

CANADA / JUDGMENT

The Owners, Strata Plan LMS 2599 v. 328354 B.C. Ltd.

2010 BCSC 819

COURT

Supreme Court of British Columbia

DECIDED

10 June 2010

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2010 BCSC 819 The Owners, Strata Plan LMS 2599 v. 328354 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

The Owners, Strata Plan LMS 2599 v. 328354 B.C. Ltd.,

2010 BCSC 819

Date: 20100610

Docket: S093920

Registry: Vancouver

Between:

The Owners, Strata Plan LMS 2599

Plaintiff

And:

328354 B.C. Ltd., Able Masonry Ltd., All Season Roofing Ltd., 0113426 B.C. Ltd. (formerly known as Allied Windows, a division of A.A.P. Windows Ltd.), Richard A. McWhinney doing business as Artisan Building Consultants, Barclay Construction Corporation, Robert Tischer a.k.a. Bob Tischer, carrying on business as Bob's Plastering & Stucco, Bogdonov Pao Associates Ltd., Cascadia Construction Ltd., also known as 467628 B.C. Ltd., Circadian Project Management Ltd., D.W. Thomson Consultants Ltd., Dan Friesen, The Corporation of the District Of Squamish, Doug Hamilton, Edward Vernon, Forma Design Inc., General Aluminum Railings Ltd., Vic Pimiskern, Herwig Pimiskern carrying on business as Herwig Pimiskern Architect, Insul-Twin Systems Ltd., James A. Thompson a.k.a. Jim Thompson, KCT Construction Ltd., Leo Olaf Lund carrying on business as L.O. Lund & Associates, Levelton Engineering Ltd., Lund Architecture Ltd., NU-Form Exteriors Ltd., Pacific Restorations Ltd., Pattar Roofing Ltd., Pattar Roofing (a Division of Pattar

Cedar Products Ltd.), Peter Ross Limited, Richard A. McWhinney, Ricki L. Vernon, Systems I Mechanical Limited, T. Moscone & Bros. Landscaping Ltd., Trimeria Construction Ltd., and Westcoast Stucco Inc.

Defendants

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A. DeJong

R. Mennie

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M. Pratchett, Q.C.

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C.A. Wallace

V.L. Reakes

Counsel for the District of Squamish:

J.G. Yardley

Place and Date of Hearing:

Vancouver, B.C.

May 31, 2010

Place and Date of Judgment:

Vancouver, B.C.

June 10, 2010

I. Introduction

- [1] There are broadly speaking two applications before me brought by some of the defendants in this "leaky condo" litigation. The project which is the subject of the litigation is referred to as Marina Estates and is comprised of three separate residential strata buildings and an amenities building. The Owners, Strata Plan LMS 2599 ("the Owners") commenced action in May 2009.

- [2] The buildings were constructed in about 1995. Moisture ingress was known prior to 2003. A comprehensive building envelope survey was done generating a written report in June 2003. Repair work was tendered in 2009 and the writ was issued in May 2009. Service of the writ was affected March 2010.
- [3] The first application is brought by the defendant Levelton Engineering Ltd. ("Levelton") seeking a declaration that the endorsed writ of summons is a nullity and asking that the writ of summons be struck. It is supported by various other defendants.
- [4] The second application is brought by Edward and Ricki L. Vernon (the "Vernons") for judgment under Rule 18(6) and to strike the claim under Rule 19(24). The applications were set for 40 minutes but argument proceeded over three hours.

II. Nullity Argument

- [5] The endorsement on the writ is a general endorsement made against all parties. There are at least 36 parties named in the writ. The endorsement reads as follows:
- 2. The Plaintiff brings this action on its own behalf and on behalf of the owners of the strata lots in the Condominium, which is legally described as:

Strata Lots 1 - 90

District Lot 486, Group 1, New Westminster District

Strata Plan LMS 2599

- 3. The Defendants, along with others, were responsible for the design, construction, development, manufacturing and inspection services, approvals and supervision and supplied materials in connection with the construction and subsequent repairs to the Condominium.
- 4. The Condominium contains a number of building deficiencies and construction defects, including defects and deficiencies that have given rise to conditions which pose substantial danger to person and property (the "Construction Deficiencies").
- 5. The Construction Deficiencies have resulted in continuous property damage and loss to the Condominium's strata lots, common property, common facilities and other common assets and property (the "Resultant Damage"), and loss of use of the same.
- 6. The Construction Deficiencies and Resultant Damage were caused or contributed to by each of the Defendants' deficient design, construction, development, manufacturing, approval, provision and use of improper materials and inspection and supervision of construction and repairs to the Condominium (collectively, the "Breaches").

