if 4 Corners' application is allowed, there are some difficult issues that will have to be resolved, probably through further litigation. Of particular concern is the undesirability of duplicative actions involving the same subject-matter; the uncertainty, or at least a potential uncertainty, about who is dominus litus; and having a lawsuit in which two parties are both plaintiffs and defendants.

[44] The judge reached his final conclusion that:

- (1) there is an insufficient degree of connection or interrelationship between the proposed and existing claims; and (2) it is not just and convenient that the proposed claim be combined with the existing claim.

IV. Analysis

[45] As I will explain, I conclude the judge did indeed err in principle in his analysis of the justice and convenience of adding parties here.

[46] I note that I agree with the judge's analysis of the inapplicability of Rule 6-2(7)(b) and no issue was raised in this regard before this Court.

A. Overview of Rule 6-2(7)(c)

[47] It is important to begin with a close reading of Rule 6-2(7)(c) in order to relate its requirements to the specific facts before us here.

[48] Turning to parse Rule 6-2(7)(c) again it provides:

Adding, removing or substituting parties by order

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[49] The judge may order a person be added as a party if two conditions are met: first, there may exist between the person and any party to the proceeding a question or issue relating to or connected with (i) any relief claimed in the proceeding or (ii) the subject matter of the proceeding; and second, that in the opinion of the court, it would be just and convenient to determine that question or issue.

[50] As this Court stated in *Neilson Architects*, the threshold to meet the first condition is a low one; the party seeking to join the new person must establish "simply that there is a real issue between them that is not frivolous, or that the plaintiff has a possible cause of action against the proposed party" (at para. 45).

[51] As to the second condition, though determining the interests of justice and convenience is at the judge's discretion and should be assessed with "flexibility" (*Cementation* at para. 8), the jurisprudence has provided guiding factors to consider in the specific circumstances of adding a party after a limitation period has expired. As the judge highlighted, these include the extent of delay in bringing the application to add, reasons for it, any explanation put forward, degree of prejudice caused by the delay, and the extent of the connection between the claims (*Letvad* at para. 29, citing *Teal Cedar*; *Neilson Architects* at para. 47).

B. Application

[52] As I will explain, it is in identifying and explaining the nature of the relationship between the claims that the judge erred here.

[53] I conclude that the judge's misapprehension of the relationship between 4 Corners' existing claim against the Boffo Group (which is based in the validity of the GSA), and its claim against Schouw and Smithe (which is based in the validity of the underlying Promissory Note secured by the GSA), led him to err in his assessment of the interests of justice and convenience.

[54] In my view, this error was sufficient to vitiate the deference otherwise owed to a judge's discretionary decisions. Appellate intervention in discretionary decisions is appropriate where the judge proceeded on a wrong principle or failed to give weight, or sufficient weight, to relevant considerations: *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2013 BCCA 24 at para. 19, citing *Stone v. Ellerman*, 2009 BCCA 294; *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27.

1. The First Stage: Threshold Relation or Connection

[55] Beginning at the first stage of the analysis, the judge's reasons correctly reflect a recognition that a threshold level of connection between the parties exists sufficient to engage Rule 6-2(7)(c). While the judge did not explicitly refer to the threshold connection being established, he proceeded with the justice and convenience analysis, implying the threshold was met. Neilson Architects addressed similar circumstances and the court at para. 83 reached a similar conclusion:

The fact he did not dismiss the joinder application outright implies he found the owners met the first test under R. 15(5)(a)(iii) [now R. 6-2(7)(c)], and established a sufficient connection between the relief, remedy, or subject matter of their original action and these respondents.

[56] While the judge did find a connection between the claims at the first stage, in the final analysis I conclude he erroneously assessed it as minimal in the overall "justice and convenience" of the matter, that is at the second stage of the Rule 6-2(7)(c) enquiry.

2. The Second Stage: Justice and Convenience

[57] The judge's reasons demonstrate a sole focus on the claim in the name of Schouw and Smithe to enforce the 2011 Joint Venture Agreement and the Smithe Consulting Agreement in the 962 Action, and ignore the fact that 4 Corners commenced the action in its own name, by necessity implicating the validity of the GSA in the action.

[58] I emphasize again that for the judge, the lack of "interrelationship" was the "key element" of the justice and convenience analysis (at para. 79); he described the degree of connection between the existing and proposed claims as "not very strong" and said there was "no obvious reason why the debt claim ought to be brought in the action against the Boffo Group instead of in a separate action" (except for the intervening limitations defence) (at para. 78).

