SUPREME COURT OF NOVA SCOTIA

Citation: *Buteau v. Maritime Permanent Roofing Ltd*, 2024 NSSC 300

Date: 20241009
Docket: No. 520085
Registry: Antigonish

Between:

Allan Robert Buteau and Amy Lynn Buteau

Plaintiffs

v.

Maritime Permanent Roofing Ltd, Interlock Roofing Ltd, Interlock Industries (Alberta) Ltd, I.E.L. Manufacturing Ltd., Interlock Group of Companies, Interlock Metal Roofing Systems AKA, Gilles Bourgeois, Carole Rundle and Mark Andrew Wenzel

Defendants

Decision
Motion for Leave to Bring a Third-Party Claim

Judge: The Honourable Justice Frank P. Hoskins

Heard: May 16, 2024, in Antigonish, Nova Scotia

Counsel: Allan Buteau and Amy Buteau, Self-represented Plaintiffs
John Shanks and Erin McSorley, for the Defendants

By the Court:

Introduction

[1] The Defendants in this proceeding, who are the moving parties on this motion, are Maritime Permanent Roofing Ltd., Interlock Metal Roofing Systems also known as Interlock Lifetime Roofing Systems, Gilles Bourgeois, Carole Rundle and Mark Andrew Wenzel (collectively, the "Defendants").

[2] The Plaintiffs, Allan Robert and Amy Lynn Buteau, are self-represented and are the Respondents in this motion.

[3] The Defendants have brought this motion for leave to issue a notice of claim against third party, adding 3312739 Nova Scotia Limited ("331 Co.") as a third party to this action.

[4] In support of this motion, the Defendants proffered the Affidavit of Carole Rundle (the "Rundle Affidavit").

[5] The Plaintiffs seek an order to dismiss the motion along with punitive damages and costs.

[6] In support of their motion, the Plaintiffs proffered the Affidavit of Allan Robert Buteau (the "Buteau Affidavit").

[7] The Motion was heard on May 16, 2024. There was no cross-examination of either affiant in this motion. The unchallenged affidavits summarize the procedural history, including the communications between the parties from their respective perspectives.

[8] In addition to their written briefs, the parties made oral submissions.

[9] The court reserved its decision to provide written reasons. Accordingly, what follows are my reasons for granting the motion with leave to the Defendants to add 331 Co. as a third party. The Defendants will have thirty (30) days in which to do this, failing which the counterclaim shall be dismissed.

Background

[10] This case has been subject to case management since November 2023. There have been several case management conferences to expedite the proceedings. Other than settling dates for future contemplated motions and/or applications, and the completion of an independent inspection of the Plaintiffs' roof, not a lot has occurred since the pleadings closed. Rather than ascribe blame for any delays, it should be noted that the parties have expressed an interest in a judicial settlement conference as they want to expediate the proceedings.

[11] In the result, even though the Plaintiffs filed their Statement of Claim on December 29, 2022, the litigation remains in its infancy stage. From Mr. Buteau's unchallenged affidavit and his submissions, he is frustrated with the pace of the lawsuit and has clearly expressed the Plaintiffs' concern that they will suffer undue prejudice if a third party is added to the action.

The Facts as Alleged by the Defendants (the Respondents to the Motion)

[12] The Defendants (the moving party) alleged the following facts in their written submissions, dated April 25, 2024:

> 6. The Plaintiffs are the registered owners of the property located at 63 Marsh Cross Road, Saint Andrews, Antigonish County, Nova Scotia, PID #10100741 (the "Property").
>
> 7. On April 22, 2022, the Plaintiffs and MPR entered into a contract (the "Contract") for the supply and installation of an Interlock Roofing System and accessories on the Property (the "Roof").
>
> 8. MPR subcontracted the installation of the Roof to 331 Co. under an independent agreement dated February 24, 2022 (the "Independent Contractor Agreement").
>
> 9. Installation of the Roof was completed in September 2022.
>
> 10. On December 29, 2022, the Plaintiffs filed a written Statement of Claim against the Defendants.
>
> 11. As set out in the Statement of Claim, the Plaintiffs have claimed breach of contract and negligence as against the Defendants and have alleged various wrongdoings with respect to the installation of the Roof.
>
> 12. On February 17, 2023, the Defendants filed a Notice of Statement of Defence.
>
> 13. Beginning in February 2023, the Defendants requested on numerous occasions that a third-party engineer Ivor MacDonald of BMR Structural Engineering, on

behalf of the Defendants, be provided with the opportunity to inspect the Roof and the alleged deficiencies.

