

Case Name:

Strata Plan LMS 837 v. Abbotsford (City)

Between

The Owners, Strata Plan LMS 837, plaintiff, and
The City of Abbotsford, 371162 B.C. Ltd., Wall
Financial Corporation, Fleetwood Homes Ltd., Jan H.
Timmer, Focus Architecture & Planning Ltd., Krahn &
Associates Engineering Ltd., Lang Structural
Engineering Inc., R.K. Roofing Ltd., Frame Rite
Construction (1992) Ltd., Westcoast Stucco Inc.,
S.J.L. Construction Co. Ltd., Bruno Wall, Robert
Scragg, James Kaufman, Doerksen Roof Design Inc.,
John Doe 1 dba A & A Railings and the said A & A
Railings, John Doe 2, John Doe 3 dba Winter Decking
and the said Winter Decking, John Doe 4, Spectrum
Skyworks Inc., William Gerhard Rietel dba G.M.R.
Enterprises, C.P. Ediger & Co. Ltd., A & A Home
Improvements Ltd., and Harry Winter dba Winter
Vinyl Decking, defendants

[2003] B.C.J. No. 889

2003 BCSC 590

New Westminster Registry No. C993191

**British Columbia Supreme Court
New Westminster, British Columbia
Morrison J.**

Heard: March 18, 2003.

Judgment: April 17, 2003.

(33 paras.)

Counsel:

Adam I. Zasada, for the plaintiff.

John S.M. MacLeod, for Spectrum Skyworks Inc.

¶ 1 **MORRISON J.**— This is an application brought pursuant to s. 15(5)(a)(iii) of the Rules of Court for an order to add the following parties to the present action:

- (a) Spectrum Skyworks Inc.;
- (b) William Gerhard Rietel dba G.M.R. Enterprises;
- (c) C.P. Ediger & Co. Ltd.
- (d) A & A Home Improvements Ltd.;
- (e) Harry Winter dba Winter Vinyl Decking.

¶ 2 All parties have been served with the materials for this application. By consent the application to add C.P. Ediger & Co. Ltd. has been adjourned. Of the other proposed defendants, only Spectrum Skyworks Inc. ("Spectrum") opposes this application.

BACKGROUND

¶ 3 Cascade Green is a four building condominium development in the City of Abbotsford built between 1993 and 1994. It has unfortunately, become the subject of what is known in this jurisdiction as "leaky condo" litigation.

¶ 4 A Building Envelope Survey report was received by the plaintiff in May, 1999. Following the receipt of the survey, the plaintiff filed a writ in this court on June 23, 1999.

¶ 5 The plaintiff then received a Building Envelope Condition Assessment report from RDH Building Engineering Limited ("RDH") on October 19, 1999. That report was to provide an assessment of the current condition of the building envelope of the buildings at Cascade Green, and based on the findings of the condition assessment, to make recommendations for remediation and renewals.

¶ 6 RDH was later retained by plaintiff's counsel to provide opinions regarding the nature and cause of moisture-related damage at Cascade Green. The report, dated October 10, 2002 (the "October 2002 Report"), is based on RDH's review of a variety of documentation related to the original design and construction of the buildings, relevant building code requirements, investigations of the condominium development, including a previously conducted assessment report, as well as information gathered during the remediation stage of Cascade Green. In the Scott Schedule appended to the October 2002 Report, RDH identified, among many other things, the skylights as a problem area and advised the plaintiff to determine the identity of the party responsible for their installation.

¶ 7 Spectrum was subsequently identified as the supplier and installer of four "T-bar" skylights at the cost of \$1,928.00, not including GST.

¶ 8 The plaintiff now seeks to add Spectrum to the action contending their work is related to the deficiencies in the design and construction of Cascade Green, particularly with regard to the skylights.

¶ 9 Spectrum opposes the application, saying there has been an unnecessary and lengthy delay by the plaintiff in identifying Spectrum, and there are insufficient reasons

for the delay. Spectrum also cited the expiry of the limitation period, and the lack of reasonable connection between a claim based in negligence to the claim against Spectrum; and further, the prejudice to Spectrum, having regard to the cost of their defence in respect of a \$1,928.00 contract.