7. The Defendants' Breaches have caused and continue to cause the Plaintiff to suffer loss, damage and expense arising from and in connection with the Construction Deficiencies and Resultant Damage.
8. The Plaintiff claims against each of the Defendants for the loss, damage and expense suffered by the Plaintiff as a result of the Defendants' breaches of contract, breaches of warranty, negligence, negligent failure to warn, negligent misrepresentation, and breaches of statutory duties.
9. The Defendants are jointly and severally liable for all of the loss, damage and expense suffered by the Plaintiff and the Plaintiff pleads and relies on the provisions of the Negligence Act, R.S.B.C. 1996, c. 333 and the applicable provisions of the Building Codes and other bylaws, codes and building regulations, as amended.

The Plaintiff claims against each of the Defendants for:

- (a) general damages;
 - (b) special damages;
 - (c) interest pursuant to the Court Order Interest Act;
 - (d) costs; and
 - (e) such further and other relief that this Honourable Court deems just.
- [6] Levelton says that a general endorsement made against all parties is inadequate. It says that it is entitled to have the writ struck as void and as a nullity or, alternatively, as a defective endorsement not cured, citing *Elloway v. British Columbia Electric Railway Company Limited* (1956), 19 W.W.R. 408, 4 D.L.R. (2d) 734 (S.C.); *Hicks v. Beaver Lumber* (1993), 98 B.C.L.R. (2d) 206 (C.A.); *Searchlight Systems Ltd. v. Liu*, 2006 BCSC 349; *McDuff Estate v. St. Paul's Hospital*, [1994] B.C.J. No. 1432 (S.C.); *Canadian National Railway Company v. Canadian Pacific Limited* (1978), 5 B.C.L.R. 242 (S.C.); *Affinity Auto Group Inc. v. Manheim Auto Auction*, 2009 BCSC 873; and *Clarke v. Perrick*, [1996] B.C.J. No. 2149 (S.C.).
- [7] In *Elloway* the endorsement was "The plaintiff's claim is for damages". It was found to be a nullity.
- [8] In *McDuff Estate*, Master Donaldson held that the endorsement there was "clearly defective, if not a nullity". The endorsement was "The Plaintiff's claim is for Medical Malpractice, Nervous Shock, Wrongful Confinement, and Battery".

- [9] The endorsement in Affinity Auto Group Inc. and Searchlight Systems Ltd. were more complex. In Affinity Auto Group Inc. the court found that the essence of the endorsement was a commercial claim under the Sale of Goods Act for receipt of deficient goods. Satanove J. found only that the endorsement contained no cause of action against the defendants, who were not sellers of the goods. The low threshold of sufficiency for an endorsement did not allow a plaintiff in a statement of claim to "completely change the nature of the claim".
- [10] In Searchlight Systems Ltd., Ehrcke J. considered an endorsement that read, in part, "The plaintiff claims for...damages against the Defendant, Irwin Cotler, Minister of Justice ("MOJ") for fees and expenses incurred by the Plaintiff in connection with litigation support afforded by the Plaintiff to accused persons in the course of criminal prosecution and due and payable by MOJ". The court found that the endorsement did not meet the low standard as it did not bring to the defendant's attention to the type of case it would have to meet.
- [11] The Owners say that the endorsed Writ of Summons is sufficient to meet the requirements of Rule 8(2) in that it sets out a "concise statement of the nature of the claim made and the relief required in the action". No specific form of words is required: Hicks. An endorsement, they say, is sufficient if it brings to the defendants' attention the type of case they would have to meet: Searchlight Systems Ltd.
- [12] In particular the Owners say that, contrary to the position of the applicants, a general endorsement alleging various causes of action against multiple defendants, without particularizing those allegations, is sufficient to meet the requirements of Rule 8(2). The Owners rely on the decision of the Court of Appeal in International Forest Products Ltd. v. Moody (1997), 36 B.C.L.R. (3d) 257.
- [13] In International Forest Products Ltd. the endorsement considered by the court was as follows:
- 6 ...: The plaintiffs' claim is against the defendants and each and every one of them for:
1. damages for:
 - (a) interference with contractual relations;
 - (b) obstruction;
 - (c) intimidation;
 - (d) nuisance;
 - (e) conspiracy to do injury to the plaintiffs in their business;
 - (f) conspiracy to harm the economic interests of the plaintiffs; and
 - (g) trespass;
 2. special damages;

3. punitive damages;
4. an interim, interlocutory and permanent injunction;
5. interest;
6. special costs; and
7. such further and other relief as this Honourable Court deems just.

