IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stuart Olson Construction Ltd. v. Richmond (City),* 2024 BCSC 856

Date: 20240501
Docket: S201520
Registry: Vancouver

Between:

Stuart Olson Construction Ltd.

Plaintiff/Defendant by Way of Counterclaim

And:

City of Richmond

Defendant/Plaintiff by Way of Counterclaim

And:

PML Professional Mechanical Ltd., Apex Granite & Tile Inc., Hexcel Construction Ltd., Lehigh Hanson Materials Limited, formerly Rempel Bros. Concrete Ltd., Fast + Epp, Fast + Epp Structural Engineers Inc., WSP Canada Inc. (formerly Levelton Consultants Ltd.), The AME Consulting Group Ltd., HCMA Architecture + Design (formerly Hughes Condon Marler Architects), and Stuart Olson Construction Ltd.

Third Parties

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the City of Richmond:	M.L. Burris
Counsel for HCMA Architecture + Design:	K.L. Weslowski
Counsel for Hexcel Construction Ltd.:	J.R. Anderson
Counsel for Stuart Olson Construction Ltd.:	C. MacKinlay
Place and Date of Hearing:	Vancouver, B.C. May 1, 2024
Place and Date of Judgment:	Vancouver, B.C. May 1, 2024

[1] **THE COURT:** When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

[2] There are three applications before the court today, although only one of the orders being sought is opposed. In particular, the applicant, City of Richmond (the "City") seeks leave to file and serve a third-party notice, a second amended response to civil claim, and an amended counterclaim adding the third party HCMA Architecture + Design (formerly Hughes Condon Marler Architects) ("HCMA") as a defendant by counterclaim. It is only this latter relief, adding HCMA as a defendant by counterclaim, that is being opposed today by HCMA. None of the other parties are taking a position.

Background

[3] By way of background, the underlying subject matter of this action involves construction of the Minoru lifestyle centre, which is a fitness centre that includes an aquatic centre. For the most part, the allegations are with respect to defective construction and/or design relating to the aquatic centre, in particular a lap pool and what are referred to as the "additional pool leaks". It is the additional pool leaks that form the basis of the claim with respect to HCMA.

[4] This matter has been ongoing for some time.

[5] The construction project was commenced in 2014. By the summer of 2019, three separate actions relating to the project had been commenced by subcontractors to Stuart Olson Construction Ltd. ("Stuart Olson"), the general contractor and the named plaintiff and defendant by counterclaim. Construction was largely complete in or around 2020.

[6] In the course of dealing with those issues the City and HCMA, who acted as the design consultant for the City with respect to the project, entered into an agreement on January 28, 2020 (the "Tolling Agreement") to toll, or suspend, the governing limitation period for the term of the agreement, which initially expired on

October 31, 2020. The Tolling Agreement was thereafter extended from time to time with the last extension being on October 25, 2023, at which time it was extended to a period ending January 31, 2025. However, prior to that expiry date, it was formally terminated with proper notice being given by the City on April 11, 2024.

[7] This action was commenced by Stuart Olson on February 10, 2020. In its notice of civil claim, Stuart Olson alleges that the design drawing specification and details were incomplete and contained errors, omissions and inconsistencies, and that the design deficiencies together with the design coordination and project administration, which was lacking, caused delays to the project.

[8] The City disputes those claims and has filed a counterclaim against Stuart Olson for damages arising from the delay and deficiency, which the City says were caused by Stuart Olson's failure to properly perform and manage the construction of the project. Stuart Olson has filed various third-party claims as have some of the subcontractors.

[9] On March 23, 2022, Stuart Olson filed an amended third-party claim, by which it added HCMA along with other consultants and subcontractors as third parties, seeking contribution and indemnity in respect of any liability it may have for the deficiencies that are the subject of the City's counterclaim. In particular, Stuart Olson alleges that the project deficiencies were caused or contributed to by the design errors and negligence of HCMA and others.

[10] In seeking to add HCMA as a defendant to the counterclaim, the City seeks to recover damages from HCMA directly in the event that Stuart Olson is correct, or it is ultimately determined that, it was a HCMA design defect that caused the damages.

[11] As to the status of the action, a case planning conference was held whereby timelines were set for the service of expert reports, the deadline for which has not expired, and for discoveries to be conducted, which have commenced, but have not been completed. In particular, HCMA has not conducted any discoveries itself as of

this time and the scheduled timing for those to be completed has not yet expired. Trial is scheduled for 60 days commencing September 30, 2024.