THE APPLICABLE RULE AND AUTHORITIES

¶ 10 Section 15(5)(a) of the B.C. Supreme Court Rules provides:

- (5)(a) At any stage of a proceeding, the court on application by any person may ...
 - (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
 - (A) with any relief claimed in the proceeding, or
 - (B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party. (Emphasis added)

¶ 11 The court's power to permit a party to be added is discretionary. In *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 at 291 (C.A.), Finch J.A. stated that such discretion was intended to be completely unfettered and subject only to the general rule that all such discretion is to be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities.

¶ 12 The authorities suggest that for s. 15(5)(a)(iii) to apply, two criteria must be met. First, there must be a degree of interrelationship between the person to be added and an existing party that relates to the relief sought or subject matter of the existing action. Second, if such an interrelationship exists, the court must determine whether the addition of the new party would be just and convenient: *Lawrence Construction Ltd. v. Vicki Fong and Gen Hwa Enterprises Ltd.* 2001 BCSC 813.

¶ 13 There is obviously a degree of interrelationship between Spectrum and the plaintiff, and that relates to the relief sought.

¶ 14 The issue of whether there is a question or issue to be tried is one of mere threshold. As set out in *Lawrence Construction*, the plaintiff need not demonstrate the allegations beyond showing that there may exist a possible cause of action. In this case, I am satisfied based on the pleadings as well as the engineering reports provided that there exists an issue to be tried against Spectrum.

IS IT JUST AND CONVENIENT TO ADD SPECTRUM?

¶ 15 In Teal Cedar, supra, Finch J.A. offered the following guidelines for the exercise of discretion in determining whether an addition would be just and convenient (see also Letvad v. Fenwick, [2000] B.C.J. No. 2639 (C.A.)):

- * the extent of the delay;
- * any explanation or reasons put forward to account for the delay;
- * the degree of prejudice caused by delay; and
- * the degree of connection between the existing claims and the claim against the proposed defendant.

Each factor should be considered in the context of the others and no one factor should be accorded greater significance over another.

a) The extent of the delay

¶ 16 The writ for this action was filed on June 23, 1999, presumably following the receipt of the Building Envelope Survey in May, 1999 conducted by Inter-Coast Consultants Ltd. (the "May 1999 Report"). At that time, the skylights were not referred to.

¶ 17 A Building Envelope Condition Assessment was subsequently conducted by RDH and a report was delivered to the plaintiff in October, 1999. In that report, "skylights" were mentioned:

It is recommended that the sloped metal roofs at the deck regions be completely reviewed by a qualified contractor (including the t-bar skylights) and new details be designed and constructed at the transitions of the sloped roofs to the adjacent systems. In additions, the decks should be re-constructed with a protected roof membrane and improved detailing at the railing wall.

(Recommendation)

7. Re-construct the sloped metal roofs at the deck regions of each building, including the skylights and the transition details between the sloped roofs and the adjacent systems.
8. Rebuild the decks at each building with a protected roof membrane and improved railing details. (Emphasis added)

¶ 18 In the October 2002 Report RDH was more specific about the skylights. In its Scott Schedule, it reported as follows:

Skylights:

Problem: Water leakage through the skylights and through the interface between the skylights and the sloped metal roofing.

Result: Water leakage damaged interior finishes.

Repairs Required: A roof was added between the 3rd and the 4th levels so that the skylights could be replaced with windows. The overhang of the roof substantially protects the windows from rainfall.

Parties Involved: Developer, Architect, General Contractor, Skylight Installer, Metal Roof Installer.

Rehabilitation Costs: \$126,000.00

From that report, a question is raised as to whether some skylights were replaced with windows. If so, Spectrum was apparently not consulted or involved in any such later work.

