Case Name:

# Strata Plan LMS 1816 v. North Fraser Holdings Ltd.

Between
The Owners, Strata Plan LMS 1816, plaintiff, and
North Fraser Holdings Limited, 411845 British Columbia Ltd., 411853 British Columbia Ltd., Nigel Baldwin, Nigel Baldwin Architects Ltd., Hughes Baldwin Architects, Van Maren Construction Co. Ltd., Intracorp Developments Ltd. previously known as Intrawest Real Estate Ltd., Intrawest Corporation in its English form and Corporation Intrawest in its French form, Van Maren Construction (#8529) Ltd., Reifel Cooke Group Limited, George C. Reifel, Guy Young, Joe S. Houssain, J. Randy Cooke, Sidney J. Mendelson, Daniel O. Jarvis, Levelton Engineering Ltd., SMB Consultants Inc., Read Jones Christofferson Ltd., Jem Decks Distribution Ltd., McGregor & Thompson Hardware Ltd., John Doe 5 doing business as Agnim Construction Ltd. and the said Agnim Construction Ltd., Dave Bhatara, John Doe 6 doing business as Sertex Mechanical Ltd. and the said Sertex Mechanical Ltd., Roger Hendrix, J.R. Trory & Company Ltd., Transwest Roofing (1994) Ltd., Northern Building Supply Ltd., John Doe 7 doing business as 470134 B.C. Ltd. and the said 470134 B.C. Ltd., Robert Rietveld, Vancouver Fascia Gutter Ltd., Mainland Stucco & Drywall (1994) Inc., Mainland Stucco & Drywall Inc., Vicon Construction Ltd., McGrail's Metal Products and Murray Nurseries Ltd., defendants

[2004] B.C.J. No. 1214
2004 BCSC 765
Vancouver Registry No. S002611

**British Columbia Supreme Court**
**Vancouver, British Columbia**
**Slade J.**

Heard: March 11, 2004.
Judgment: June 9, 2004.
(59 paras.)

**Counsel:**

Counsel for the Plaintiff: S. Vanderfluit

Counsel for the Defendants, Acastina Investments Ltd.
and Marjon Investments Ltd.: D. Fredericksen

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**SLADE J.:—**

I. Overview

¶ 1 This action arises out of the ingress of water at a condominium project known as Harbour House.

¶ 2 The original defendants included those described as the developers, the architects, and the general contractor. Other parties, subcontractors for the most part, have been joined as defendants in the course of the litigation thus far.

¶ 3 The application now before the court relates to the general contractor. The party identified as the general contractor in the original Statement of Claim was Van Maren Construction Co. Ltd. Another defendant, Van Maren Construction (#8529) Ltd., was later joined in the action. Paragraph 83 of the Amended Statement of Claim asserts that:

> The General Contractor, both or either of Van Maren or Van Maren (#8529) was engaged by the Developer to act as general contractor on the construction of Harbour House.

¶ 4 The present application seeks to join other parties as defendants. These include Van Maren Management Ltd., Van Maren Equities Ltd., Marjon Investments Ltd., and Acastina Investments Ltd.

¶ 5 The proposed amendments to the Statement of Claim assert:

> (1) that the two Van Maren companies which are presently defendants in the action (the present Van Maren defendants) and the four proposed defendants (the proposed Van Maren defendants) were, at all material times, a partnership within the meaning of that term in s. 2 of the Partnership Act, R.S.B.C. 1996, c. 348;
> (2) that the present and proposed Van Maren defendants were, individually or collectively, the general contractor.

¶ 6 Marjon and Acastina oppose the application.

II. Background

¶ 7 Harbour House consists of three separate buildings. Buildings 1 and 2 are four-storey apartment buildings. Between the two apartment buildings is Building 3, a block of six three-storey townhouses. There are 82 units in total, 76 apartments and six townhouses. One level of underground parking extends under all three buildings. It was constructed in 1994 and 1995.

¶ 8 The issues for trial center on responsibility for alleged deficiencies in construction and the related duties of those involved in the development, construction, and marketing of the project.

¶ 9 The City of Vancouver issued an occupancy permit for Building 1 on February 13, 1995, and permits for Buildings 2 and 3 on March 30, 1995.

¶ 10 By August, 1995, reports of leaks were being submitted to the strata council and to the property manager.

¶ 11 Throughout 1995, 1996 and early 1997, the developer instructed the general contractor to perform repairs to the building envelope at Harbour House.