14. As Your Lordship is aware, the request for Mr. MacDonald's inspection of the Roof was the subject of various Case Management Conferences before your Lordship, namely on June 28, 2023, September 20, 2023, October 23, 2023, and November 27, 2023.

15. On December 6, 2023, the Defendants filed a motion for an Order granting Mr. MacDonald's inspection. After the Defendants filed their motion, the Plaintiffs agreed to allow Mr. MacDonald's inspection to occur by consent.

16. A Consent Order for inspection of the Roof was signed by the parties on January 9, 2024, and issued on January 22, 2024.

17. On January 12, 2024, Ivor MacDonald attended at the Property and completed his inspection on the Roof.

18. Upon speaking to Mr. MacDonald following his inspection, it became clear to the Defendants that Mr. MacDonald's findings supported a third-party claim against 331 Co.

19. On January 19, 2024, the Parties attended a Case Management Conference with Your Lordship.

20. During this conference, the Defendants advised that in light of discussions with Mr. MacDonald regarding his preliminary findings from his inspection, the Defendants were contemplating adding 331 Co. (the installer of the Roof) as a Third Party to the proceedings.

21. On February 2, 2024, the parties again attended a Case Management Conference. The Defendants advised that they intended to commence a Third-Party claim against 331 Co.

22. On February 26, 2024, the parties attended another Case Management Conference with Your Lordship. The Defendants confirmed their intent to add 331 Co. as a Third-Party. The Plaintiffs advised that they could not consider consenting to the addition of the Third-Party until they had the opportunity to review a report from Ivor MacDonald.

23. On March 26, 2024, the parties again attended a Case Management Conference with Your Lordship, and the Plaintiffs advised that they would not consent to the Defendants adding 331 Co. as a Third-Party to the proceedings.

24. On April 5, 2024, Mr. MacDonald provided his report summarizing his findings following the inspection (the "Inspection Report"). The Defendants provided the Inspection Report to the Plaintiffs on this same date.

25. The Defendants now seek to add 331 Co. as a Third-Party to this action given the new evidence obtained through Mr. MacDonald's inspection.

The Facts as Alleged by the Defendants (the Moving Party)

[13] The Plaintiffs (Respondents to the moving party) alleged the following facts in their written submissions dated May 13, 2024:

13. On or about April 27, 2022, the Buteaus entered into a contract for the supply and install of a new roof on their home. The install was to take place within 8 to 12 weeks. The install did not start until more than 19 weeks after the contract was signed.

14. The install was not completed until September 19, 2022.

15. There were several install issues that needed to be addressed, and the roof began to leak before the financing paperwork could be completed.

16. The roof came with a Guardian Lifetime warranty of 50 years. This warranty would come into effect upon sign off of the Buteaus' financing contract. Under this warranty, all disputes had to go to mandatory arbitration, and as such, had the roof been installed in accordance with the contract all leaks that occurred after install would have been corrected under warranty and any disputes would have been delt with through arbitration (See Exhibit "3" of Buteau affidavit).

17. On November 10, 2022, the Defendants filed a lien under the *Builder's Lien Act* against the Buteaus' property. On December 20, 2022, they filed a Statement of Clam against the Buteaus. On February 7, 2023, the Buteaus filed their Statement of Defence in the action.

18. The Buteaus facilitated inspections on September 28, 2022, October 13, 2022, November 23, 2022, November 30, 2022, February 10, 2023, April 24, 2023, and January 12, 2024. As of September 28, 2022, the Defendants were aware that there were issues with their installer's work and had an obligation to bring it to his attention for correction.

19. On October 5, 2022, Gilles Bourgeois provided an initial repair procedure acknowledging the poor workmanship of the installer (See Exhibit "4" of Buteau affidavit).

The Law

[14] It is helpful, at the outset, to outline the *Civil Procedure Rules* that govern the whether the court should grant the motion to add 331 Co. as a third party to the Action.

