COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.,* 2011 BCCA 421

Date: 20111026
Docket: CA038739

Between:

The Owners, Strata Plan NES 97

Respondent
(Plaintiff)

And

Timberline Developments Ltd.

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe

On appeal from: Supreme Court of British Columbia, 16 December 2010
(*The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.,* Vancouver Registry S099090)

Counsel for the Appellant:	James A. Hall
Counsel for the Respondent:	Allyson L. Baker
Place and Date of Hearing:	Vancouver, British Columbia September 8, 2011
Place and Date of Judgment:	Vancouver, British Columbia October 26, 2011

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Chief Justice Finch:

I. Introduction

[1] The defendant, Timberline Developments Ltd., the developer of a phased six building ski lodge at Fernie, B.C., appeals from the judgment of the Supreme Court of British Columbia pronounced on 16 December 2010, holding it liable to the plaintiff owners of the strata lots for expenses attributable to the six hot tubs for their repair, maintenance and energy costs.

[2] The plaintiff's claim was based on s. 227 of the *Strata Property Act*, S.B.C. 1998, c. 43, as amended by B.C. Reg. 43/2000 (the "*Act*"), which provides in part:

> 227 (1) Subject to sections 233(2) and 235(3), until all phases of a phased strata plan have been deposited, the owner developer must contribute to the expenses of the strata corporation that are attributable to the common facilities.
>
> (2) Subject to the regulations, the owner developer's share of the expenses under subsection (1) is calculated as follows:
>
> $$\frac{\text{unit entitlement of strata lots in phases not deposited}}{\text{unit entitlement of strata lots in all phases whether deposited or not}} \times \text{expenses attributable to the common facilities}$$
>
> ...
>
> [Emphasis added.]

[3] The words "common facility" are defined in s. 217 of the *Act* as follows:

> 217 In this Part, "common facility" means a major facility in a phased strata plan, including a laundry room, playground, swimming pool, recreation centre, clubhouse or tennis court, if the facility is available for the use of the owners.
>
> [Emphasis added.]

[4] Both ss. 217 and 227 are found in Part 13 of the *Act*, headed "Phased Strata Plans".

[5] The defendant opposed the plaintiff's claim. It denied that the hot tubs were common facilities, and alleged that the hot tubs "were provided primarily or substantially for the use of owners and guests in each particular building".

[6] The claim was tried as a summary trial on affidavit evidence. The defence contended, as it has on appeal, that the provisions of ss. 217 and 227 are to be construed having regard for the purpose of the legislation; that the purpose of the legislation is to protect early owners in a phased development from bearing the whole cost of a common facility provided for the benefit of all owners in a completed development; that because the hot tubs were also built on a phased basis as the six buildings were completed, the early owners were not unfairly burdened with the expenses related to those hot tubs built later on; and that because the facts of this case lay outside the ambit of the legislation's rationale, the hot tubs were not a common facility, and the plaintiff therefore had no claim under s. 227 of the *Act*.

[7] The learned summary trial judge accepted that the rationale of the legislation is to spread the costs associated with a common facility in a phased development over all owners in the completed project. However, he held that the hot tubs came within the definition of "common facility" in s. 217, and that on the plain language of s. 227, the "owner developer must contribute to the expenses attributable to them during the material time".

[8] Accordingly the judge held the defendant liable for the claimed expenses.

[9] The defendant also asserts that the judge erred in admitting evidence tendered by the plaintiff as to the costs or expenses associated with the repair, maintenance and operation of the hot tubs. That evidence was contained in an affidavit of one of the plaintiff owners, Jason Sinclair, and in the affidavit of a mechanical engineer, Wilbey Chow. The defendant says Sinclair's evidence was inadmissible because it constituted an "assessment" or opinion as to energy consumption that Mr. Sinclair was not qualified to give. The defendant says that Chow's evidence was inadmissible because the report he signed was authored by

two persons, that the data on which the opinion was based was assembled by another person, Ed Porasz, and that one cannot tell from the report whether Chow was in fact the person who did the engineering analysis.