¶ 12 In 1997, the strata corporation retained a consultant to test for moisture content in the walls of the buildings. Reports in November, 1997, and September, 1998, indicated the existence of wood rot and mould.

¶ 13 In late 1998, as a result of ongoing complaints of deficiencies, the strata corporation retained another consultant to undertake an assessment of the building envelope. On or about May 12, 1999, the consultant provided the strata corporation with a Building Envelope Condition Assessment, which concluded that there had been a building envelope failure and that extensive repairs were necessary.

¶ 14 The owners commenced the action in May, 2000, against the developer, architect, and Van Maren Construction Co. Ltd. Van Maren Construction (#8529) Ltd. was added to the action by order dated September 26, 2002.

¶ 15 An unsuccessful mediation was held in September, 2003. The trial is scheduled for June 13, 2005.

III. The Proposed Amendments

¶ 16 The proposed amendments are set out in a document entitled "Third Amended Statement of Claim".

¶ 17 The proposed amendments assert that Van Maren Construction, Van Maren Construction (#8529), Van Maren Management Ltd., Van Maren Equities Ltd., Marjon Investments Ltd., and Acastina Investments Ltd., individually or collectively, was the general contractor.

¶ 18 It is further asserted that these six companies functioned as a partnership in fact and in law. They are described, collectively, as the "Van Maren companies". There is a plea of joint and several liability among the Van Maren companies.

¶ 19 The proposed amendments allege facts which the applicant says are indicia of a partnership among them. These, in summary, are as follows:

(1) Van Maren Management, Van Maren Equities, Marjon, and Acastina (the "Van Maren companies") "through their agent created the defendant Van Maren Construction (#8529), all of which participated in the construction Harbour House [sic]".
(2) The Van Maren companies had common officers, directors and employees and carried on business from the same office.
(3) The businesses of the Van Maren companies were "inextricably interwoven together as a partnership". Each carried on the business of real estate development and construction, "including, without limitation, the design,

> development and construction of Harbour House, in common with each other with a view to profit, under the name of "Van Maren", and maintain for that purpose a common registered and records office ...."

¶ 20 The proposed amendments include a separate and alternative plea that Van Maren Construction (#8529) was, at all material times, the agent of the Van Maren companies.

¶ 21 The plaintiff introduced affidavit evidence going to both the basis in fact for the joinder of the proposed defendants, and the reasons for the delay in seeking to have them joined in the action. The evidence in the former category includes the particulars of shareholdings in, and registered offices and place of business of, the Van Maren companies.

III. Issues Raised on this Application

¶ 22 These are the issues:

(1) Is it necessary to introduce evidence in support of an application to add a party?
(2) Would it be just and convenient to add the proposed defendants?

IV. Position of Parties

¶ 23 The applicant submits that the proposed amendments to the Statement of Claim make out a reasonable cause of action as against the proposed defendants, and that there is no requirement to present evidence to support its claim to the existence of a cause of action. The applicant also submits that if evidence is required the affidavit evidence which reveals that the Van Maren companies have the same shareholders, registered offices, and places of business, is sufficient to support the joinder in the action of the proposed defendants.

¶ 24 The respondent submits that the affidavit evidence falls far short of demonstrating the existence of a cause of action as against the proposed defendants. It is asserted that the evidence does not establish a factual basis on which it could be found that a partnership exists among the Van Maren companies. Absent such evidence, the applicant has not made out a basis for joinder of the proposed defendants.

¶ 25 The respondent submits, in relation to the second issue, that even if a cause of action is made out as against the proposed defendants, it would not be just and convenient to join them due to the applicant's delay in bringing this application, and the potential loss of a limitation defence.

V. The applicable Law

¶ 26 The respondent relies on Strata Plan LMS 1410 v. Surrey (City) (2003), 33 C.P.C. (5th) 186, 2003 BCSC 635, as authority for the proposition that evidence is required on an application to join a party. There, the court concluded at [paragraph] 10:

> Ordinarily, the allegations set out in a proposed Amended Statement of Claim will not be enough. The burden on the Plaintiff to show that there is a real issue to be determined can only be discharged by affidavit evidence.

¶ 27 In Strata Plan LMS 1410, supra, the court considered the decisions of the British Columbia Court of Appeal in MacMillan Bloedel Ltd. v. Binstead (1981), 58 B.C.L.R. 173 (C.A.), and Letvad v. Fenwick (2000), 82 B.C.L.R. (3d) 296, 2000 BCCA 630.

