

CANADA / JUDGMENT

Strata Plan BCS 1165 v. National Home Warranty Group Inc.

2014 BCSC 942

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 942 Strata Plan BCS 1165 v. National Home Warranty Group Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Strata Plan BCS 1165 v. National Home Warranty Group Inc.,

2014 BCSC 942

Date: 20140530

Docket: S115538

Registry: Vancouver

Between:

The Owners, Strata Plan BCS 1165

Plaintiff

And

National Home Warranty Group Inc., Royal & Sun Alliance

Insurance Company of Canada, and in French, Royal & Sun

Alliance du Canada, Societe D'Assurances, Travelers

Guarantee Company of Canada / La Compagnie Travelers

Garantie du Canada, Onni Imperial Landing Development

Limited Partnership, Onni Development (Imperial Landing)

Corp., Onni Project Management Services Ltd., SCR

Engineering Consultants Ltd., 0599202 B.C. Ltd., 0649813 B.C. Ltd.,
Universal Polymers Inc., Pacific Polymers International Inc.,
GSI Holdings Inc., GBP Holdings Inc., Almetco Building
Products Ltd., 3090723 Nova Scotia Limited, 0113426 B.C. Ltd., VFS
Waterproofing Ltd. and Allstar Mechanical Ltd.

Respondents

Before: The Honourable Mr. Justice Myers

Corrected Reasons: These Reasons for Judgment were corrected
at paragraph 55 on June 25, 2014.

Reasons for Judgment

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C. Michelle Tribe

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Brian D. Rhodes

Place and Date of Hearing:

Vancouver, B.C.

April 10-11, 2014

Written reply submissions of Plaintiff

May 15, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 30, 2014

I. Introduction

- [1] This is an action with respect to leaking in the plaintiff's multi-building condominium in Richmond. The plaintiff applies to add the following five respondents as defendants:
- (a) KMBR Architects Planners Inc., D. Greggwood Brown and Eric Stacey (the project's architects);
 - (b) BC Building Science & Engineering Ltd. (the project's building envelope consultants) and its related entity, BC Building Science Partnership;
 - (c) Soprema Inc. (the manufacturer and supplier of a roofing membrane);
 - (d) City of Richmond; and
 - (e) D.M.S. Mechanical Ltd. (the mechanical contractor for drains).
- [2] The plaintiff commenced this action on August 22, 2011 against National Home Warranty Group Inc., Royal & Sun Alliance Insurance Company of Canada, and Travelers Guarantee Company of Canada, all of whom provided the plaintiff with "2-5-10" home warranty insurance pursuant to the Homeowner Protection Act, S.B.C. 1998, c. 31. In January 2014 the plaintiff obtained an order to add the other defendants who are shown on the style of cause. The three Onni defendants are alleged to be the developers and general contractors. I will refer to them collectively as Onni.
- [3] The application is brought under Rule 6-2(7), the relevant parts of which I set out later. The courts have interpreted the rule as involving two branches: the first requires the plaintiff to demonstrate that it has a question or issue to be tried against the proposed defendant. The second is the "just and convenient" test, which involves a consideration of potential limitation defences.
- [4] There are two principal points of contest between the parties. The first is whether the proposed notice of civil claim discloses a cause of action. The main argument of the respondents is that the pleading is overly general. The second point of contest is the limitation period. The defendants say that the limitation period has expired against them. Based on that, they argue it would not be just and convenient to add them as defendants because they would lose their limitation defence. Alternatively, they argue that if they are added, the limitation defence should be preserved for trial. The plaintiffs argue the opposite.

II. Facts

- [5] The plaintiff is a strata corporation comprised of five four-storey wood frame buildings on top of a one-level concrete underground parkade. The buildings were substantially completed at varying times in 2005.
- [6] The condominium is covered by 2-5-10 home warranty insurance issued by Travelers Guarantee and Royal & Sun Alliance pursuant to the Homeowner Protection Act.
- [7] The warranties required the plaintiff to give the providers and the owner notice of any claimed defects within a reasonable time and prior to expiry of applicable warranty coverage.
- [8] The plaintiff began notifying the warranty providers and Onni of its concerns soon after occupancy of the buildings. These concerns fell into the following categories:
 - (a) Leakage into the parkade, particularly through its concrete roof slab. The plaintiff reported leaking into the parkade to Onni in 2005, while the condominium was still under construction.
 - (b) Inadequate drainage of water below the parkade, which has caused the drains in the parkade to overflow.
 - (c) Uneven settlement and cracking of the floor slab in the parkade.
 - (d) Concerns with the exterior of the condominium buildings (balconies, windows, doors, roofs and walls).
 - (e) Concerns with the interior finishing of the buildings.
- [9] Onni responded to the plaintiff's notices by performing work on the buildings and parkade, and assuring the plaintiff that any defects covered by the 2-5-10 warranties would be addressed.
- [10] The plaintiff received a number of consulting reports on the building beginning in October 2006. The first was a report prepared for Onni from BEMCO Services Ltd. titled "Building Envelope Maintenance Report". The report noted some "maintenance items" with respect to the envelope. Regarding the parkade, it noted that "the parkade is currently undergoing some leak repairs."
- [11] In 2007, the plaintiff retained its own consultant, Levelton Consultants, to review drainage issues in the parkade.
- [12] As I set out later, for the purpose of these reasons I assume that the limitation period began to run in October 2006, the earliest date advocated by the respondents. I will therefore not detail the further and later reports reviewed by the plaintiff.