II. Facts

[10] The facts underlying this litigation are not in dispute, nor is it contended that the case was not suitable for a summary trial. The judge stated the relevant facts succinctly as follows:

> [4] Timberline Lodges consists of 175 strata lots constructed in six buildings over 11 phases over an 18 year period.
>
> [5] Included in the Timberline Lodges complex are a total of six hot tubs, each associated with a particular lodge; elevators in each of four lodges, namely the last four to be built; and a common laundry room in each of three of the lodges. The plaintiff's position is that these Facilities are "common facilities" for the purpose of allocating expenses pursuant to s. 227 of the *Act*. The defendant's position is that it is not responsible for the expenses because the Facilities are not "common facilities" or "major facilities" within the meaning of the *Act*.
>
> [6] The material period of the claim is December 10, 2003 through February 1, 2008. Expenses incurred prior to December 10, 2003 are statute barred owing to the expiry of the applicable limitation period. The claim is cut off at February 1, 2008 because that is the date on which all phases of the phased strata plan were deposited in the Land Title office.
>
> [7] Each of the owners of Timberline Lodges has a right to use the Facilities. However, the extent to which a particular owner of a strata lot in one of the lodges would choose to use a hot tub associated with another lodge is not clear.
>
> [8] During the material period the expenses associated with the Facilities have been paid for by the owners solely in accordance with the relative unit entitlement of each deposited strata lot. In practice, this means that the expenses have been shared among owners of strata lots as they have existed from time to time.
>
> [9] The defendant, in its capacity as owner developer, has not contributed to the expenses associated with the Facilities, according to the formula found in s. 227 of the *Act*.

[11] With respect to the evidence of the expenses claimed, the judge said:

[29] On the evidence I am persuaded that the expenses that were associated with the replacement of two of the hot tubs were properly the consequence of wear and tear over time. Facilities can be expected to have a natural life and at some stage their replacement is necessary. Here the replacement of one tub proved to be relatively expensive and involved an upgrading to relevant contemporary standards. The replacement of the hot tubs caused expense that is properly regarded as "attributable" to the common facility. I, therefore, reject this ground of the defendant's objection to a liability to contribute to the expenses.

[30] I also find that the estimate of the expenses as set out in affidavit number two of Mr. Sinclair is a reasonable estimate of expenses attributable to the hot tubs. I appreciate that the estimate is based on a number of assumptions, but that does not render it a guess. In my view, given the nature of the expenses in issue, it is inevitable that any estimate would require assumptions to be made. Determining the expenses is not a matter of nice or scientific calculation. Although I accept that certain of the assumptions underlying the calculations may be subject to some criticism, such as the treatment of costs associated with evaporation of water from hot tubs, the overall position taken in the calculations is somewhat conservative. I allow the expenses attributable to the hot tubs in the amounts claimed.

III. Analysis

A. Interpretation and Application of ss. 217 and 227 of the *Strata Property Act*

[12] The accepted principle for purposes of interpreting a statutory provision is contained in this much-endorsed passage from E.A. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[13] The words of a section to be interpreted must first, therefore, be understood in the context of the *Act* as a whole. In addition, in this case, attention must be paid to the fact that both ss. 217 and 227 are contained in Part 13 of the *Strata Property Act*, which deals specifically with phased strata plans.

[14] As well, the words of an Act are to be read or understood "in their grammatical and ordinary sense". That is, words must be given their plain meaning, considered in the context of the legislation as a whole.

[15] Finally, the plain meaning of the words, as read in their statutory context, must not conflict with the overall design and purpose of the legislation, nor with the intention of Parliament or the Legislature as it appears from the language of the Act.

[16] In general terms, the purpose of the *Strata Property Act* is to lay down clear rules for the creation, registration and transfer of strata titles, and for the delineation of the respective rights and responsibilities of those who develop strata plans, and those who purchase or who may subsequently wish to transfer a strata property.

[17] Part 13 of the *Act* contains provisions specifically tailored to strata properties that are developed in stages, or "phases". For present purposes, Part 13 allocates responsibility for expenses attributable to "common facilities" as between owners of strata lots in a phased development that is only partially completed at the time they become owners, and the owner developer of the phased development, as collectively representing all strata lots in the completed development.

[18] The defendant contends that requiring an owner developer to contribute to the expenses of hot tubs in the early phases puts an unfair burden on it, because those hot tubs were of no benefit to strata lots in the then-undeveloped phases; and that, conversely, no unfair burden is imposed on the owners of the strata lots in the early phases by their having to bear the full expense of those hot tubs, because those early owners had the benefit of the hot tubs to the exclusion of later owners.