¶ 28 In Binstead, supra, MacFarlane J.A. on behalf of the court stated that the function of a chambers judge in hearing an application under Rule 15(5)(a)(iii) of the Rules of Court is to decide whether there may exist between the parties an issue which can be decided by the court. The issue must be a "real one in the sense that it is not entirely frivolous and would result in courts wasting judicial time". It was observed that the presence of such an issue may be demonstrated "through whatever means, and not necessarily affidavits".

¶ 29 In Letvad, supra, Esson J.A., for the court, stated:

> ... [Binstead] is not authority for the proposition that the burden of demonstrating a real issue can be discharged other than by affidavit evidence. In that case, there was affidavit evidence, the principal purpose of which was to prove that sworn evidence had been given in a criminal proceeding which went to that issue. On the other hand, I see no reason to doubt that McFarlane J.A. was right in saying in obiter that the burden could be discharged "through whatever means, not necessarily affidavits". ... But there should be few exceptions to the ordinary rule that on Chambers applications evidence is placed before the Judge by affidavits which comply with the requirements of the Rules. (at [paragraph] 37)

¶ 30 It may appear, in the context of an application under Rule 15(5)(a)(iii), that the decision in Letvad conflicts with the earlier decision of the B.C. Court of Appeal in Gladwin [Jewellers] Ltd. v. Chubb Industries Ltd. (Chubb Security Systems) (1986), 68 B.C.L.R. 74. There, the court found that the pleadings were a sufficient basis upon which to grant an order for joinder.

¶ 31 A recent decision of this court applies the same standard as in Gladwin. In Strata Plan LMS 2869 v. Redekop Properties (Lonsdale) Inc., [2002] B.C.J. No. 2599, 2002 BCSC 1608, Henderson J. cited Hunt v. T & N plc (1989), 41 B.C.L.R. (2d) 269 as authority that a joinder application can be decided on the pleadings. In Hunt, Mr. Justice Hutcheon said, at p. 271:

> In this case the proper test to apply to both the application to add a party and the applications to amend is to determine whether the pleadings as amended disclose a reasonable cause of action. In my view, I do not think that the bare pleading of "parent and alter ego" discloses a reasonable cause of action.

¶ 32 In McLachlin and Taylor, British Columbia Practice (Butterworths: loose-leaf, 1979) [Service Issue 50 (April/03) pp. 15-21.2], the authors conclude that it is sufficient that the proposed pleadings reveal an issue between the parties. The passage from Letvad relied upon in Strata Plan 1410 is characterized there as obiter dicta.

¶ 33 It appears that in each of Binstead, Letvad, and Strata Plan 1410, there was affidavit evidence going to the basis in fact for the claim against the proposed defendants. For that reason, the passages from each case that appear to assert the need for affidavit evidence going to the existence of a real question or issue are obiter dicta.

¶ 34 While I acknowledge and respect the contrary view, I consider myself bound by the decisions of the British Columbia Court of Appeal in Gladwin and Hunt. This application may be disposed of without affidavit evidence going to the basis for the claim as against the proposed defendants.

VI. Application of Rule 15(5)(a)(iii)

¶ 35 I am satisfied that the proposed amendments to the statement of claim establish a sufficient basis for the joinder of the proposed defendants. The allegations of fact in support of the characterization of the Van Maren companies as a partnership are rather thin, but sufficient to raise a real question or issue that is not entirely frivolous.

¶ 36 The remaining question is whether it would be just and convenient to join the proposed defendants. The following guidelines for this determination are repeated in Letvad:

- 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.

(a) Delay

¶ 37 Water ingress problems appeared in the project in 1995. An engineering company was hired to conduct investigations and undertake building envelope repairs in January, 1999. The repairs were completed in February, 2002.

¶ 38 On May 10, 2000, the applicant filed a writ of summons against the developer, architect and Van Maren Construction Co. Ltd. Van Maren Construction (#8529) Ltd. was added as a defendant by order dated September 26, 2002.

¶ 39 A demand for discovery of documents dated August 29, 2000, was served on Van Maren Construction Co. Ltd. As at mid-May, 2003, Van Maren had not yet produced a list of documents. On May 15, 2003, counsel for the applicant arranged with counsel for Van Maren to review the latter's clients' documents. On attending at Van Maren's counsel's office to review a collection of documents, counsel for the applicant found that the project documents were intermingled with Van Maren documents from "Tugboat Landing" another project in which a Van Maren company was involved.

¶ 40 On June 23, 2003, counsel for Van Maren advised the applicant's counsel that the documents relating to Tugboat Landing had been culled from the collection. The document collection was voluminous, and a list had not yet been prepared.