[15] This motion is governed by Civil Procedure Rule 14.11, the relevant portions of which read as follows:

> **4.11 Third party claim**
>
> (1) A defendant may make a claim in an action against a person who is not a party, if the claim against the third party is of one of the following kinds:
>
> (a) a claim alleging that the third party is liable to the defendant for all or part of the plaintiff's claim;
>
> (b) a claim that would be consolidated with the plaintiff's action if the defendant started a new action against the third party for that claim;
>
> (c) a claim jointly against the plaintiff and the third party to which Rule 4.10(1) applies.
>
> (2) The defendant may start the third party action by filing a notice of claim against third party.
>
> (3) The notice of claim against third must include a statement of claim against the third party as part of the notice.
>
> …
>
> (7) A notice of claim against third party may be filed before the deadline in Rule 31 - Notice for the defendant making the third party claim to file a defence, unless a judge orders otherwise.
>
> [Emphasis added]

[16] Rule 4.11(7) is the operative subsection in this motion because the Defendants' deadline for filing notice of claim against third party under Rule 4.11(7) has passed and therefore they must seek leave to do so.

[17] Civil Procedure Rule 35.08 is also relevant. It provides:

> **35.08 Judge joining party**
>
> **(1)** A judge may join a person as a party in a proceeding at any stage of the proceeding.

(2) It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.

(3) The presumption is rebutted if a judge is satisfied on each of the following:

(a) joining a person as a party would cause serious prejudice to that person, or a party;

(b) the prejudice cannot be compensated in costs;

(c) the prejudice would not have been suffered had the party been joined originally or would have been suffered in any case.

(4) Despite Rule 35.08(1), a judge may not join a person as a plaintiff, applicant, applicant for judicial review, or appellant, unless the person consents.

(5) Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

(6) A judge who joins a person as a party to a proceeding may give directions for the party's participation in the proceeding, including any of the following:

(a) an amendment to the heading;

(b) a process by which the party may give notice of a claim, defence, or ground;

(c) a process by which each other party may respond to the notice;

(d) requirements for the new party to make disclosure and be discovered.

[18] Rule 35.08 must be read in conjunction with Rule 83.04, which provides:

83.04 Amendment to add or remove party

(1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).

(2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:

> (a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;
>
> (b) the expiry precludes the claim;
>
> (c) the person protected by the limitation period is entitled to enforce it.
>
> …

Determination of Applicable Limitation Period

[19] Before embarking on my analysis of the central issue in this motion, I must determine the applicable limitation period to add a third party to the action.

[20] In *Automattic Inc. v. Trout Point Lodge Ltd.*, 2017 NSCA 52, the Nova Scotia Court of Appeal clearly stated that a party cannot be added to a proceeding when a limitation period has expired. Thus, motion judges must first determine the applicable limitation period. There is no residual discretion for a motion judge to add defendants without making that inquiry (*Automattic Inc.*, at paras. 38-42).

[21] In *Sears v. Top O' the Mountain Apartments Limited,* 2021 NSSC 80, Justice Norton held that a third-party claim for contribution and indemnity is discoverable as of the date that the defendant is served with the Notice of Action.

[22] In this case, the Plaintiffs filed the Notice of Action on December 29, 2022, and it was served on the various Defendants in January and February 2023 (Rundle Affidavit, at Tab "D"). The limitation period for the third-party claim will not expire until early in 2025, two years after the Defendants were served with the Notice of Action.

[23] Having reviewed the evidence, the relevant *Civil Procedure Rules* and case authorities, I find that the Defendants' third-party claim against 331 Co. is within the limitation period.

Relationship between MPR & 331 Co.: Employee or Independent Contractor

[24] The next sub-issue that must be decided is whether 331 Co. is an independent contractor. The Plaintiffs say that 331 Co. is a contract employee and/or a dependant contractor and, therefore, should not be permitted to issue a Notice of Claim naming 331 Co. as a third party to this action.

[25] In essence, the parties agreed with the notion that if 331 Co. is an employee of MRP, then it is prohibited from making the motion to add 331 Co. as a third party.

[26] The Plaintiffs submit that the proposed third party, 331 Co., is a contract employee and/or dependant contractor and therefore cannot be the subject of a third-party claim. Moreover, the Plaintiffs say that any dispute with 331 Co. should be dealt with internally and in accordance with the employment agreement (Respondents' written submissions, dated May13, 2024, at paras. 20-25).