[19] The plaintiff responds that the concept of "unfair burden" in relation to common facilities for the purposes of s. 227 amounts to an attempt by the defendant to read into the section words that it does not contain. The plaintiff argues that the Legislature could have chosen to include equitable considerations such as "fairness" or "burden" in the concept of common facilities, but did not do so. The plaintiff points

out that many other provisions of the *Strata Property Act* do include equitable considerations such as “unreasonableness”, “unfairness”, and “hardship”.

[20] In particular, the plaintiff points to ss. 226(5)(a), 233(5)(a), and 233(6)(a), all of which expressly incorporate considerations of equity or unfairness, and all of which are found in Part 13 of the *Act*.

[21] The plaintiff also points out that it was open to the defendant to have designated the hot tubs as “limited common property”, defined in s. 1 of the *Act* to mean “common property designated for the exclusive use of the owners of one or more of the strata lots”. If this designation had been made, there would have been no question of the defendant’s obligation to contribute to the hot tubs’ expense under s. 227.

[22] The learned trial judge appears to have accepted that there could be two purposes to s. 227, namely certainty and fairness. He said:

> [21] I agree that the rationale for the enactment of s. 227 and s. 217 of the *Act* is to achieve a scheme allocating expenses for certain kinds of facilities between owners who purchase strata lots early in the development of a project and the owner developer who is in effect a proxy for persons who will become owners in the future, sometime after the common facilities have been built. An obvious example would be where a large swimming pool is built that is intended to benefit all of the eventual owners of the strata corporation, but the pool is built when only 10% of the strata lots have been completed. In those circumstances, it is fair to allocate the burden of the expenses between the 10% of the existing owners and the owner developer standing in effect as a proxy for the 90% of the strata lots yet to be created.
>
> [22] While it is appropriate that the rationale underlying the sections be taken into account in their interpretation, it is not appropriate to do so at the expense of the plain language of the sections. I agree with the submission of the plaintiff that fairness in allocating the burden may not be the only purpose underlying the enactment. As counsel submitted, another purpose is ensuring certainty, even if that comes at the price of rough justice. The circumstances to which the section could apply are complex and varied. It may not be possible to craft a legislative rule that is responsive to all of the potential nuances that can arise in a phased development. In such circumstances, effect must be given to the plain wording of the section. Its application cannot be distorted in an effort to respond equitably to complex

> nuanced situations. That is what the defendant is asking me to do here.

[23] There can be no doubt that certainty is an important, if not the only, purpose of the legislation.

[24] Section 227 sets out a mathematical formula for the calculation of that portion of the expenses for common facilities payable either by the owners in a completed phase, or phases, or by the owner developer of the whole project. Certainty in making this calculation, of course, heads off disputes and the additional expenses related to resolving them.

[25] There is, however, an argument that s. 227 was intended to include an element of fairness. The section provides a means of allocating proportionally the expenses attributable to a common facility in a phased development that will be an amenity for all strata lots in the completed development, in instances when the common facility is built and available for use in one or more of the early phases.

[26] Because a number of hot tubs were planned for the completed project, and because they were built and became available as each of the phases was completed, there was in this case an apparent tension between the undoubted purpose of certainty and the possible additional purpose of fairness. The certainty purpose was met by applying the plain language of s. 227. This application arguably involved some sacrifice of fairness, because the owners of strata lots in an early phase enjoyed the use of a hot tub facility, or facilities, and were not at that point required to contribute to the expenses attributable to all of the hot tubs in the-then uncompleted development.

[27] Assuming that both certainty and fairness are to be considered purposes of the legislation, one may ask whether the judge erred in giving primacy to the purpose of certainty over that of fairness. In this context it may be appropriate to consider the extent or degree of unfairness caused by giving effect to the plain language of s. 227. It seems to me that any unfairness is minimal. Such an

application of the section requires the owner developer to contribute to the expenses attributable to the first-constructed hot tubs when not all strata lot owners are able to make use of or to enjoy the facility until all phases of construction are completed. However, when all phases of construction have been completed, all strata lot owners have the right to use all hot tubs, no matter that they may be located at or within a particular lodge building. Moreover, as noted by the plaintiff, it was always open to the defendant to have excluded the application of s. 227 to the hot tubs by designating them as limited common property.

[28] In my respectful view, to the extent that the application of s. 227 produces unfairness for the owner developer, it is of a very limited nature. Against this minimal unfairness should be weighed the uncertainty that would arise if these facts were said to necessitate departure from the statutorily prescribed formula for expense allocation provided by s. 227.

