

CANADA / JUDGMENT

Strata Plan VR2124 v. Indal Ltd.

2004 BCCA 611

COURT

British Columbia Court of Appeal

DECIDED

6 December 2004

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2004 BCCA 611 Strata Plan VR2124 v. Indal Ltd. COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Strata Plan VR2124 v. Indal Ltd., 2004 BCCA 611 Date: 20041206 Docket: CA032354

Between: The Owners, Strata Plan VR2124 Appellant (Plaintiff) And Indal Limited Respondent (Defendant) Before: The Honourable Mr. Justice Donald (In Chambers) D.C. Creighton Counsel for the Appellant D.L. Miachika Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia 4 November 2004 Place and Date of Judgment: Vancouver, British Columbia 6 December 2004 Reasons for Judgment of the Honourable Mr. Justice Donald:

- [1] This matter came before me as a motion for directions as to whether leave was required to appeal the order of Mr. Justice Masuhara pronounced 24 September 2004.
- [2] The plaintiff, here the applicant and proposed appellant, moved ex parte to add Indal Limited ("Indal") as a defendant. Indal manufactured the windows and doors used in the construction of what has become a leaky condominium. Madam Justice Gill granted the order.
- [3] Indal applied to set aside the order. The plaintiff brought a cross motion to add Indal in the event Indal's application succeeded.
- [4] Mr. Justice Masuhara set aside the ex parte order on the ground that the plaintiff failed to make complete disclosure of material facts, in particular, expiry of the limitation period and potential prejudice caused to Indal by the delay in adding Indal as a defendant in 2003 to a suit brought in 1997. He found on the evidence that the limitation defence had accrued before the ex parte motion. He determined that the plaintiff received an expert report on 3 June 1997 giving notice of the alleged defects in the windows and doors and the time began to run for two years from that date at the latest.
- [5] In dealing with the plaintiff's cross application pursuant to Rule 15(5)(a)(iii), Masuhara J. found it was not just and convenient to add Indal because: (1) the application was brought after expiry of the limitation period; (2) Indal disposed of documents and lost contact with potential witnesses; and (3) Indal lost the opportunity to inspect the windows and doors after they were replaced.

- [6] Accordingly he ordered that:
1. The Order of the Honourable Madam Justice Gill pronounced July 3, 2003 adding Indal Limited as a Defendants [sic] to this action be vacated and set aside as against Indal Limited;
 2. A Declaration that Indal Limited is not a party or Defendant to this action;
 3. The style of cause and style of proceeding in this action be amended to delete all references with respect to Indal Limited as a Defendant; and
 4. Costs incurred by Indal Limited connected with this action be paid by the Plaintiff at Scale 3 to Indal Limited forthwith after assessment.
- [7] Is this an order requiring leave to appeal? I have decided that the plaintiff has an appeal as of right from the order because it finally disposed of the rights of these parties in the action. Although the proceedings below appear to be interlocutory on the surface, it is my view that the order in question has a final dispositive effect because of the determination of the limitation issue.
- [8] This case is unlike *The Owners, Strata Plan LMS 1212 v. Winchester Investments Ltd.*, 2004 BCCA 500 per Smith J.A., where leave to appeal an order refusing to add a party was dismissed because the plaintiff could simply start a separate action and move to consolidate: see para. 11. Here, although the plaintiff has started a separate action out of an abundance of caution, the plaintiff cannot escape the limitation finding if it stands up.
- [9] This is a dual effect case, i.e. if the issue is decided one way the rights of the party are determined and if decided the other way the action carries on. Earlier jurisprudence of this Court would suggest that the question of whether leave is required can be answered by reference to the nature of the process and therefore dual effect cases should have leave. I think the more contemporary focus is on the effect of the order rather than the nature of the process from which the order emerged: see *Zanetti v. Bonniehon Enterprises Ltd.* (2002), 177 B.C.A.C. 165, 2002 BCCA 555 per Ryan J.A. in chambers. See also the thorough review of this vexed question in *Lions Gate Marketing Co. Ltd. v. Used Car Dealers Assn. of Ontario* (2004), 242 D.L.R. (4th) 332, 2004 BCCA 354 per Finch C.J.B.C. in chambers, in particular his adoption of the finality test formulated by Lambert J.A. in *Topgro Greenhouses Ltd. v. Houweling* (2002), 171 B.C.A.C. 209, 2002 BCCA 387.
- [10] In *Strata Plan LMS 989 v. Redekop* (2003), 193 B.C.A.C. 4, 2003 BCCA 613, Smith J.A. in chambers directed that leave was required from an order adding defendants to an action in circumstances where the chambers judge refused to give effect to a limitation defence. However in obiter dicta Smith J.A. said at para. 6: Had the application been dismissed, it would have finally disposed of the rights between the parties.
- [11] In the present matter the order leaves nothing in the action between these two parties and accordingly I determine that it has a final effect. The plaintiff has an appeal as of right. "The Honourable Mr. Justice Donald"

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