[27] The moving party says MPR and 331 Co. entered into a contract dated February 24, 2022 (the "Independent Contractor Agreement") under which 331 Co. agreed to install Interlock Roofing Systems and accessories on behalf of MPR. A copy of the Independent Contractor Agreement along with proof of insurance on behalf of 331 has been entered in evidence as Exhibit "A" in the Rundle Affidavit.

[28] The Defendants say that this Agreement clearly establishes that 331 Co. is an independent contractor and thus 331 Co. can be added as a third party.

[29] The Plaintiffs cite *Boutilier v. Rouvalis*, 2021 NSSM 54, as authority for a finding that 331 Co. is a contract employee of MPR, as an installer, not an independent contractor. The Plaintiffs submits the following:

> a. The installer works exclusively for MPR on a "Full time" basis. This is evidenced by the ad and email marked as Exhibit "1" of Buteau affidavit.
>
> b. The product is sold and supplied by MPR, and the installation manager has sole control of the scheduling of the work and the materials supplied as per the email attached in Exhibit "1" of the Buteau affidavit.
>
> c. According to the alleged agreement, marked as Exhibit "A" of the Rundel affidavit, Interlock is responsible for supplying and monitoring all manufacture's specifications of their materials.
>
> d. According to the alleged agreement marked as Exhibit "A" of the Rundell affidavit, the installer's compensation is based on a "Pay Rate Sheet" (see paragraph 5.1).
>
> e. The sole business of MPR is to install the interlock products (Allan Robert Buteau's Affidavit, at para. 25).

[30] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, Major J., writing for the Supreme Court of Canada, noted that the distinction between an employee and an independent contractor applies not only to the application of various forms of employment legislation, the availability of an action for wrongful dismissal, the assessment of business and income taxes, the priority

taken upon an employer's insolvency and the application of contractual rights. He wrote:

> 36 Various tests have emerged in the case law to help determine if a worker is an employee or an independent contractor. The distinction between an employee and an independent contractor applies not only in vicarious liability, but also to the application of various forms of employment legislation, the availability of an action for wrongful dismissal, the assessment of business and income taxes, the priority taken upon an employer's insolvency and the application of contractual rights … Accordingly, much of the case law on point while not written in the context of vicarious liability is still helpful.

[31] Justice Major concluded:

> 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, *supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing *Atiyah, supra,* at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

Application to the Facts

[32] The Defendants reject the notion that there was an employment relationship between MPR and 331 Co., pointing to the Independent Contractor Agreement. Notwithstanding this agreement, the Plaintiffs say there was an employee relationship, based on the common law criteria.

[33] The question of whether an individual is an employee or independent contractor is a question of law to be determined on the facts of each case. The Court should consider and apply the "total relationship" test (*Wellington (County) v. Butler*, [2001] O.J. No. 4219 (Supt. Ct. J.), at paras. 8, 31-32). The central question is whether the person who has been engaged to perform services performs them as a person in business on his own account. When determining that question, the court should consider factors such as the designation given by the parties to the agreement, the level of control the employer has over the worker's activities, whether the worker provides his own equipment, whether the worker hires his own helpers, the degree of financial risk taken by the worker, and the worker's opportunity for profit in the performance of his work (*Bennett v. Cunningham*, (2006), 55 C.C.E.L. (3d) 304 (S.C.J.)).

[34] A description in a contract of a person as an independent contractor is not always determinative (*Sagaz*, at paras. 46 - 49). The parties' clear understanding of their legal relationship at the time the agreement is signed should, however, be accorded significant weight particularly when the agreement is in plain language, contains no fine print and is not, on its face, oppressive, unfair or difficult to understand (*Wellington*, at para. 16).