[29] Ultimately, I am not persuaded that s. 227 must be read as incorporating a "fairness" component. The Legislature did not do so expressly, as it did with other provisions of Part 13. If fairness is to be viewed as an additional consideration, the balance struck by the learned trial judge between the purposes of certainty and fairness, in my opinion, was reasonable. I do not think he can be said to have erred in treating certainty as the more important of the two.

[30] The appellant attacks the judge's reasons on a number of other grounds. The appellant states:

1. the hot tubs were not a "major facility" as required by the definition of "common facility" in s. 217;

2. the judge introduced a subjective element into the interpretation of s. 217 by treating "major" as meaning important or significant, when there was no evidence as to either of those qualities' being attributable to the hot tubs;

3. the phrases “common facility” and “major facility” are both singular, and a common facility cannot be six hot tubs.

[31] I would not give effect to these objections. The judge construed the words “major facility” in the context of the examples given in s. 217 which, except for a laundry room, are all recreational facilities available for the use of the owners. As to their importance or significance to the owners of a strata property in a ski lodge, if that is not a matter of common sense, it is at least something of which the judge could take judicial notice. Importance is, of course, a relative concept, and one which different owners might attribute by different degrees to the hot tubs. However, the fact that six hot tubs were provided for the completed development is some indication of the importance attributed to them by the owner developer itself. I do not consider that the judge’s treatment of this issue introduced any unacceptable level of subjectivity.

[32] As to whether six hot tubs can be considered a “common facility” or a “major facility”, rather than six separate facilities, I am of the view that the judge’s application of the definition to this project does no violence to the language of s. 217. The hot tubs, whether considered individually or collectively, provided an amenity to all strata lot owners. I do not think that the six hot tubs are outside the definition of common facility any more than would be six tennis courts, six bowling lanes, or six pool tables.

[33] Regarding the shared usage of the hot tubs, the judge said:

> [26] The hot tubs are also available for the use of the owners. Even if owners tend to use the hot tub associated with their own lodge, there is nothing to prevent them using other hot tubs. The evidence suggests that when it is convenient or desirable to do so, owners or guests at Timberline Lodges may choose to use any of the hot tubs. What is critical, however, is that the owners have the right to use them.
>
> [27] As a result, I conclude that the hot tubs are “common facilities” within the meaning of s. 217 and that by application of the plain language of s. 227, the owner developer must contribute to the expenses attributable to them during the material time.

[34] In my respectful view that is, on these facts, the correct interpretation of s. 217, and hence a proper basis for the application of s. 227.

[35] I would not give effect to the first ground of appeal.

B. Admissibility of the Evidence as to Damages

[36] The defendant objected to the affidavit evidence of Jason Sinclair on two grounds. First, the defendant argues that the evidence amounted to expert opinion that Mr. Sinclair was not qualified to give. This argument is expressed in the appellant's factum as follows:

> 97. Mr. Sinclair's evidence was objectionable because he essentially provided an assessment of the energy consumption (both natural gas and electricity) of the hot tubs. An assessment was required because neither the natural gas consumption nor the electricity consumption is separately metered for the hot tubs. So the questions for the Strata were how much of our natural gas bill is attributable to the hot tubs, and how much of our electricity bill is attributable to the hot tubs.
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> 98. Mr. Sinclair's evidence required the application [sic] formulas dealing with engineering and thermodynamics concepts (some of which he received from an engineer residing in Vaughan, Ontario (Mr. W. Chow)) as applied to certain allegedly relevant data dealing with the hot tubs.
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> ...
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> 102. The evidence of Mr. Sinclair included calculations, analysis and conclusions, and the appellant submits that much of Mr. Sinclair's evidence was inadmissible opinion evidence. The appellant submits that the evidence provided at paragraphs 35 to 49 of Affidavit #2 of J. Sinclair [AB, pp. 84-87] and all related exhibits ought not to have been admitted especially in light of the cross-examination of J. Sinclair at AB, p. 247, line 46-47; p. 248 and p. 249, lines 1 to 5.

[37] Second, the defendant says that because Sinclair was an owner plaintiff he cannot be regarded as having the necessary objectivity to give reliable evidence, whether the evidence is characterized as opinion or not.

[38] The defendant also objects to the admissibility of the evidence of Wilbey Chow, a mechanical engineer resident in Ontario, whose affidavit exhibits the report of "M & E Engineering Ltd." which is signed by Mr. Chow as well as by

Mr. Umer Kasuji. The report appends a number of tables, analyses and calculations. The defendant argues for the exclusion of the evidence on two main grounds: first, that the report was not properly tendered as an expert opinion and Mr. Chow was not properly qualified and accepted as an expert by the court; and second, that Mr. Chow may not have been the true author of the report, as appears from the cross-examination of Mr. Sinclair.