[59] However, this ignores the fact that the Boffo Group has explicitly pled in its response to the 962 Action that the security interest held by 4 Corners is invalid (at para. 31):

The Boffo Defendants deny that 4 Corners holds any valid security interest as alleged in the Notice of Civil Claim as alleged or at all and further say that the circumstances in which 4 Corners acquired that alleged security interest, which are known to the plaintiffs but unknown to the Boffo Defendants, negate the legal validity of any security interest registered in the name of 4 Corners.

- [60] The Boffo Group goes on to conclude that "4 Corners has no standing to sue the Boffo Defendants".
- [61] Determining the rights under the GSA is key to addressing the validity of this argument. This is the "obvious reason" why the 4 Corners' debt claim against Schouw should be determined as part of the same proceedings as 4 Corners' claim against the Boffo Group.
- [62] Indeed, the high degree of interrelationship between the claims is further supported by the fact that 4 Corners also sued in its own name in the 962 Action. On the existing pleadings in the 962 Action, 4 Corners seeks to enforce the GSA by in turn enforcing the Schouw/Boffo agreements. I say this because it is necessary for 4 Corners to rely on the GSA to sue in its own name in the 962 Action, and enforcing the Schouw/Boffo agreements will in turn sound to the benefit of 4 Corners under the GSA.
- [63] 4 Corners seeks the fruits of those agreements in its own name along with Schouw. Clearly 4 Corners', as distinct from Schouw and Smithe's, ability to support that pleading against the Boffo Group depends on its ability to enforce the GSA and advance its standing under it.
- [64] It may be that on a proper analysis it will eventually be determined that 4 Corners has no ability to sue the Boffo Group in its own name; that at best it can only stand in the shoes of Schouw in this regard; and as between Schouw and Boffo the viability of the GSA is wholly irrelevant and should not have found its way as an issue into the 962 Action. But on the existing pleadings, the validity of the GSA and 4 Corners' standing arising therefrom is at least part of the "subject matter" of the 962 Action, particularly in light of the Boffo Group's response. I say this at least to the extent the Boffo Group is defending on the basis of the invalidity of the GSA and is effectively asking the court to opine thereon in its consideration of the actions.
- [65] To complete the analysis here: the enforceability of the Promissory Note is critical to the continued viability of the GSA, and 4 Corners' direct claim to the monies owing (if any) to Schouw under its agreements with the Boffo Group.
- [66] Taking the current pleadings in the 962 Action at face value, there is a strong interrelationship between the claim on the Promissory Note and the relief sought and/or subject matter of the 962 Action.
- [67] This weighs heavily in favour of granting the application in the Rule 6-2(7)(c) analysis.

- [68] So too does the fact that there was little delay (four months, not seven as the chambers judge said) between the expiry of the limitation period and the application to add and amend, and no discernible prejudice to Schouw and Smithe (apart from the loss of the limitations defence). This delay apparently resulted from former counsel's strategic choices, not 4 Corners' own inattention.
- [69] As the judge said, the relatively minimal delay and lack of fault involved "favour the applicant somewhat".
- [70] Looking at the overriding consideration in the matter--"justice and convenience"--it is also instructive to note the judge found that only potential, not actual, inconvenience would arise from a proceeding amended by 4 Corners' application. He simply said "there are some difficult issues that will have to be resolved".
- [71] Weighed against the loss of 4 Corners' cause of action on the Promissory Note, the lack of delay, and the degree of interrelationship between the claims, those difficulties do not tip the balance in my view.
- [72] The respondents raise numerous other arguments as to why it is not just and convenient to add Schouw and Smithe as defendants: they point to the oddity of having parties as both plaintiffs and defendants in the same action, the difficulty of having parallel claims in the 362 and 962 Actions, and the ethical difficulties of 4 Corners having the same lawyer as Schouw and Smithe in one part of the 962 Action but not another.
- [73] Schouw and Smithe in one capacity as plaintiffs and in another as defendants, although odd, is not per se unacceptable. The common law rule against a legal entity suing itself, discussed in cases such as *Public Trustee v. Guaranty Trust Co. of Canada*, [1980] 2 S.C.R. 931; *Harrison v. Harrison*, 40 B.C.L.R. 143 (B.C. S.C.); and *Wiseman v. British Columbia (Transportation & Highways)*, 2007 BCSC 1447 at para. 66, is not engaged, as Schouw and Smithe are not claiming against themselves--they are claiming against the Boffo Group in their capacity as plaintiffs and are defending against 4 Corners in their capacity as defendants. Indeed, Rule 22-5(5) expressly allows an action that includes multiple claims against different parties to proceed, stating that a party need not be interested in all relief sought in a proceeding.
- [74] The existence of the 362 Action mirroring the relief sought in the 962 Action is the stuff of a stay application in the case management process.
- [75] As for the concern with splitting Schouw's cause of action between the two proceedings, I note that in the 962 Action as proposed to be amended, 4 Corners still seeks the payment to the plaintiffs of all of the "monies payable or that become payable by the Boffo Group pursuant to the 2011 Joint Venture Agreement and the Smithe Consulting Agreement". While there will, of necessity, have to be an accounting between 4 Corners and Schouw and Smithe if the action succeeds, there is no splitting of the cause of action in this regard.