¶ 41 In parallel to the pre-trial processes, arrangements were made for mediation. The mediation was set for July 8, 2003, then re-scheduled to September 9, 2003. Prior to September, 2003, the primary focus of the applicant was on preparation for the mediation.

¶ 42 The applicant had, prior to the commencement of the mediation, obtained further knowledge through the discovery process of the corporate structure and corporate relationships of the Van Maren companies. The evidence before me does not specify when that information was obtained. It appears from the affidavit evidence that it was obtained after May 20, 2003, and more likely after June 23, 2003.

¶ 43 The applicant chose not to proceed against the proposed defendants while the mediation was pending, as two of the Van Maren entities, namely Van Maren Construction Co. Ltd. and Van Maren Construction (#8529) Ltd., were already parties to the action.

¶ 44 This application was filed on March 10, 2004.

¶ 45 The trial is scheduled to commence June 13, 2005.

¶ 46 The delay, if measured from the date that the writ of summons was filed, is lengthy. The primary explanation offered by the applicant relates to the delay in the production and ultimate listing of documents. It was upon a review of the documents that the potential for a claim against the proposed Van Maren defendants was discovered.

¶ 47 The relationship between the present and proposed Van Maren defendants could, with reasonable diligence, have been found out by other means. However, such an inquiry would not likely occur in the absence of information that would suggest this as an avenue for inquiry. This information was obtained in the discovery process.

¶ 48 I am satisfied with the explanation for the delay. The applicant was, in the circumstances, reasonably diligent.

(b) Prejudice

¶ 49 There is no significant potential for prejudice to the proposed defendants due to the loss of corporate memory or documents, as one of the Van Maren companies has been a defendant from the date of commencement of the litigation.

¶ 50 There is a significant connection between the claims as against the present Van Maren defendants, and the proposed Van Maren defendants. If it is determined that a Van Maren company was negligent in the performance of its duties as general contractor, and it is determined that the Van Maren companies constitute a partnership in law, a basis for the applicant's argument for joint and several liability will be established.

¶ 51 The parties differ on the question whether a limitations defence has accrued. It is common ground that the limitation period is six years. The applicant says that time commenced running in January 1999, due to the application of the postponement provisions of the Limitation Act, s. 6(3) to (5). The respondent says that time commenced running in 1995, when water ingress problems first appeared, or upon the receipt of the 1997 report from a consultant.

¶ 52 I am not able, on the evidence before me, to determine whether a limitation defence has accrued in favour of the proposed defendants.

¶ 53 In Brito (Guardian ad litem of) v. Woolley (1997), 15 C.P.C. (4th) 255, Master Joyce (as he then was) set out an approach to the determination of Rule 15(5) applications where issues of limitations are raised. This matter falls within the third scenario identified in that judgment:

> 3. If the defendant alleges that there is an accrued limitation defence and the plaintiff denies that fact and the court cannot determine that issue on the interlocutory application, then the court should proceed by asking this question: assuming that there is a limitation defence, would it nonetheless be just and convenient to add the party even though by doing so the defence is taken away? If the answer to that question is yes then the order should be made. In that event it does not matter whether or not, in fact, a limitation period has expired because in either case it would be just and convenient to add the party and any limitation defence will be gone.

¶ 54 The loss of the protection of the six-year limitation period would not place the proposed Van Maren defendants in a different position than the original Van Maren defendant.

¶ 55 I conclude, having taken into account the explanation for delay, the absence of prejudice to the proposed defendants in the conduct of the litigation, and the connection between the claims as against the present and proposed Van Maren defendants, that it would be just and convenient to join the proposed defendants as defendants in the action.

V. Permitted Amendments

¶ 56 Counsel for the applicant stated in the course of the hearing that the objective of this application was to raise the issue of partnership among the Van Maren companies.

¶ 57 I am unable to reconcile the separate proposed plea that Van Maren Construction (#8529) Ltd. was an agent of other Van Maren companies and the proposed pleadings which relate to partnership. The amendment to this plea of agency is not allowed.

¶ 58 This application also sought to add Van Maren Management Ltd., Van Maren Equities Ltd., and Expert Siding & Carpentry Co. Ltd. as defendants. In addition it sought to replace the defendant Jem Decks Ltd. with Jem Sundecks Ltd., and to remove Mainland Stucco & Drywall (1994) Inc. from the style of cause. These were unopposed, and the amendments are allowed.

¶ 59 Costs will be in the cause.

SLADE J.

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