

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Queen's Marque Developments Limited v. Gamma Windows and Walls International Inc.*, 2024 NSSC 85

**Date:** 20240321  
**Docket:** 503261  
**Registry:** Halifax

**Between:**

Queen's Marque Developments Limited

*Plaintiff*

v.

Gamma Windows and Walls International Inc.

*Defendant*

**DECISION ON MOTION TO AMEND**

**Judge:** The Honourable Justice Scott C. Norton

**Heard:** March 20, 2024, in Halifax, Nova Scotia

**Decision:** March 21, 2024

**Counsel:** William L. Ryan KC, for the Plaintiff  
Nathan Sutherland and Patrick Thompson, for the Defendant

**By the Court:****Introduction**

[1] The Defendant, Gamma Windows and Walls International Inc. (“Gamma”), seeks leave to file an amended defence and add a counterclaim against the Plaintiff, Queen’s Marque Developments Limited (“QM”). The underlying litigation arises out of the construction of a building complex on Lower Water Street in Halifax, Nova Scotia.

[2] QM commenced this action on December 23, 2020. Since then Gamma filed a lien action, and QM and various other entities have filed seven additional actions. I am the appointed case management judge for all of the proceedings.

[3] In its Defence to this action delivered to QM on December 10, 2021 and filed on January 18, 2022, Gamma pleaded facts in support of its intended counterclaim, but pleaded that the counterclaim and the QM claim should be resolved through arbitration. In light of the many legal proceedings now existing, including parties that are not party to the arbitration provisions of the contract, Gamma no longer believes that arbitration is possible and seeks instead to pursue the counterclaim in this proceeding. QM opposes the proposed amendment, primarily on the basis that it is barred by the passage of time.

[4] By its own admission, Gamma had knowledge of the claims they intended to bring against QM at the time they delivered their Defence on December 10, 2021. The applicable limitation period is two years pursuant to s.8 of the *Limitation of Actions Act*, SNS 2024, c. 35 (“Act”). The proposed amendment to add a counterclaim is beyond the statutory limitation period.

**The Legal Bases for the Motion**

[5] Gamma brings this motion pursuant to *Rule* 83 and s.22(b) of the *Act*.

[6] *Rule* 83.02 governs amendments to pleadings and allows a party to an action to amend a notice of defence more than 10 days after pleadings have closed with permission from the court. *Rule* 83.11 governs the amendment permitted by a judge including the impact of an expired limitation period:

### 83.11 Amendment by judge

- (1) A judge may give permission to amend a court document at any time.
- (2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.
- (3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
  - (a) the material facts supporting the cause are pleaded;
  - (b) the amendment merely identifies, or better describes, the cause.

[7] The test on a motion to amend is straight forward: generally, amendments should be granted unless the party opposing the amendment can show prejudice that cannot be compensated in costs, or that the applicant is acting in bad faith. In *Halifax (Regional Municipality Pension Committee) v. State Street Global Advisors Ltd.*, 2012 NSSC 64, Duncan J. (as he then was) summarized the law as follows:

[13] The approach to the exercise of the discretion provided by **Rule 83.02(2)** was described in *Garth v. Halifax (Regional Municipality)* 2006 NSCA 89, per Cromwell J.A.:

[30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs ...

[14] Further direction is found in *Global Petroleum Corp. v. Point Tupper Terminals Co.* (1998), 170 N.S.R.(2d) 367 (C.A.) where Bateman J.A. wrote, at para. 15:

The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs.

[15] The burden to demonstrate either serious prejudice that cannot be compensated with costs, or bad faith, rests upon the plaintiff, subject to rebuttal. The evidentiary burden is high. e.g., *M5Marketing Communications Inv. v. Ross* 2011 NSSC 32, at para. 31.

[Bold in original, underline added]

[8] As is clear from these authorities, the opposing party has a high evidentiary burden to establish that the applicant is acting in bad faith or that the opposing party

will suffer prejudice which cannot be compensated in costs: *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.*, 2001 NSSC 178.