- [76] Any ethical issues facing counsel for the plaintiffs in the 962 Action similarly can be managed by counsel meeting its duties under the Law Society rules and in case management.
- [77] In any event, the co-existence of the petition and the 962 Action already raises challenges for the same counsel acting for 4 Corners, Schouw, and Smithe in the 962 Action.
- [78] In my view, none of the arguments succeed in overcoming the conclusion that, given the minimal delay by 4 Corners, the interrelationship between the claims, and the lack of actual prejudice to Schouw and Smithe, the interests of justice and convenience weigh in favour of allowing 4 Corners to claim for the \$6.675 million they say they were guaranteed repayment of under the Promissory Note.

V. Conclusion

- [79] In short, accepting that there has been an error in principle in the exercise of the judge's discretion in the Rule 6-2(7)(c) application, I look afresh at the interests of justice and convenience, keeping in mind the factors identified in Letvad and also addressed in Lui No. 1, Lui No. 2, Cementation, McIntosh, and Neilson Architects.
- [80] I need only refer to this Court's decision in Cementation, which is an expansive treatment of the "extent of the connection" factor. The Court noted that the "real and substantive connection" test between a third party and the plaintiff's loss was to be modified when considering the addition of a party. It is more accurately reflected by the words "interconnected" and "interrelated":

The "interrelationship" must still explain why the claim by or against the added party ought to be made in the same proceedings and ought not to have been made in new proceedings. There should also be an explanation for the delay, such explanation arising from the broad circumstances that explain the interrelationship. And, of course, the guidelines must continue to be applied as indicators and not as supplanters of the interests of justice and convenience, which must remain paramount.

- [81] As I have already highlighted, in the case at bar there is a high degree of "interrelationship" between the Promissory Note, the enforceability of the GSA, the standing of 4 Corners in the 962 Action, and the development agreements 4 Corners is seeking to enforce. This explains why the claim on the Promissory Note ought to be made in these proceedings. And there is an explanation for 4 Corners' delay, namely the decisions of its counsel.
- [82] In the circumstances I can only conclude that the add/amend application in the context of the proposed pleadings in Schedule A is both just and convenient. I will so order.

- [83] This brings us to the petition and the relief sought by Schouw and Smithe. On appeal, Schouw and Smithe argue that because 4 Corners is barred from starting a claim by s. 6 of the Limitation Act, and barred from pursuing the debt by non-judicial means by s. 27, it cannot use its interpretation of the GSA to continue pursuing the 962 Action, as the 962 Action is a form of "non-judicial remedy" for enforcement of the Promissory Note.
- [84] In my view, 4 Corners is correct when it submits that these issues fall away with the addition of Schouw and Smithe as defendants and the amendments concerning the Promissory Note in the 962 Action. With the amended 962 Action extant, 4 Corners does not run afoul of ss. 6 or 27 of the Limitation Act. 4 Corners as a plaintiff in the 962 Action, which predates the expiration of limitation on the Promissory Note, has the ability to pursue amendments to that proceeding to the full extent of the Rules and s. 22 of the Limitation Act. To this extent, the Promissory Note is viable, making the GSA similarly so. I would allow the appeal from the judge's granting of relief in the petition.
- [85] For these reasons, I would allow both appeals.
- "The Honourable Chief Justice Bauman"
- I agree:
- "The Honourable Mr. Justice Harris"
- I agree:
- "The Honourable Madam Justice DeWitt-Van Oosten"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/02/2020BCCA0227.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/smithe-residences-ltd-v-4-corners-properties-ltd-2020-bcca-227>

Prepared on 27 October 2026 · Esheria