[39] The plaintiff's response to these objections is that the evidence of Mr. Sinclair's calculations is not expert opinion. The plaintiff says Mr. Sinclair's evidence consists essentially of arithmetical calculations within the competence of an educated layperson. To the extent the calculations are based on "assumptions", the plaintiff argues, the trial judge was correct in characterizing those assumptions as "conservative", and that they are therefore to be regarded as reasonable.

[40] The plaintiff does not dispute that the report of Mr. Chow is in the nature of an expert's opinion. The plaintiff says Mr. Chow was qualified to give the opinion, that he deposed he was primarily responsible for the preparation of the report, that the assumptions underlying his opinion are reasonable, and that even if the report does not strictly comply with the requirements of the *Supreme Court Civil Rules*, the judge nevertheless did not err in admitting his evidence.

[41] With respect to the Affidavit #2 of Mr. Sinclair, the first issue to be decided is whether the information and calculations he sets out concerning hot tub expenses constitute expert opinion evidence. The starting point for such a determination is *R. v. Abbey*, [1982] 2 S.C.R. 24, which describes the function of expert evidence at trial:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is

> unnecessary.": *R. v. Turner*, [1975] Q.B. 834, 60 Cr. App. R. 80 at 83, [1975] 1 All E.R. 70, per Lawton L.J.
>
> [Emphasis added.]

[42] Since the purpose of an expert's opinion is to provide scientific information beyond the scope of the trier of fact, it follows that the determination of what constitutes expert evidence should likewise depend on the knowledge or competence of a judge or jury. If a witness, in expressing his or her testimony, relies on theoretical or technical expertise that the trier of fact would likely not possess, then that witness is performing the function of an expert.

[43] Mr. Sinclair provided two broad types of information in paragraphs 35 to 49 of his Affidavit #2. The first type comprises background facts about the design of the hot tubs, the nature of the heating system, and the data Mr. Sinclair relied on for calculating the energy consumption of the hot tubs. The second consists of the calculations themselves.

[44] The defendant does not specifically object to any of the background facts contained in these paragraphs, and indeed, there is nothing about the information to suggest that any of it is the product of inference, or that it lies beyond the knowledge competence of a judge or jury. Mr. Sinclair identifies the energy suppliers for Timberline Lodges, and describes, in simple terms, the use of natural gas and electricity in the heating and functioning of the hot tubs. He outlines the basic approach he took in measuring consumption during the relevant time period, making note of the fact that gas and electricity consumption for the hot tubs was not metered separately from consumption for other purposes.

[45] Most importantly, Mr. Sinclair identifies the sources for the data he uses in his calculations. These include an estimate of the electricity and natural gas consumed by the hot tubs, prepared by M & E Engineering Ltd.; information about electricity usage of the hot tub equipment's motors, copied from the specified kilowatt ratings stamped on the equipment nameplates; and the gas and electricity rates over the years, obtained from Terasen Gas' Customer Advocacy Group, in the case of the

natural gas, and from the Strata Corporation's BC Hydro Invoices, for the electricity. While Mr. Sinclair, as a qualified engineer, may have had an easier time in assembling and presenting this information than a layperson might have done, there is nothing to suggest that he relied on any specialized knowledge or inferences in doing so.

[46] As for the calculations themselves, they involve nothing more than simple arithmetic. With respect to the natural gas consumption of the hot tubs, Mr. Sinclair adds up the estimated consumption for each tub in British Thermal Units (BTUs), as determined by M & E Engineering Ltd., and multiplies the total by a constant in order to convert from BTUs into gigajoules (GJs) (this constant, it should be noted, is widely available on the Internet). He then multiplies the total energy consumption in GJs by the average annual price per GJ of natural gas to arrive at the total cost of the gas consumed by the hot tubs during the relevant period. The calculation of the hot tubs' electricity consumption involves a similar series of steps, though it is slightly more complicated, since it requires one set of calculations for the machines that are always running, and another for machines that only run when the hot tubs are in use. Nevertheless, the necessary math involves nothing more complicated than addition and multiplication: well within the presumed competence of a judge or jury.