Analysis

Legal Framework

[12] The parties do not disagree as to the applicable law with respect to applications for additions of parties brought under R. 6-2(7) and governance of third party proceedings under R. 3-5.

[13] Specifically, they argue that the considerations for the court are similar to those set out in *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2013 BCSC 1741, at para. 42, as affirmed 2014 BCCA 17, namely:

a) The prejudice to the parties;

b) The expiration of the limitation period;

c) The merits of the proposed claim; and

d) The delay in the proceedings and the timeliness of the application.

[14] To add a party to a claim, the claims against that party must also be connected and interwoven to the claims already plead. The court must, in that regard, be satisfied either that the party ought to have been joined as a party or that their participation in the proceeding is necessary, or that there exists a question or issue relating to or connected with any relief claimed in the proceeding, or with the subject matter of the proceeding.

[15] For the purpose of this application, HCMA does not dispute that the issues raised in the proposed counterclaim are sufficiently intertwined and connected to the existing claim and counterclaim such that the initial threshold is met.

[16] Rather this case largely turns on the other factors, with HCMA relying on their argument that the limitation period has expired, and that there has been a delay in

bringing this application such that it is not in the overall interests of justice to have the claims made and them added as a defendant.

[17] The fundamental question on any application is whether the balance of justice and convenience favours granting leave or favours requiring the newly added claim to be pursued in a separate proceeding.

Expiry of Limitation Period – Tolling Agreement

[18] Much of this application turns on an interpretation of the Tolling Agreement as that determined whether the limitation period has expired.

[19] The first point in dispute is the purpose of the Tolling Agreement.

[20] The City argues that the Tolling Agreement executed on January 28, 2020, arose in direct response to the three subcontractor claims that were commenced on that date and that the timing of the application arises in the context of the whole of the litigation. HCMA argues that its purpose and intent was to allow or enable the parties to complete the contract itself such that any consideration of factors such as delay should be measured from when the construction was completed in 2020.

[21] Recital F of the Tolling Agreement provides:

> The architect and the owner, collectively the parties, each of which a party, are currently working to complete the project by summer 2020 and wish to focus their collective efforts on completing the project without having to involve the architect in any disputes or legal proceedings with Stuart Olson, including in the Lawsuits.

[22] The “Lawsuits” as referenced are defined in the agreement as the subcontractor claims.

[23] The tolling provision is contained at para. 3, as follows:

> To the extent the limitation period has not already expired as of the commencement date of this agreement, the parties agree to toll the running of any applicable limitations under any applicable statutes of limitations or timelines under the *Supreme Court Civil Rules* BC Reg 168 2009, in respect of <u>any claims</u> arising on the project, including any claims in connection with the lawsuits for a period up to including October 31, 2020 (the “Tolling

> Agreement") provided that the parties may extend the tolling period by mutual written agreement.
>
> The parties further agree not to plead, argue, or otherwise raise any statute of limitations, waiver, estoppel, latches, or any similar defence, whether statutory, contractual, equitable, or otherwise, in response to a claim initiated by the other party arising from the project, including in connection with the Lawsuits, to the extent such defence arises during the tolling period.
>
> [emphasis added]

[24] Thus, the City argues, the limitation period was suspended on January 28, 2020 when it was entered into, and only continues to run as of its termination date of April 11, 2024, such that the limitation period has not yet expired.

[25] In the alternative, the City argues that given that the nature of the amendments to the pleadings that have occurred to date, and when the amendments were made which they argue defined more clearly the position of Stuart Olson with respect to the design claims being brought against HCMA, that the limitation would not have passed in any event.

[26] The position of HCMA is that this Tolling Agreement was meant to only apply to the third-party claims and not to a direct claim being brought against them by the City. Specifically, HCMA argues that the Tolling Agreement does not contemplate that new claims would be filed other than the defined "Lawsuits". Under that interpretation, the limitation will have expired for a claim as sought in the counterclaim, and the only relief that will be available will be contribution and indemnity under a third party claim.

[27] To support this interpretation, HCMA argues that para. 3 cannot be read in isolation but must be read in harmony with, and be guided by, the whole of the Tolling Agreement, including recital C which specifically references the issues that had arisen between the owners and Stuart Olson regarding delays on the project.