[35] In this case, the Independent Contractor Agreement addresses the relationship between the parties. It clearly states that MPR engages 331 Co. as an independent contractor to perform the services for MPR on the terms and conditions set out in the Agreement, which include:

- Thoroughly familiarize itself and its employees with the Products and their installation processes and methods to perform the services;

- Supply at its own cost whatever equipment, product and tools (other than proprietary products and tools) it requires to fulfil its obligations under this

Agreement and be solely responsible for any and all expenses incurred in the performance of the services;

- Obtain and cover the cost of any training and ongoing training necessary for itself or its employees to perform the services. The contractor is encouraged to attend any company-sponsored or 3rd party training updates;

- Ensure that all paperwork (including but not limited to photos) is properly completed, signed and submitted to the company in a timely manner;

- Use its best efforts to satisfy the customer and to address any complaints or disputes arising out of the contractor's performances of services;

- Ensure that all customer payments are made payable to the company and any payments received shall be submitted to the company promptly;

- Follow the specifications in the Purchase Contract and only change the specifications with written direction signed by and from the contractor ("Additional Work Notification"). The contractor will not be compensated for any service performed without an Additional Work Notice;

- Either return left-over product from the installation to the company or make it available for pick-up; and

- Keep the premises and surrounding area free from accumulation or debris and trash and ensure thar the site is cleaned up daily and broom swept upon completion.

[36] The Independent Contract Agreement also requires contains conditions pertaining to fees, which include:

- The company will pay the contractor according to the current Pay Rates Sheet, which rate may be amended from time to time by the Company, less any advances, upon satisfactory completion of the services as defined at 5.2. A 10% holdback will be applied to all jobs. The holdback will be released to the contractor once there are no statutory holdback obligations.

- Contractor is responsible for obtaining s signed customer completion photos from the homeowners, and for providing completion photos to the company ("Satisfactory Completion") together with the contractor's invoice as a condition to being paid for the installation; and

- Contractor's compensation shall be in direct proportion to the services and the jobs installed and shall in no way reflect the number of hours worked.

[37] The Independent Contract Agreement also requires the contractor to have insurance on all its operations throughout the Agreement, at its own expense.

[38] In my view, the description of the billing and remuneration process described in the Independent Contract Agreement better fits with independent contractor status, rather than an employment relationship. Nor is there any evidence that 331 Co. could not hire employees without the authorization or permission of MPR.

[39] While I am mindful that an Independent Contract Agreement describing a person as an independent contractor is not always determinative, it should, however, be accorded significant weight, particularly when the Agreement is in plain language, contains no fine print and is not, on its face, oppressive, unfair or difficult to understand.

[40] In this case, I find that the Independent Contract Agreement is in plain language and is not on its face, oppressive, unfair or difficult to understand.

[41] There is no evidence that the installers were regularly supervised by MPR, nor that their activities were heavily controlled by MPR. There is no evidence that the installers were not providing their own equipment or hiring their own helpers.

[42] Having considered the evidence and submissions of the parties, I am not satisfied that the Plaintiffs have established that 331 Co. is a contract employee rather than an independent contractor. In my view, the Independent Contractor Agreement between MPR and 331 Co. establishes the relationship between the parties as that of an independent contractor.

[43] Considering that finding, I will proceed to the central issue of this motion, whether leave should be granted for the Defendants to issue a notice of claim naming 331 Co. as a third party to this action.

Positions of the Parties

[44] The Defendants' position is that the court should grant leave for them to issue a third-party claim against 331 Co. They argue that this will avoid a multiplicity of proceedings and better ensure the just, speedy and efficient determination of this proceeding.

[45] The Plaintiffs submit that adding a third-party claim would delay the proceedings and cause them undue prejudice (Plaintiffs' written submissions, at paras. 42-47).

Governing Rules and Authorities

[46] It is appropriate at this juncture to make a brief comment on the general objects of third-party proceedings before embarking upon my analysis of the central issue in this motion.

[47] In *Keddy v. Grand Sky Co. Ltd.,* [1998] N.S.J. No. 351 (S.C.), Justice Hall cited the reasons for third-party proceedings:

> 4 The general objects of third party proceedings are set out in *The Law of Civil Procedure*, Williston and Rolls, Volume 1, at page 426 - 427 where the following is stated:
>
> The objects of third party procedure are:
>
> (1) to avoid a multiplicity of actions. The procedure provides a substitute for another action, and disposes of all issues arising out of a transaction as between the plaintiff and the defendant, and between the defendant and a third party;
>
> (2) to avoid the possibility that there might otherwise be contradictory or inconsistent findings in two different actions on the same facts;
>
> (3) to allow the third party to defend the plaintiff's claim against the defendant;
>
> (4) to save costs; and
>
> (5) to enable the defendant to have the issue against the third party decided as soon as possible, in order that the plaintiff can not enforce a judgment against him before the third party issue is determined.
>
> Third party procedure provides a means whereby a defendant may claim contribution, indemnity or relief over against a third party, who may then defend not only the defendant's claim against him, but also the claim of the plaintiff against the defendant. In defending the plaintiff's claim, the third party may raise defences open to the defendant, notwithstanding that the defendant has not chosen to avail himself of them or even that the defendant has admitted the facts sought to be denied or controverted by the third party.