[13] The plaintiff filed this action on August 22, 2011, naming only the warranty providers. The plaintiff did not serve the action immediately, and continued to deal with the warranty providers in an effort to get them to perform repairs.

[14] No trial date has been set.

III. Does The proposed pleading disclose causes of actions against the proposed defenDants?

[15] Applications to add parties are determined pursuant to Rule 6-2(7); the relevant parts provide:

(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.

[16] In *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.* 2010 BCCA 329, the Court of Appeal noted that rule has two branches: the first requiring the plaintiff to demonstrate that it has a question or issue to be tried against the proposed defendant. The second is the "just and convenient" test.

[17] I am now dealing with the first branch. With respect to that, the Court of Appeal said:

[45] The threshold is low. It has been expressed as establishing 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. This requirement may be met solely on the basis of proposed amendments to the statement of claim, or the parties may provide affidavit evidence addressing it. If evidence is provided, the court is not to weigh it and assess whether the plaintiff could prove the allegations. It is limited to examining the evidence only to the extent necessary to determine if the required issue between the parties exists . [citations removed]

[18] The courts have said that the test is analogous to that used in a motion to strike. That, in turn, takes regard of whether a notice of civil claim can be amended to disclose a cause of action: *B.B.F. v. British Columbia*, [1989] B.C.J. No. 269 (C.A.).

[19] The respondents' arguments regarding the sufficiency of the pleadings are the same: they argue that no facts are pleaded in support of the allegations. This is to be distinguished from a case where facts are pleaded but where it is argued they do not disclose a cause of action known in law.

- [20] For the architects, the proposed pleading alleges they were responsible for the drawings, specifications and inspections and selecting proper waterproofing materials. It alleges that they owed a duty to use reasonable care in providing those services. The proposed pleading alleges breaches of those duties but does not say how the breaches occurred.
- [21] For Soprema (the membrane supplier): the proposed pleading identifies Soprema as the manufacturer of the roof membrane. It says that Soprema (together with other material supplies) owed a duty to take reasonable steps to ensure that its materials complied with drawings and the Building Code, and that it owed a duty to supply materials free of material defects. The pleading alleges that the roof membrane lifted, wrinkled and de-bonded.
- [22] The proposed pleading also alleges a duty to provide proper instructions for the installation of the materials and a duty to warn of defects that would pose a risk to health and safety. It says that these duties were breached.
- [23] For Richmond, the proposed pleading states that it owed a duty to inspect drawings and other design documents to ensure compliance with the Building Code and bylaws and a duty to inspect the construction to ensure compliance. It alleges a duty not to issue an occupancy permit unless the construction was compliant. The proposed pleading alleges a breach of those duties.
- [24] I will deal with BC Building Science & Engineering Ltd. and BC Building Science Partnership later.
- [25] As has been noted by the courts, pleadings may be general as long as they show the grounds upon which each prospective defendant is being sued.
- [26] Soprema relies on *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, in which the Chief Justice said at para. 22:

It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

This must be read in the context of the issue before the court: whether Canada could be liable to either consumers or tobacco companies with respect to what it did in regard to the regulation of tobacco products. It was a novel claim. Amongst other key factors the analysis needed to deal with issues of proximity and foreseeability with respect to a government actor in order to determine whether a duty of care existed.

- [27] This case is more straightforward. The duties of architects, engineers, material suppliers and inspecting municipalities are now fairly well defined. The real issue is whether the claim has been pleaded with sufficient particularity.

- [28] For each defendant, the pleading states the role in the building project, alleges the duty of care, and pleads the breach of that duty. What are lacking are particulars, in the sense that the pleading does not specify the precise manner in which the duties have been breached. Nevertheless, I think the proposed pleading is sufficient to disclose a cause of action and to indicate to the defendants the basis upon which they are being sued. This conclusion is not meant to pre-judge a possible future motion for particulars.
- [29] Soprema says that the pleading improperly lumps it together with other membrane suppliers and relies on *Forde v. Interior Health Authority*, 2007 BCSC 1706. However, neither *Forde*, nor any other case, purports to lay down a prohibition against dealing with defendants collectively in a notice of civil claim. Rather, the ultimate objective is for a party to understand what claim is being made against him. Soprema is identified as having supplied the roof membrane, which is alleged to have failed. It knows the nature of the claim made against it.