[28] Further, HCMA argues the intent of the agreement to only apply to third party claims is illustrated by para. 5, which provides as follows:

> In the event the owner terminates the agreement and seeks leave to issue a third-party notice to the architect under Rule 3-5(4)(b) of the *Supreme Court Civil Rules*, the architect will consent to the application.

[29] There was some question whether or not HCMA was seeking to invoke the *contra proferentem* rule as a principle of the court's interpretation of the Tolling Agreement given that it was drafted by the City, however HCMA did not seek to rely upon the principle. Rather, they argued that the Tolling Agreement is clear as to its limited applicability to third party claims.

[30] I do not agree.

[31] The claims specifically mentioned to be subject to the tolling of any limitation period are broader than just those arising under the defined term "Lawsuits", given that the words "including any claims in connection with the Lawsuits" [emphasis added] is used. Specifically, para. 3 states the tolling applies to "any claims arising on the project" [emphasis added].

[32] In my view it is clear that, due to the Tolling Agreement, there is no accrued limitation defence, such that the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.

[33] I also note that the project was completed in June of 2020. If, as HCMA argues, the intention of the Tolling Agreement was to complete the project and that that was the only purpose of the Tolling Agreement, then it is unexplainable why they extended it so many times thereafter.

[34] Even if I am incorrect in that respect, I still retain the jurisdiction to make the order sought.

[35] In this respect, as HCMA points out, in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, at para. 47, the existence of a limitation defence is a relevant but not a determinative factor, as ultimately the court will make the order if it is just and convenient to do so.

[36] If it is clear that there is an arguable limitation defence, the question to be determined is whether it will nevertheless be just and convenient to add HCMA, notwithstanding that HCMA will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad v. Fenwick*, 2000 BCCA 630 ("*Letvad*").

[37] If, however, the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, with those same factors being considered.

[38] Thus, even if am wrong in finding that the Tolling Agreement covered the claims the City seeks to advance against HCMA, I will consider whether or not it would be just and convenient in any event to make the order as sought, in light of the other factors for consideration, as set out in *Letvad*.

Is the Joinder Just and Convenient

[39] Once the limitation period issue has been addressed, the considerations as to whether or not it is just and convenient to make the joinder include the merits of the proposed claim, the delay in the proceedings and the timeliness of the application, and balance of prejudice between allowing or not allowing the joinder.

[40] HCMA did not raise any argument as to the merits of the proposed claims, based on the pleadings as drafted, arguing instead that there was significant delay in bringing this claim, and that they are prejudiced as a result.

[41] On the issue of prejudice, the City argues since there are no new issues being raised, therefore there is no prejudice. In particular, the issue of HCMA's involvement and liability as arising from its actions has already been an issue in these proceeding since it was joined as a party in March, 2022 by Stuart Olson.

[42] In contrast, the City argues that the prejudice to it if HCMA is not added is significant as they will arguably have to commence a new action with increased delay, cost, and from the court's perspective, a risk of inconsistent findings.

[43] Some of this prejudice is easily addressed as, I would suspect, an application would be made to have the trial of such a new action joined with the trial of this action. However, it is not entirely clear how quickly that could be done such that it would not compromise the September 2024 trial date. Neither party made any argument on that point one way or the other.

[44] HCMA relies on para. 30 of *Letvad*, where it was found that a presumption of prejudice occurs if the limitation period has expired, arguing that because this falls outside the Tolling Agreement, there is a presumption of prejudice. As I have noted, I am not of the view that this falls outside the square corners of the Tolling Agreement.

[45] Further, HCMA argues that the claims although connected are, in fact, distinctly different. They argue that the Stuart Olson's claims against HCMA in the proposed counterclaim arise from the failure and the leaks with respect to the additional pool items, which are the result of design defects. In contrast, the argument of the City, as currently pled, is that it is entirely construction errors that have caused their damages.

[46] The City acknowledges that the claims made against HCMS are different, in that it enables them to recover against HCMS if they are proven wrong in their primary position that the issues arose from design defects, such that they can recover from HCMA if it is determined that the damages arose a result of construction defects, and such defects were caused by HCMA.

[47] I agree that HCMA’s exposure is therefore different depending on the determination of liability in terms of whether or not there is a right of contribution or indemnity or a direct against them by the City.

[48] However, in my view, that is the natural consequence of the difference between there being a third-party claim and a counterclaim. The fact that the exposure or liability risk is changed does not mean that a new issue has been raised

such that they are not in a position to be able to answer or are prejudiced by the joinder.