[14] The action named certain specific persons as defendants and other persons who were said to be "persons unknown". In this court Paris J. dismissed an application to strike the action on the ground that the endorsement was insufficient. Hall J.A. refused leave to appeal, but the full court reconsidered the application and did so on the merits.

[15] McEachern, C.J.B.C., speaking for the court referred to the "modern view" of these matters expressed by the Court of Appeal in *Mussell v. Cronhelm* (1994), 111 D.L.R. (4th) 95, where Prowse J.A. wrote for the court at pp. 100-101:

... Rule 2 provides that a failure to adhere strictly to the rules will give rise to an irregularity, rather than a nullity. With respect to the latter rule, regard may be had to the words of Lord Denning, speaking of the English counterpart to Rule 2, in *Harkness v. Bell's Asbestos and Engineering, Ltd.*, [1966] 3 All E.R. 843 (leave to appeal to the House of Lords refused) at 845-6:

This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that "it is not possible...for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." That could not be said in 1963; see *Re Pritchard* (dec'd.) ([1963] 1 All ER 873 at 879, [1963] Ch. 502 at 518); but it can be in 1966. The new rule does it.

Thus, in *Sheldon v. Brown Bayley's Steelworks Ltd. and Another*, [1953] 2 All E.R. 894, the English Court of Appeal held that failure to serve a writ within the prescribed time did not render it a nullity, but an irregularity. *Sheldon* was referred to with approval by this Court, the Saskatchewan Court of Appeal, and the Ontario Court of Appeal in *Kelly*, [46 D.L.R. (2d) 38], *supra*, *Simpson*, [65 D.L.R. (2d) 324], *supra*, and *Brown v. Humble*, [1959] O.R. 586, respectively.

[16] Thus the court held in *International Forest Products Ltd.* that "...Elloway cannot be regarded as authoritative since the adoption of Rule 2(1)" at para. 15. The appeal was bound to fail on alternate grounds including the "force of Rule 1(5) and 2(1) and the modern authorities": at para. 18.

[17] In this case the writ identifies the property at issue, the various strata lots, which comprise a condominium development. It asserts that the defendants were responsible for the design, construction, development, etc. of the condominium. It asserts that the condominium has building deficiencies and construction defects, resulting in continuous property damage and

loss. It says that the defendants caused or contributed to those deficiencies and construction defects. The plaintiff claims against the defendants for their losses as a result of "breaches of contract, breaches of warranty, negligence, negligent failure to warn, negligent misrepresentation, and breaches of statutory duties".

- [18] In my opinion the endorsement, while general, brings to the attention of the defendants in a general way the type of case it will have to meet. That is to say, it brings to the attention of the defendants that their work or participation in the condominium development is said to have caused or contributed to property loss and damage, for which they are legally responsible under the various theories advanced.
- [19] Of course, this is construction litigation, and it is notorious that assigning responsibility for losses alleged to have arisen can be difficult and complex. See the decision of Verhoeven J. in *Strata Plan LMS 2174 v. 387903 B.C. Ltd.*, 2010 BCSC 401. In my opinion it would be counselling perfection to require a party to more fully particularize responsibility in an endorsement in this litigation on pain of finding the endorsement a nullity.
- [20] I am mindful of the difficulties all of the defendants will encounter because of the timing of the litigation and the fact that remedial action has commenced. It may be that unnecessary costs are incurred to protect their positions. Those are serious matters which may need to be separately addressed. In my opinion those matters do not inform the analysis of the sufficiency of the writ.
- [21] The threshold for finding sufficiency of a writ is low. In my opinion the general endorsement satisfies this threshold, based on the decision of McEachern C.J.B.C., speaking for the Court in *International Forest Products Ltd.* The writ is not a nullity. Alternatively, even if the writ is not sufficiently endorsed it is at most an irregularity which, in my opinion, can be cured by issuance of a statement of claim. The application to strike the writ is dismissed.