[48] Similarly, in *Sears,* Justice Norton stressed the importance of having third-party claims for contribution and indemnity before the court in one proceeding. In doing so, he highlighted the challenges that would arise if a defendant brought a separate claim for contribution and indemnity, including the potential for multiple

proceedings arising out of the same incident and issues with stale evidence and the need to preserve evidence indefinitely (at para. 56).

[49] The Defendants submit that it is consistent with the presumption in Rule 35.08 (2) for all parties with an interest in the issues to be determined by the court in one proceeding. Thus, they say that it is in accordance with the Rules, the case law and the interest of justice for 331 Co. to be added as a third party to this action.

Presumption of Joining a Party: Rule 35.08

[50] In *Power v. Nova Scotia (Maintenance Enforcement Program),* 2020 NSSC 314, Justice Chipman considered Rules 35.08 and held that there is a *presumption* in favor of joiner. To rebut that presumption, the Plaintiffs need to show:

(a) Serious prejudice by joining the Third-Party;

(b) That serious prejudice cannot be compensated for costs; and

(c) The serious prejudice would not have occurred if the third party had been joined originally (at para. 15).

[51] The Defendants submit that the Plaintiffs have failed to rebut the presumption in Rule 35.08 in favor of joining all parties with an interest in the issues before the court in one hearing. They argue that the court should consider the following factors in determining whether to grant leave to bring the third-party claim:

(a) Whether there is bad faith by the Defendants in bringing the third-party claim;

(b) Whether there is serious, non-compensable prejudice to the Plaintiffs; and

(c) Whether the limitation period has expired.

[52] The Defendants submit that an examination of these relevant factors makes clear that leave should be granted to file a third-party claim against 331 Co.

[53] The Plaintiffs, on the other hand, maintain that the motion is made in bad faith, and that they will suffer serious, non-compensable prejudice, if permission is granted to file a third-party claim.

Bad Faith

[54] The Plaintiffs say that the Defendants have brought this motion for vexatious purposes, in an attempt to delay this action and cause further prejudice. Thus, it is suggested that there is bad faith as the motivation behind this motion.

[55] The Plaintiffs submit as follows at paras. 3-12 of their written submissions:

> 3. The Defendants appear to be implying that they are relying on the MacDonald report as new evidence, however, the MacDonald report does not implicate the installer directly nor does it disclose any evidence that was not available to the Defendants at the time they filed their defence.
>
> 4. The Defendants claim that the delay in getting the MacDonald report was caused by the Plaintiffs, however, the delay was the direct result of the actions of Defendants and their Counsel. As it stands, the Plaintiffs and the Defendants entered into a consent order for inspection, however, the Defendants have refused or neglected to complete their inspection in accordance with the consent order and are therefore in breach of that order.
>
> 5. If the Defendants have any cause of action against the installer, it would not be through these court proceedings but through the alleged Independent Contract Agreement for installers as provided under Exhibit "A" of the Rundel Affidavit.
>
> 6. The Defendants have brought this motion at this time for vexatious purposes. The Defendants are simply trying to delay this action and causing further prejudice against the Plaintiffs. The Defendants spent almost 7 months indicating their willingness to settle once they had their inspection. Adding a third party at this time will potentially push settlement out another year or more.
>
> 7. The Plaintiffs and the installer are prejudiced by the fact that Gilles Bourgeoius destroyed evidence on November 23, 2022, and November 30, 2022, by removing large sections of the Plaintiffs roof and not documenting the removal.
>
> 8. Many of the witnesses are no longer available.
>
> 9. The Plaintiffs are further prejudiced by the fact that the damage to their home is ongoing and may include mould that could cause health concerns in the future.
>
> 10. The Plaintiffs cannot have their chimney safely cleaned, which increases the risk of fire and all progress on their home has been stalled including repairs and any steps to mitigate damage.

