Case Name:

Strata Plan LMS 1400 v. Objekt Properties Corp.

Between
The Owners, Strata Plan LMS 1400, plaintiff, and
Objekt Properties Corp., Brenton Construction Ltd., Robert Leshgold, Architect, Jonathan Stovell, City of Vancouver, Reliance Holdings Ltd., Read Jones Christoffersen Ltd., A.V. Western Stucco Ltd., McLaughlin Construction, Jack Leshgold, Leiba Leshgold, Michael Brent Alston, Sally Ann F. Alston, defendants

[2002] B.C.J. No. 2305
2002 BCSC 1420
Vancouver Registry No. C995675

British Columbia Supreme Court
Vancouver, British Columbia
Brooke J.

Heard: August 22, 2002.
Judgment: October 7, 2002.
(17 paras.)

Counsel:

Garth M. Evans, for the plaintiff.
D. Scott Lamb, for the defendants, Robert Leshgold, Architect, Jonathan Stovell, Reliance Holdings Ltd., Jack Leshgold and Leiba Leshgold.
Brent D. Jordan, for the defendant, City of Vancouver.

[Quicklaw note: A Corrigendum was released by the Court November 5, 2002. The correction has been made to the text and the Corrigendum is appended to this document.]

¶ 1 **BROOKE J.**:— The defendant, City of Vancouver, seeks dismissal of the action against it pursuant to Rules 18A, 19 (24) and 25(1) of the Rules of Court. The application is resisted by the plaintiff and by the defendants, Robert Leshgold, Architect, Jonathan Stovell, Reliance Holdings Ltd., Jack Leshgold and Leiba Leshgold.

¶ 2 By way of background, the plaintiff claims against 13 defendants, including the defendant, City of Vancouver, for damages for construction defects in a condominium development undertaken between 1993 and 1994.

¶ 3 The claims against the City of Vancouver are specifically set out in paragraphs 40 and 41 of the statement of claim, and generally against all of the defendants in paragraph 33 of the statement of claim.

¶ 4 Paragraph 40 says this:

> The City of Vancouver was negligent in its inspections of the Building and failed in its duty to ensure that the Building was constructed to and complied with the City of Vancouver Building By-laws, the British Columbia Building Code and the National Building Code and was further negligent in issuing the Occupancy Permit without ensuring that the Building had been constructed in compliance with the City of Vancouver Building By-laws, the British Columbia Building Code and the National Building Code.

¶ 5 Paragraph 41 says:

> In breach of the duty of care owed to the Plaintiff by the City of Vancouver the Building was not constructed in accordance with the City of Vancouver Building By-laws, the British Columbia Building Code and the National Building Code which resulted in structural defects, water leaks, rotting and other damage to the Building.

¶ 6 Paragraph 33 says:

> The Defendants, and each of them, owe a duty to warn the Plaintiff of any potential or actual defects, deficiencies and/or damages in the construction of the Building. In breach of their duty to the Plaintiff, the Defendants, and each of them, failed to warn the Plaintiff of the Defects and Deficiencies which were known to the Defendants and each of them. As a result of the said failure to warn, the Plaintiff has suffered damages.

¶ 7 On the hearing of the notice of motion the defendant, City of Vancouver, abandoned its application under Rule 25(1), adjourned its application for summary trial under Rule 18A, and proceeded with its application under Rule 19(24). Rule 19 (24) provides:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be, ...

¶ 8 In Hunt v. Carey Can. Inc. (1990), 49 B.C.L.R. (2d) 273, the Supreme Court of Canada said this at p. 289:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

¶ 9 The defendant City of Vancouver relies upon s. 294(8) of the Vancouver Charter, S.B.C. 1953, c. 55 which provides:

> (8) The city, or any officer or employee thereof, in inspecting and approving plans or in inspecting buildings, utilities, structures or other things requiring a permit for their construction, has no legal duty, on which a cause of action can be based, to ensure that plans, buildings, utilities, structures, or other things so constructed, comply with the by-laws of the city or any other enactment. The city, or any officer or employee thereof is not liable for damages of any nature, including economic loss, sustained by any person as a result of neglect or failure of the city or officer or employee thereof to discover or detect contraventions of the by-laws of the city or other enactment or from the neglect or failure, for any reason or in any manner, to enforce such a by-law or enactment or for any damage from a failure to recommend, or resolve to file a notice in the land title office pursuant to section 336D.