III. Rule 19(4) Application

- [22] In determining whether an endorsement or statement of claim should be struck on the grounds that it discloses no reasonable claim, the court is required to assume that the facts alleged in the statement of claim can be proved. The court then asks whether it is "plain and obvious" that the plaintiff's claim discloses no reasonable cause of action.
- [23] In considering the plain and obvious standard the court should consider (1) whether there is a fit question to be tried, regardless of complexity or novelty, (2) whether the outcome of the claim at trial is beyond a reasonable doubt, (3) whether serious questions of law or questions of general importance are raised or if facts should be known before rights should be decided, (4) whether the pleadings might be amended, and (5) whether there is some element of an abuse of process: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

- [24] The plaintiff says its claims in the endorsed Writ of Summons are against the Directors for negligent misrepresentation, and breaches of statutory duty. The plaintiff says that these arise from the Directors' role in causing and contributing to the defects and deficiencies in the course of development and construction, their representations, and with respect to their statutory duties.
- [25] The Vernons appear to concede that they "face potential liability for misrepresentation in the disclosure statement". They invoke section 22(7) of the Real Estate Development Marketing Act, S.B.C. 2004, c. 41 relying on the authority of professionals on which they relied.
- [26] I agree with the plaintiff that the Vernons have offered up a defence to the plaintiff's claims. The fact they may have a defence does not mean that it is "plain and obvious" that the claim cannot succeed. Of course, the Directors' evidence regarding their defence cannot be considered by the court in determining an application under Rule 19(24): *Carruthers v. Langley* (1984), 57 B.C.L.R. 373, 13 D.L.R. 4th 528 (S.C.), *aff'd* 69 B.C.L.R. 24 (C.A.).
- [27] There is also the question of the representations made in the correspondence referenced below.
- [28] Of course, we are dealing with this question based only on the endorsement in the writ. That said, I am unable to say that the defendants have met the "plain and obvious" standard required.
- [29] The application under Rule 19(24) is dismissed.

IV. Rule 18(6) Application

- [30] In application under Rule 18(6) a defendant may, on the ground there is no merit in the whole or part of the claim, apply to court for judgment on an affidavit verifying that there is no merit in whole or in part to the claim and stating that the deponent knows of no facts which would substantiate the whole or part of the claim.
- [31] The applicant in such an application must establish that there is no bona fide triable issue of fact or law: *Carnahan v. Coates* (1990), 71 D.L.R. (4th) 464, 47 B.C.L.R. (2d) 127 (S.C.). Put in another way, it must be shown that the plaintiff is "bound to lose": *Pitt v. Holt*, 2007 BCSC 1555.
- [32] In a Rule 18(6) application, matters of fact cannot be weighed, and all inferences from the facts must be viewed in the light most favourable to the plaintiff: *Carnahan*.
- [33] The material before the court includes an undated letter to "Homeowners" saying that "We did it right" and making various claims about the quality of the development and the experience of the developer. It reads as follows:

Marina Estates

#310-1466 Pemberton Avenue

Squamish, BC, V0N 3G0

Ph: (604) 892-2628 Fax: (604) 815-0069

Dear Homeowners,

In light of all the publicity in the city with leaky condo's ... we wanted to give you reassurance of our quality construction, at Marina Estates.

While the developers with leaky buildings are now hiring envelope engineers to fix their problems - we had hired an envelope engineer, Levelton Engineering Ltd., to inspect our buildings from the start of construction through to the end.

We did it right...

We have wrapped our building with 2 layers of tar paper

We have used plywood - not particle board

Our lumber was kiln dried to allow for max. dryness and less shrinkage

We have a double layered 20 year roof

We have enclosed a copy of our engineering report from Levelton. These buildings were built to exceed all standards - if there is a problem we will fix it immediately! At our cost.

Your developer has been constructing buildings for over 30 years producing strong, quality buildings. To this date he has never had a claim for leaky buildings.

It is now time to do our final envelope sealing. This will be carried out by Dennis and Andy over the next couple weeks, weather permitting.

Humidistats . . .very important!

Keep between 40 and 50. It makes for a healthier home and building.

If you have any questions, call your property manager.