> 11. The Plaintiffs are in breach of both their mortgage and insurance agreements.
>
> 12. The presumption is that in bringing a motion of this nature at this time, the moving party is acting in good faith and after reading the Rundle affidavit and their legal brief they have failed to meet that burden.

[56] The Defendants submit that the burden of establishing bad faith lies with the Plaintiffs who, they submit, have failed to meet this high burden:

> 43. Bad faith is established if the requested amendment is motivated by an improper purpose, including delaying or obstructing the proceeding, or to subvert justice;
>
> 44. The Defendants are not motivated by any improper purpose in bringing the third party claim against 331 Co. The Defendants submit they have a legitimate basis for a third party claim for indemnity and contribution against 331 Co. as an independent contractor. Further, adding 331 Co. as a Third Party to the present action serves the interests of the just, speedy and efficient resolution of this dispute per Civil Procedure Rule 1.01 and avoids a multiplicity of proceedings. This is further underscored by the presumption in Rule 35.08 that the effective administration of justice requires each person who has an interest in the issues to be before the Court in <u>one hearing.</u>
>
> 45. The evidence establishes that the Defendants have acted expeditiously with respect to bringing the third party claim. The Defendants advised the Plaintiffs and the Court of their intention to bring a third party claim against the installer as soon as they were made aware of a claim for contribution and indemnity against 331 Co. following Mr. MacDonald's communication of his preliminary findings from his inspection of the Roof in January 2024. The Defendants have acted diligently to bring the third party claim upon receiving Mr. MacDonald's findings.
>
> 46. There is no evidence of any bad faith on the Defendants' part in seeking to have 331 Co. added as a Third-Party. As the party alleging bad faith, the Plaintiffs have the onus to provide strong and compelling evidence to support this allegation. The Defendants submit they have failed to do so.

[57] The law is well-settled that the burden of establishing *bad faith* is on the party raising it. It is a serious allegation and there would have to be strong and compelling evidence in support of it.

[58] Having considered all the evidence, the case law and the submissions of the parties, I am not satisfied that there is sufficient evidence on the record to

demonstrate that the Defendants' motion to add 331 Co. as a third party is motivated by an improper purpose, including delaying or obstructing the proceeding or subverting justice (*Mitsui & Co. (Point Aconi) Ltd. and Jones Power Co. Ltd*, 2001 NSSC 178, at para. 29). Put differently, in this case there is not enough evidence to support a finding of bad faith, as mere suspicion is not enough (*M5 Marketing Communications Inc. v. Ross*, 2011 NSSC 32, at para. 31).

[59] In my view, the Defendants have acted professionally, responsibly and expeditiously in bringing this third-party claim. I have reached this conclusion after considering all of the evidence, including the able submissions of the parties.

[60] I am satisfied that the Defendants brought this motion upon discovering that they had a legitimate basis for a third-party claim for indemnity and contribution against 331 Co. as an independent contractor. Indeed, the Defendants advised the Plaintiffs and the court of their intention to bring a third-party claim against the installer (331 Co.) following Mr. MacDonald's communication of his preliminary findings from his inspection of the roof in January 2024.

[61] There is no evidence of any bad faith on the Defendants' part in seeking to have 331 Co. added as a third party. As previously stated, the Plaintiffs have the onus to provide strong and compelling evidence to support this allegation. Mere suspicion is not enough. The Plaintiffs have not met this burden.

Serious Non-Compensable Prejudice

[62] Having considered all the evidence, and submissions of the parties, I find that adding 331 Co. as a third party will not result in any serious, non-compensable prejudice to the Plaintiffs which would justify a denial of leave to bring the third-party claim. Let me explain.

[63] In *Altschuler v. Bayswater Construction Limited*, 2019 NSSC 197, Justice Bodurtha summarized the principles guiding the assessment of non-compensable prejudice. He noted:

> [16] In *Thornton v. RBC General Insurance Company*, 2014 NSSC 215, at para. 33, Justice Wood (as he then was), described prejudice that cannot be compensated in costs:
>
> > 33 ... That type of prejudice is typically evidentiary in nature, which requires a consideration of whether documents and witnesses have been lost due to the passage of time.