[9] Justice Bodurtha, in *Altschuler v. Bayswater Construction Limited*, 2019 NSSC 197, at para. 17, cited the following comments about non-compensable prejudice by the Ontario Court of Appeal in *1588444 Ontario Ltd. (c.o.b. Alfredo's) v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, at para. 25:

- There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: *Iroquois*, at paras. 20-21, and *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (C.A.), at para. 65.
- The non-compensable prejudice may be actual prejudice, i.e. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841 (C.A.), at paras. 5-7, and *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106 (Gen. Div.), at para. 9.
- Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: *Hanlan v. Sernesky* (1996), 95 O.A.C. 297 (C.A.), at para. 2, and *Andersen Consulting*, at paras. 36-37.
- At some point the delay in seeking an amendment will be so lengthy and the justification so inadequate, that prejudice to the responding party will be presumed: *Family Delicatessen Ltd. v. London (City)*, 2006 CanLII 5135 (Ont. C.A.), at para. 6.
- The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 27 O.R. (3d) 576 (C.A.), at paras. 3-4, and *Plante v. Industrial Alliance Life Insurance Co.* (2003), 66 O.R. (3d) 74 (Master), at para. 21.

[10] These principles apply to all amendments. There is additional analysis where the amendment is sought after the expiration of a limitation period. *Rule 83.11(3)* permits a judge to allow an amendment after the expiry of a limitation period if:

1. The material facts supporting the cause are pleaded, and
2. The amendment merely identifies, or better describes, the cause.

[11] Justice Farrar, writing for the Court of Appeal in *Automattic Inc. v. Trout Point Lodge Ltd.*, 2017 NSCA 52, noted, at para. 28:

[28] Rule 83.11(3) is not complicated. A motions judge may allow amendments to the pleadings to allow additional causes of action after the expiry of a limitation period if the judge is satisfied that the facts material to the new cause of action are pleaded and the amendment merely identifies or better describes the cause.

[12] In this case, Gamma's amendments rely on the material facts pleaded in the Statement of Defence filed in January, 2022. It identified QM's specific breaches of duties and gave notice of intention to bring a counterclaim. More specifically:

- At para. 12, Gamma pleaded that QM was responsible for any alleged delay and that Gamma had suffered damages as a result.
- At para. 15, Gamma pleaded material facts of QM's alleged breaches of duties.
- At para. 16, Gamma gave QM notice of its intended counterclaim, at that time to be pursued by arbitration.
- At paras. 17-23, Gamma pleaded that QM had breached its duty of care to Gamma, set out the material facts regarding this breach, and it pleaded that it had suffered damage as a result.
- At para. 18, Gamma pleaded material facts regarding how QM had breached its duty of care to Gamma.
- At para. 20, Gamma pleaded that QM had acted in a high handed and arbitrary manner, and sought to undermine Gamma's contractual and financial interests.
- At para. 21, Gamma pleaded that QM had acted in breach of its duty of good faith in contractual performance.

[13] I find that the supporting material facts for the addition of the counterclaim were pleaded in the original Defence along with notice of the intended counterclaim. There is no surprise to QM as to the nature or extent of the counterclaim. There is a high evidentiary burden on QM to establish bad faith or non-compensable prejudice. QM filed no evidence on the motion. There is no evidence of bad faith on the part of Gamma. There is no evidence of prejudice suffered by QM that cannot be compensated by costs. Accordingly, I find that the motion to amend satisfies the requirements of *Rule* 83.11(3).

[14] Alternatively, I find that the proposed amendments are permitted by s.22(b) of the *Act*. That section provides:

22 Notwithstanding the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim

...

(b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits...

[15] Subsection (b) permits a claim to be added, notwithstanding the fact that it changes the capacity in which a defendant is sued, provided that the added claim is:

1. Related to the conduct, transaction or events described in the original pleading, and
2. The defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits.

[16] QM acknowledges that the authorities have applied a relatively low threshold to the requirement that the claim is related to the conduct, transaction or events described in the original pleadings: *Altschuler, supra*; *Dyack v. Lincoln*, 2017 NSSC 187. I have no difficulty finding that this requirement has been met.

[17] Consistent with my findings above, it is clear to me that QM had sufficient knowledge of the added claim to the extent that it will not be prejudiced in defending the claim. QM acknowledges at para. 38 of their brief that the case authorities such as *Altschuler, supra*, make it clear when prejudice is alleged, specific details must be provided and the prejudice must be non-compensable by costs. My prejudice analysis above applies equally here. QM filed no evidence to establish any such prejudice. Concerns about expanding the scope of litigation, adding to trial length and delay, or the need to schedule additional discovery examinations, will generally not be sufficient to demonstrate non-compensable prejudice.

[18] In conclusion, the motion to amend is granted, with costs payable to Gamma in the amount of \$1,000 inclusive of disbursements. The amended pleading shall be filed in a form that accords with the *Rules* on or before April 15, 2024.

[19] Order accordingly.

Norton, J.