¶ 19 A construction project, especially in the case of a condominium development, involves a number of individuals and parties. It is entirely possible that as investigations were conducted at the earlier stages of this litigation, additional parties could surface and be identified. Should or could Spectrum have been identified earlier?

b) Any reasons or explanations put forward to account for the delay

¶ 20 The plaintiff contends that this application was not made earlier because they needed time to determine their litigation strategy as well as determine the identity of each of the parties and the nature of their involvement in the design and construction of Cascade Green.

¶ 21 Counsel for Spectrum submits that "only the smallest dose of due diligence" would have led the plaintiff to know of his client, at a much earlier date.

¶ 22 Even if the plaintiff is unable to offer a sufficient explanation for the delay, in *Tri-Line Expressways v. Ansari* (1977), 30 B.C.L.R. (3d) 222 (C.A.), Lambert J.A. stated that the insufficiency of reasons would not, in itself, constitute a bar to the addition of a party to an action.

c) The degree of prejudice caused by the delay

¶ 23 When a party seeks to add a defendant following the commencement of an action, the proposed defendant could potentially suffer prejudice. A presumption of prejudice may arise if the limitation period for the claims made against the proposed defendant has expired. In this case, Spectrum did not pursue a defence of limitation period. I find on the evidence that time did not begin to run until the receipt of the October 1999 report.

¶ 24 Counsel for Spectrum submits that in assessing prejudice, regard should be had to the cost of their defence in respect of a \$1,928.00 contract. To compare the cost of the contract, on its own or in relation to the cost of the defence mounted, is misleading. Because the degree of prejudice suffered may not be dependent upon the monetary value of a contract between the parties.

¶ 25 An area of prejudice raised by Spectrum was that of intervening work done with regard to the skylights. Could they have remedied anything at an earlier stage, had they known of any problems? They were never informed, although as early as October, 1999, there was a recommendation of some reconstruction that included the skylights. What intervening work was done, if any, and by whom? Did it add to existing problems? By being brought into the picture at this later date, Spectrum claims prejudice.

- d) The degree of connection between the existing claims and the claim against the proposed defendant

¶ 26 There is a degree of connection between the existing claims and the claim against Spectrum. The engineering reports indicate that there is water damage to Cascade Green and identify a number of possible problems as well as potential parties involved in the design and construction of the condominium development, including the installer of the skylights. Spectrum is one such potential party.

CONCLUSION

¶ 27 By mid-October, 1999, the plaintiff had a report in hand that pointed to problems involving the skylights. One of only nine recommendations that were made in that report by RDH involved reconstruction which included specifically the skylights.

¶ 28 The plaintiff brought this notice of motion to add Spectrum as a defendant on February 17, 2003, the matter being heard on March 18, 2003. The plaintiff was quick to issue its writ in June, 1999, following the report of May, 1999 but there has been, in my view, an extensive delay in seeking to identify and add Spectrum as a defendant.

¶ 29 The report of October, 2002 was certainly more specific with regard to the skylights, and suggested the parties responsible to include the developer, architect, general contractor, skylight installer and metal roof installer. But that report also seems to indicate that "a roof was added between the 3rd and 4th levels so that the skylights could be replaced with windows." If that was intervening work that was done, Spectrum was not advised or consulted, nor is there any indication of when that work might have been done.

¶ 30 I agree with counsel for Spectrum that the plaintiff could have learned the identity of the skylight installer with a minimal amount of due diligence, and at a much earlier date. In my view the plaintiff has given insufficient explanation or reasons to account for the delay.

¶ 31 Spectrum would have been in a much better position to deal with this claim had they been notified of it in 1999 or 2000. The problem of intervening work is a serious one, and one of prejudice to Spectrum.

¶ 32 Given all the circumstances of this application, in my view the discretion of the court should be exercised to deny the application to add Spectrum as a party. Given the

evidence before the court, it would not be just or convenient to add Spectrum at this date to this extensive action.

¶ 33 The application is dismissed. Costs in the cause, scale 3.

MORRISON J.

QL UPDATE: 20030428
cp/i/nc/qlsng