BC Building Science Partnership and BC Building Science & Engineering Ltd.

- [30] BC Building Science & Engineering Ltd. and BC Building Science Partnership stand in a different light. I will refer to them as the company and the partnership respectively.
- [31] The pleading alleges that the company was the project's building envelope consultant and sets out the duties it is alleged to have owed and breached. The company did not appear at the hearing and did not contest being added; the partnership does object to being added.
- [32] The proposed pleading does not contain any substantive allegations against the partnership. The pleading's only reference to it is that the company is a general partner of the partnership.
- [33] The partnership deposed that it was formed on July 1, 2005, near the end of the project. It is comprised of several corporations, one of which is the company.
- [34] After the formation of the partnership, the company continued carrying out its functions as building envelope consultant for the project without direction from the partnership and without any representations that the work was now being performed by the partnership.
- [35] The partnership argues that a partner in a firm is the agent of the firm only for the purposes of the firm's business. Further, a firm will only be liable for the negligent acts of an individual partner when the partner performed the negligent acts in the course of carrying out the firm's business or with the authority of his partners. It points to the fact that a notice of civil claim is required to state the legal basis for a claim, and that is not set out in the proposed pleading.
- [36] In reply, the plaintiff says only that it alleges that the partnership is vicariously liable for the acts of the partner.

[37] I agree with the partnership that the proposed pleading is insufficient to disclose a cause of action against the partnership. However, as did Russell J. in *Forde*, I would dismiss the application with the ability of the plaintiff to renew it after the pleading has been amended.

IV. Just and convenient - The limitation issue

[38] As I said, the plaintiff argues that the limitation period has not expired. Even if it has expired it argues that the respondents should be added without preserving the limitation issue for determination at trial. The respondents say the opposite.

[39] The parties agree that the now repealed Limitation Act, R.S.B.C. 1996, c. 266 applies. This is so because s. 30(3) of the current Act, the Limitation Act, S.B.C. 2012, c. 13, provides that claims discovered prior to June 1, 2013 are subject to the former Act. The parties also agree that the claims against them are subject to the six-year limitation period in s. 3(5) of the former Limitation Act.

[40] Section 4(1)(d) of the former Act allows a party to be added or substituted notwithstanding that the limitation period has run:

4(1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

...

(d) adding or substituting a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

[41] After considering the first aspect or branch of what is now Rule 6-2(7) (the cause of action requirement) the Court of Appeal in *John A. Neilson Architects* went on to consider the second aspect, which includes a consideration of the limitation period. It noted that the effect of adding a defendant would be to extinguish a limitation defence, unless the right of the defendant to argue the point at trial was specifically preserved. The Court of Appeal, at paras. 47 and 48, noted four options:

...

1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.
2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.

3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation Act.

48 There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.*, [1987] 4 W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. No. 1086 (S.C.) [Shaw] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, 83 B.C.L.R. (4th) 138.

- [42] It follows from this that I must first determine whether it is clear that there is a valid limitation defence.
- [43] The buildings were completed between February and December 2005. This motion was filed in December 2013. The limitation issue hinges on the postponing of the running of the limitation period based on s. 6(4) of the former Limitation Act which provided:
- (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
 - (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
 - (5) For the purpose of subsection (4),
 - (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
 - (b) "facts" include
 - (i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,

[44] The respondents submit that the limitation period has expired because the plaintiff received the BEMCO Reports in 2006 and 2007, and Levelton's preliminary reports on parkade drainage December 6, 2007, more than six years prior to service of this application.

[45] In *Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611 at para. 22, another leaky condominium case, the Court of Appeal cautioned against making decisions on limitation issues involving postponement in an application to add defendants.

[46] In applying that caution, in *Owners of Strata Plan LMS 2174 v. 387903 B.C. Ltd.*, 2010 BCSC 401, Verhoeven J. noted that:

37 On this application, the plaintiff argues that, unlike *Star Masonry*, the state of the evidence before the court is sufficient to allow me to decide the limitation issues, namely: (i) whether the running of time was postponed pursuant to s. 6(4) of the Act, which is the plaintiff's burden to prove: the Act s. 6(6); and, if so, (ii) the date on which time would commence running. I note that the answers to these questions could well be different for each of the five parties sought to be joined on this application.