The defendant, City of Vancouver, also relies upon the decision of the Court of Appeal in Kaiser v. Bufton's Flowers Ltd. (1995), 2 B.C.L.R. (3d) 85 where, at p. 93, the court said this:

> The nature and purpose of s. 294(8) is to protect the City, a public entity, against liability arising out of a particular common law cause of action (see Nielsen v. Kamloops (City), [1984] 2 S.C.R. 2). The protection accorded by the legislation is related, not to the moment carelessness occurred, but to attempts subsequent to its enactment, to found a cause of action based on breach of a legal duty arising from such carelessness. However, unless such a cause of action was complete before the legislative enactment, the cause of action is abolished by the prospective effect of the enactment.

And later on the same page:

> In my view, on the plain meaning of the language of the section, the appellant's action against the City is barred because there was no cause of action in existence at the time the statute was enacted.

¶ 10 I am satisfied that the broad and inclusive language of s. 294(8) captures the claims set out in paragraphs 40 and 41 of the statement of claim, and that it is "plain and obvious" that the cause of action contained within those paragraphs of the statement of claim is abolished.

¶ 11 I now turn to the more generalized claim against all of the defendants set out in paragraph 33 of the statement of claim. There it is said that the defendant, City of Vancouver, owed a duty to warn the plaintiff of any potential or actual defects in construction and that the defendant city failed to warn the plaintiff of any such defects which were known to the defendant, as a result of which the plaintiff has suffered damage.

¶ 12 Paragraph 33 of the statement of claim should be amended to assert that the defendants knew (or perhaps should have known) of the alleged defects, and I proceed as if it had been so amended and material facts pled in support of each element of this cause of action.

¶ 13 The defendant, City of Vancouver, says that s. 294(8) is cast broadly enough to capture a cause of action based upon a failure to warn. The defendant, City of Vancouver, relies upon the last sentence of this subsection, which I paraphrase as follows:

> The City ... is not liable ... for any damage from a failure to recommend, or resolve to file a notice in the land title office pursuant to section 336D.

This section, and I paraphrase, says this:

> 336D.(1) Where, during the course of carrying out his duties, the City Building Inspector observes a condition, with respect to ... a building ... that he considers
>
> (a) to be a contravention of a by-law or regulation relating to the construction or safety of buildings ... or
>
> (c) the contravention is of a nature that a purchaser, unaware of the contravention, would suffer a significant loss or expense if the by-law were enforced against him
>
> he may, in addition to any other action that he is authorized or permitted to take, recommend to Council that a resolution under subsection (2) be considered.
>
> (2) ... the Council may confirm the recommendation of the City Building Inspector and may pass a resolution directing the City Clerk to file a notice in the land title office stating that
>
> (a) a resolution relating to that land has been made under this section, and
>
> (b) further information respecting it may be inspected at the offices of the City Clerk.

...

Section 336D is permissible in nature and enables the City to give constructive notice to the world of a condition with respect to a building that may be in contravention of a building by-law or regulation. As such, it is a form of warning. The question is this: Is the exclusion of liability, as a result of failure to recommend or resolve to file a notice, sufficient to discharge the defendant, City of Vancouver, upon its duty to warn of a defect of which it knows (or reasonably should know)? The law is that a party possessed of knowledge of danger in the continuing use of a mechanical device has, from the moment that that party becomes seized of that knowledge, a duty to warn those to whom that mechanical device has been supplied. Moreover, the failure to warn constitutes an independent tort and renders the party liable for the economic loss directly attributable to the failure to warn (Rivtow Marine Limited v. Washington Iron Works, [1973] 6 W.W.R. 692 (S.C.C.)).

¶ 14 While I am satisfied that s. 294(8) extinguishes the liability of the City for damage arising from a failure to recommend or resolve to file a notice under s. 336D, I am not satisfied that it goes so far as to extinguish any cause of action for damages arising from a more generalized failure to warn of a defect of which the City knew (or should have known). My task is to determine whether it is "plain and obvious" that there is no cause of action on the facts alleged in the pleadings, which I must assume to be capable of proof. There is, in my opinion, a chance that the plaintiff might succeed in its claim arising out of the failure of the defendant, City of Vancouver, to warn of a defect or danger of which it knew (or reasonably should have known).

¶ 15 In the result, paragraphs 40 and 41 of the statement of claim are struck as disclosing no reasonable claim.