[49] In contrast, the prejudice of the City being left without recourse to a remedy, in the event that it was determined to be a design defect rather than a construction defect is, in my view, the greater prejudice.

[50] Turning then to delay, the City argues that it was reasonable for it to wait until now to bring this action because the parties were actively pursuing mediation, which did not occur until a month or so ago. As a result of the mediation being unsuccessful, the positions are now being taken to crystallize these pleadings and make the amendments as are being sought.

[51] Further, they argue that given their interpretation of the Tolling Agreement and agreed upon suspension whereby HCMA agreed that no action need be brought prior to its expiry. As I have noted, that interpretation was a reasonable one.

[52] HCMS relies on the comments of the Court of Appeal at para. 46 of *Letvad* where the court noted that even if there are no factual issues, an amendment may be refused if there is excessive and unexplained delay.

[53] HCMA also relies on *Cisneros Mendez v. Hudson Retail Inc.*, 2023 BCSC 2037, where four years was considered to be an inordinate delay such that it was not just and convenient to make the order. Here, the construction was completed in 2020 and, HCMA argues, the City ought to have turned its mind to its claims against HCMA starting at that point rather than waiting four years. However, this fact disregards the fact that HCMA continued to extend the Tolling Agreement well beyond the completion date of the project. Even if the initial purpose of the Tolling Agreement was to complete construction, it would appear that the purpose of it changed thereafter.

[54] In my view the delay is explained.

[55] Although I agree with HCMA's submission that it is not, on its face, necessarily reasonable for a party to put all of their eggs in the basket of mediation to complete, as mediation is uncertain, such that waiting for mediation would not on its own be a sufficient explanation, when coupled with reliance on the Tolling Agreement, it provides a reasonable explanation.

[56] The interpretation that the City was giving to the Tolling Agreement was a reasonable one, and provides a reasonable explanation as to why they were not finalizing their claims and pleadings earlier.

[57] As to the issue of the timeliness of this application, again, the mediation, or the unsuccessful conclusion of the medication, is the factor that the City relies upon as the benchmark for when its focus began to change from resolving the issues outside of court, to perfecting this matter for the purpose of litigating it, such that pleadings had to be finalized and all parties properly joined.

[58] I accept that the application was brought in a timely manner with respect to the overall context of the litigation, including the mediation and the case plan conference and deadlines that were set out therein.

[59] In addition, as noted by the City, in *Fernandez v. The Barrel Public House Ltd.*, 2020 BCSC 980, even if the court does find that there is an unexplained delay, or the application was not brought in a timely way, a court is entitled to look at the other factors that could outweigh that delay, and ultimately the role of the court is to determine each case on its own facts and determine whether or not it is in the overall interests of justice to have the action joined.

[60] Thus, looing at the overall interests of justice as to whether it is just and convenient to make the order sought, no other party is opposing. While I initially assumed that meant that the parties were generally not concerned that this will delay or cause any effect to the trial date or fundamentally changes the deadlines that have been set out pursuant to the case plan order, counsel corrected me in the

course of these Reasons to advise that, if the joinder application is granted, an application was expected to be made to adjourn the trial.

[61] In any event, as I noted, the parties have not yet completed their discoveries. Some have been concluded, but HCMA has not conducted their own. As such, HCMA has not been prejudiced by being prevented from discovering parties on issues that will arise as a result of these changes to pleadings.

Conclusion and Orders Made

[62] I find it is in the overall interests of justice to grant the order as sought. Specifically, I make the orders as sought in paras. 1, 2, and 3 of the notice of application as sought.

[63] As a final matter, HCMA argued that if the order was made that paras. 5 and 6, and perhaps 4, of the proposed amended counterclaim should be struck, or leave not granted in respect of those paragraphs. Those paragraphs set out the claims made as to the duty owed by HCMA under the terms of the contract and what the alleged breaches are. In my view, they provide necessary context and, if they were omitted, the claims may not be properly pled such that the claim could be deficient on its face.

[64] The fact that those paragraphs are also included in the third-party claim, a point made by HCMA, also illustrates how these issues are so intertwined and connected that it is just and convenient that the claim be added to this action, rather than through separate proceedings.

[65] I do not see it is any necessary to exclude those paragraphs from the amended counterclaim to be filed.

[66] That just leaves costs.

(SUBMISSIONS ON COSTS)

[67] THE COURT: I agree that the City was wholly successful in this application. The City shall have its costs in any event of the cause. Thank you.

"Associate Judge Robertson"