[47] The defendant objects to the admission of Mr. Sinclair's calculations on the ground that they required "the application [sic] formulas dealing with engineering and thermodynamics concepts." With respect, this is misleading. While it is true that the evidence relates to the functioning of machines and the generation of heat, the calculations themselves do not explore the science of these subjects, as the report by M & E Engineering Ltd. does. Notwithstanding Mr. Sinclair's professional qualifications, the evidence contained in his affidavit did not require an expert to prepare.

[48] The second issue to be decided is whether Mr. Sinclair's evidence should have been excluded as a result of his interest in the outcome of the litigation. If

Mr. Sinclair had been acting as an expert witness, then the party tendering him would have had the burden of proving to the trier of fact that he had the requisite independence to testify (*Deemar v. College of Veterinarians (Ontario)* 2008 ONCA 600, 92 O.R. (3d) 97, 298 D.L.R. (4th) 305, 81 Admin. L.R. (4th) 307 at para. 21). Since Mr. Sinclair was not acting as an expert witness, however, there is no such requirement. The old common law rule disqualifying parties to an action or interested witnesses from testifying was repealed by statute in England in the 1850s (see *Flag Resources (1985) Ltd., Re* 2011 ABCA 115), and this is echoed in s. 3 of the *B.C. Evidence Act*. It was for the judge in this case to decide whether Mr. Sinclair's evidence was sufficiently objective to be relied upon. The reasons show that the judge examined this evidence critically, and found it to be a satisfactory foundation for an award of damages.

[49] Turning to Mr. Chow's evidence, there is no dispute that his report is in the nature of expert evidence. Rather, the first issue to be determined is whether it should have been excluded as a result of the plaintiff's failure to tender the report as expert evidence and to qualify Mr. Chow as an expert before the court. It is true that, in general, an expert report must satisfy the requirements of Rule 11-6(1) of the *Supreme Court Civil Rules* in order to be admissible. However, in a summary trial such as this one, Rule 9-7(5)(e)(ii) allows a court to order a report admissible even though it does not conform to Rule 11-6(1). Moreover, Rule 1-3(2) directs courts to consider proportionality when conducting a proceeding: a principle that militates for a more relaxed application of the rules of form where appropriate. In the instant case, there is nothing to suggest that the learned trial judge erred in exercising his discretion to admit the report.

[50] The second issue is whether Mr. Chow's report should have been excluded because of the uncertainty of its authorship. The defendant points to the presence of Mr. Kasuji's signature alongside Mr. Chow's, together with the revelation that Mr. Porasz had been responsible for gathering and compiling raw data for the report, as reasons for questioning Mr. Chow's role in the project.

[51] In *Jones v. Ma,* 2010 BCSC 867, the British Columbia Supreme Court considered an expert report which, though signed by a single person and prefaced by the statement that "the undersigned is responsible for the opinions expressed in this report", appeared rather to be the work of several individuals. The body of the report made frequent use of the "we" pronoun and passive voice constructions, thereby avoiding the identification of any particular author. A *voir dire* was held, in which it was revealed that the majority of the work done in preparing the report was not carried out by its signatory. In finding that the report did not meet the requirement of Rule 40A(5) (now Rule 11-6(1)) that an expert report set out the name of the person primarily responsible for preparing it, W.F. Ehrcke J. stated at para. 11:

> This is not simply a matter of form. The purpose of the rule is to ensure fairness to both parties by providing the party on whom the report is served with adequate notice to enable them to effectively cross-examine the expert and to properly instruct their own expert if they choose to retain one.

[52] In the instant case, there are also some grounds for uncertainty concerning the authorship of Mr. Chow's report. Mr. Chow swears that he is "primarily responsible for the preparation of the Report" in his affidavit, and is identified as "the author" in the report itself. However, there are several indications that it was a collaborative effort. These include the presence of Mr. Kasuji's signature alongside Mr. Chow's, Mr. Sinclair's admission under cross-examination that he never spoke directly to Mr. Chow, and the use of the "we" pronoun and passive voice constructions in the description of the work that was carried out in compiling the report.

[53] Ultimately, however, the determination of the report's primary author is a finding of fact. There was evidence to support the conclusion that Mr. Chow was the primary author, and the learned trial judge's conclusion in this regard is entitled to deference. One cannot say that he made a palpable and overriding error in accepting Mr. Chow at his word. There is therefore no basis on which to disturb his finding.

[54] Accordingly, I would not give effect to the second ground of appeal.

[55] I would dismiss the appeal.

"The Honourable Chief Justice Finch"

I Agree:

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Tysoe"