38 In this case there have been no examinations for discovery, or cross-examinations on affidavits. In any event, as noted by Levine J.A., it may be that a trial is required to properly decide the limitation issues. I am satisfied therefore that it would be an error for me to decide the limitation issues on the evidence available to me on the application. I should therefore proceed on the assumption that by joining the defendants, they will lose the benefit of a limitation defence that they would otherwise have had.

This applies with equal force to the present case, particularly given the bare-bones pleading. Accordingly, I also will continue my analysis on the assumption that the defendants will lose a valid limitation defence.

[47] Determining whether a defendant should be added after the expiry of a limitation period involves an analysis of the factors identified in *Letvad v. Fenwick*, 2000 BCCA 630, quoted by the Court of Appeal in *John A. Neilson Architects* (above), which include:

- the extent of the delay;
- the reasons for the delay;
- any explanation put forward to account for the delay;
- the degree of prejudice caused by delay; and
- the extent of the connection, if any, between the existing claims and the proposed new cause of action.

- [48] I have emphasized the word "include", because I think it important to highlight that the listed considerations are not exclusive. They should not be interpreted as a statute. As para. 27 of Letvad makes clear, all of the circumstances are to be considered. The overriding consideration is whether it would be just and convenient to add the parties.
- [49] The time factor with respect to the when a defendant is sought to be added is relevant to two considerations: the length of delay and prejudice. In both instances it is the time after which the limitation period plus the one year for serving a notice of civil claim that is relevant: *Amezcua v. Taylor*, 2010 BCCA 128 at para. 42 (regarding delay) and *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297 at para. 8 (regarding prejudice).
- [50] The earliest date the limitation period could have begun to run - and the earliest date advocated by the respondents - is October 2006. This is when the plaintiff received the report from BEMCO. That means that the period of delay and prejudice to consider is after October 2013.
- [51] With respect to delay, the current motion was filed in December 2013. I do not see that as being unreasonable. I would again adopt the words of Verhoeven J. in *Owners of Strata Plan LMS 2174*:
- [67] I begin with some general observations. In leaky condo cases such as this, it is common for the water ingress problems to take several years to develop, and several more years to be adequately investigated. On the evidence available to me this case is quite typical. The 10 year delay between the conclusion of construction and the filing of the Writ of Summons is not unusual in this kind of type of case. Indeed it is common.
- [68] Problems of water ingress in complex structures are themselves inherently complex. Every structure is unique and requires careful investigation in delineating the problem areas and appropriate remedial approaches and methods. There are separate, potentially difficult issues as to causation and responsibility for defects discovered, including whether the defects are caused by faulty design, construction methodology, or some combination thereof. Investigations are costly, and repairs are usually very costly. At every step, the requirements of ordinary strata corporation governance impose delays. The strata corporation is not a single individual who can quickly make decisions having regard solely to his or her own interests, nor is it a business corporation where the senior executive staff can quickly make such decisions. It is a form of democratic government requiring appropriate decision making in accordance with the legislation, bylaws, and rules. In the first instance the decisions are made by the strata council, comprised of volunteers, which must act prudently on appropriate advice and after due consideration. The strata council must then obtain the approval of the members of the strata corporation at annual or special general meetings for major decisions requiring the expenditure of unbudgeted funds. On the evidence all of these factors are applicable in this case.

- [52] The plaintiff has provided a satisfactory explanation for the delay that in large measure hinges on the factors identified by Verhoeven J.
- [53] Turning to prejudice, the cases deal with presumed and actual prejudice. Actual prejudice is to be proved by the proposed defendants. None of the defendants have filed any evidence of actual prejudice. It is to be noted that the builder - to whom the respondents were subcontractors - was aware of the problems from the outset. Further, the plaintiff reported the claim to the insurer shortly after the buildings were occupied and therefore well within any limitation period. In those circumstances it is hard to conceive of any presumed prejudice; rather, given the lack of evidence of actual prejudice, it is more likely that the respondents were aware of the building problems and the potential claims against them. Finally, with respect to Richmond, notice pursuant to s. 286 of the Local Government Act, R.S.B.C. 1996, c. 323, was given to them in June 2010.
- [54] The respondents do not raise any serious issue with respect to the other considerations regarding the limitation period. Nor do they raise any issues with respect to other factors relating to joinder. It is clear that there is a connection with the existing claims. Quoting from Casablanca, the plaintiff is entitled to "round up the usual suspects".

V. Conclusion

- [55] The application is granted with respect to all proposed defendants with the exception of BC Building Science Partnership. The dismissal with respect to BC Building Science Partnership is without prejudice to the plaintiff applying again after it has amended the proposed pleading. I am not seized of that application.

"E.M. MYERS, J."

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