¶ 16 The plaintiff is at liberty to seek to amend paragraph 33 of the statement of claim, and the application to strike that paragraph is dismissed. Should the plaintiff fail to seek these amendments within a reasonable time the defendant, City of Vancouver, may renew its application under Rule 19(24). The defendant, City of Vancouver's application under Rule 18A is adjourned generally.

¶ 17 Costs in the cause.

BROOKE J.

* * * * *

CORRIGENDUM

Released: November 5, 2002

[1] This Corrigendum is further to my Reason for Judgment dated and filed on October 7, 2002.

[2] Paragraph 13 on page 7 is amended in the first line following the quote to change the word "permissible" to "permissive". Paragraph 13 is amended to read as follows:

The defendant, City of Vancouver, says that s. 294(8) is cast broadly enough to capture a cause of action based upon a failure to warn. The defendant, City of Vancouver, relies upon the last sentence of this subsection, which I paraphrase as follows:

> The City ... is not liable ... for any damage from a failure to recommend, or resolve to file a notice in the land title office pursuant to section 336D.

This section, and I paraphrase, says this:

> 336D.(1) Where, during the course of carrying out his duties, the City Building Inspector observes a condition, with respect to ... a building ... that he considers
>
> (a) to be a contravention of a by-law or regulation relating to the construction or safety of buildings ... or

(c) the contravention is of a nature that a purchaser, unaware of the contravention, would suffer a significant loss or expense if the by-law were enforced against him

he may, in addition to any other action that he is authorized or permitted to take, recommend to Council that a resolution under subsection (2) be considered.

(2) ... the Council may confirm the recommendation of the City Building Inspector and may pass a resolution directing the City Clerk to file a notice in the land title office stating that

(a) a resolution relating to that land has been made under this section, and

(b) further information respecting it may be inspected at the offices of the City Clerk.

...

Section 336D is permissible in nature and enables the City to give constructive notice to the world of a condition with respect to a building that may be in contravention of a building by-law or regulation. As such, it is a form of warning. The question is this: Is the exclusion of liability, as a result of failure to recommend or resolve to file a notice, sufficient to discharge the defendant, City of Vancouver, upon its duty to warn of a defect of which it knows (or reasonably should know)? The law is that a party possessed of knowledge of danger in the continuing use of a mechanical device has, from the moment that that party becomes seized of that knowledge, a duty to warn those to whom that mechanical device has been supplied. Moreover, the failure to warn constitutes an independent tort and renders the party liable for the economic loss directly attributable to the failure to warn (Rivtow Marine Limited v. Washington Iron Works, [1973] 6 W.W.R. 692 (S.C.C.)).

(amendment underlined)

[3] The Reasons are amended accordingly. In all other aspects, the Reasons stand.

BROOKE J.

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Strata Plan LMS 1400 v. Objekt Properties Corp.

[2002] C.C.S. No. 22644
[2002] B.C.J. No. 2305
2002 BCSC 1420
Vancouver Registry No. C995675

British Columbia Supreme Court
Brooke J.

October 7, 2002
(17 paras.)

Practice — Pleadings — Striking out pleadings — Municipal law — Liability of municipalities — Negligence — Standard of care, building construction approval.

Application by the defendant City of Vancouver to have the action against it struck for failure to disclose a reasonable claim. The plaintiff Strata Plan LMS 1400 claimed against 13 defendants for damages for construction defects in a condominium development. The strata plan alleged that the City was negligent in its inspections of the building and failed in its duty to ensure that the building was constructed in compliance with City bylaws and the provincial and federal building codes. It also claimed that the City breached its duty to warn of defects and deficiencies. The City relied on the Vancouver Charter, which provided that it was not liable for failure to discover contraventions of the bylaws when it inspected buildings. The Charter enabled the City to give constructive notice of a building's contravention of a bylaw or regulation.

HELD: Application allowed in part. It was plain and obvious that the claims for failure to ensure that the building was constructed in compliance with the relevant legislation and negligent inspection would fail based on the Vancouver Charter. Those paragraphs were struck. However, it was not clear that the Charter extinguished a cause of action for failure to warn of a defect. Accordingly, that paragraph was not struck.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rules 18A, 19(24), 19(24)(a), 25(1).

Vancouver Charter, S.B.C. 1953, c. 55, s. 294(8).

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