Sincerely

(Signature)

Marina Estates

[34] There is also a letter dated July 25, 2000 which provides further assurances. The Strata Corporation was copied with this correspondence. It reads as follows:

EDWARD VERNON

328354 BC LTD.

July 25, 2000

Black Tusk Property Management

Box 477, Squamish, BC, VON 3G0

Re: Marina Estates Strata Corporation LMS 2599

Dear Rod Derouin,

When we originally developed the concept for Marina Estates our goal was to create a development with the highest quality of construction Squamish had ever seen.

We hired the best engineers available from mechanical to structural as well as envelope engineers, which were highly recommended in the industry. We paid top dollar for our own team of inspectors in addition to Municipal inspectors like Peter Remple. We hired highly skilled and experienced tradesman who are considered the best in their industry. We researched and acquired the best warranty program available through a company, which was unheard of in the B.C. housing industry.

We feel we have exceeded our part in providing the best quality of construction. This is why it was very disturbing to see that when the envelope engineer made a recommendation for maintenance of these buildings, a maintenance program was never implemented. These buildings were constructed to the highest standards, but due to the inclement weather Squamish receives it is imperative to have a maintenance program in place. Levelton Engineering, being the original envelope engineers for the project, already has extensive knowledge on the construction of these buildings. Therefore, I personally would not hesitate, and highly recommend, using Levelton Engineering for your regular inspections. They have their reputation and integrity and are highly knowledge [sic] in this field. Again, I highly recommend that you follow the instructions of the engineers and have the buildings maintained on Levelton's recommended schedule.

If you are to contact anyone for repairs I recommend you call the original tradesmen as they are already familiar with the buildings and many of them still have warranties on their work. The following is a list of trades from Marina Estates:

Roof membrane: Pacific Restoration (Don Lepp) - 898-4661

Cedar shingles: All Season Roofing (Ron Rana) - 585-6746

Stucco: Westcoast Stucco (Milne Martin) - 852-4249

One final point, with the velocity of the wind and the driving rain the envelope can be broken. It takes knowledge to fix it, to prevent further damage. I have now seen the new Building Code designed to counteract the current problems B.C. buildings are having. For your assurance, our buildings still exceed even the new Building Code. However, it is still imperative you implement regular inspections and maintenance to prevent any problems.

Yours truly,

"Edward Vernon"

Edward Vernon

c.c. Marina Estates Strata Corporation LMS 2599

[35] There are also potential issues regarding the disclosure statements signed by the Vernons.

[36] In the circumstances I am unable to say that there is no triable issue or that the plaintiffs are bound to lose. This application is refused.

V. COSTS

[37] The plaintiff has been successful in these applications. With respect to Levelton's application it asks that costs be payable forthwith in any event of the cause. The plaintiff says that such an order is appropriate whether the application is frivolous or without merit, relying on *Lalji v. Sunderji*, [1997] B.C.J. No. 239 (S.C.), leave to appeal denied [1997] B.C.J. No. 953 (C.A.).

[38] In *Lalji* there was an order for special costs and those costs were made payable forthwith in any event of the cause. A short leave application was made in the absence of urgency with service affected in a manner designed to embarrass a party. In my opinion *Lalji* is not helpful, nor is the Ontario authority cited, where the practice, according to Mark M. Orkin, *The Law of Costs*, 2nd ed. looseleaf (Aurora, Ont.: Canada Law Book, 2010), is "...to fix costs at the end of a motion and order that they be paid forthwith unless there is good reason not to do so...." (p.4-3, 4-4).

[39] In *Lalji* at para. 8, the Court of Appeal, in refusing leave, approved Madam Justice Levine's statement that "Costs awarded on an interlocutory application are usually not recoverable until the conclusion of the litigation". I see no reason to depart from that practice here.

[40] The plaintiff says that the Directors' application should be dismissed with special costs payable forthwith pursuant to Rule 57(3), citing *Catalyst Paper Corporation v. Companhia de Navegacao Norsul*, 2009 BCCA 16, *Chudy v. Merchant Law Group*, 2007 BCSC 279, and *Stach v. Younger*, 2009 BCSC 476.

[41] There is nothing in these defendants' applications that, in my opinion, constitutes reprehensible conduct. In fact, the general nature of the endorsement on the writ, and the timing of service of the claim contributed to all of these applications.

[42] The applications are dismissed with costs of these applications to the plaintiff at Scale B. Such costs are not recoverable until the conclusion of the litigation against these defendants.

"The Honourable Mr. Justice Savage"

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