[17] In *1588444 Ontario Ltd. (c.o.b. Alfredo's) v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, [2017] O.J. No. 24, the Ontario Court of Appeal said the following about non-compensable prejudice 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.
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> - 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.
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> - 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.
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> - 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 CanII 5135 (Ont. C.A.), at para. 6.
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> - The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 27 O.R. (3d) 576 (1996), 27 (C.A.), at paras. 3-4, and *Plante v. Industrial Alliance Life Insurance Co.* (2003), 66 O.R. (3d) 74 (Master), at para. 21.
>
> - The onus to rebut presumed prejudice lies with the moving party: *Family Delicatessen*, at para. 6.

[18] In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.*, 2001 NSSC 178, the defendant asserted prejudice of a similar nature to that claimed by the defendant in this case. Justice Wright concluded that the defendant had failed to demonstrate prejudice that could not be compensated in costs:

> 32 The demonstration of prejudice alone, however, does not satisfy the legal test to be applied on this application. The burden is on Mitsui to further demonstrate that the prejudice caused cannot be compensated in costs. Undoubtedly these amendments, if permitted, will necessitate further discovery and the re-instruction of experts which inevitably will result in more cost and some measure of delay. There has not as yet been any discovery of experts, however, and although there is always a risk of fading memories, any lay witnesses who do need to be re-examined will at least

> have the benefit of the transcripts of their earlier discovery evidence in a situation where the factual underpinning of the case has not changed.

[64] The Defendants submit that the circumstances which give arise to serious, non-compensable prejudice are not present in this case. To illustrate their point, they cite the following cases as examples where serious, non-compensable prejudice was found:

- In *DeGruchy v. Pettipas*, 2004 NSSC 65, the court found that there was serious non-compensable prejudice when the Defendants sought to amend their defence two weeks before trial of an action with a long history, to add a limitations defence. This amendment would require further discoveries and would require the adjournment of the impending trial.

- In *Hardy v. Prince George Hotel Ltd*, 2004 NSSC 168, the Defendants' application to add a third party was dismissed due to serious non-compensable prejudice given the advanced stage of the proceedings. The Defendant had added the third party six years prior and had subsequently discontinued the third party action five years prior. The trial was now scheduled within 18 months. The court found that the delay of approximately five years was sufficiently lengthy to constitute non-compensable prejudice, largely because the Defendants had known of the third-party's potential involvement from the beginning (as evidenced by the discontinued third-party proceedings against them).

[65] The Defendants submit that these two cases highlight the type and extent of prejudice that is required in order to constitute serious, non-compensable prejudice warranting denial of a third-party claim. They further submit that the case at bar does not rise to the threshold of serious, non-compensable prejudice as established by the case law (Defendants' written submissions, at para. 52).

[66] The Defendants argue that this case is in very early stages of the litigation, unlike the above-noted cases. Documents have been disclosed but discoveries have not yet been scheduled. Unlike the above-noted cases, where the matters were close to or on the eve of trial, this matter has not been set down for trial and is, in fact, years away from a trial. While pleadings have closed, the Defendants' third-party claim against 331 Co. is still well within the two-year limitation period set out in the

Limitation of Actions Act, SNS 2014, c. 35, s. 8(1)(a) (Defendants' written submissions, at para. 53).

[67] Also, the Defendants' say that they have acted diligently to bring this motion to add the third party as soon as they became aware of a third-party claim against the installer following Mr. MacDonald's inspection in January 2024 (Defendants' written submissions, at para. 54).

[68] The moving party acknowledges that adding 331 Co. as a third party will result in some procedural delay. However, they submit that any such delay does not rise to the high threshold of serious, non-compensable prejudice warranting denial of the third-party claim in the very early stages of this litigation and well within the limitation period (Defendants' written submissions, at para. 55).

[69] Lastly, the Defendants say that "any potential prejudice caused by the delay in adding 311 Co. as a third party rests on the Plaintiffs." They argue that since February 2023, they repeatedly attempted to have Mr. MacDonald's inspection take place by consent. Moreover, "it was not until January 2024, after the Defendants' filed a motion to compel Mr. MacDonald's inspection, that the Plaintiffs finally consented to Mr. MacDonald completing his inspection of the Roof." (Defendants' written submissions, at para. 55).

[70] The Plaintiffs, on the other hand, stress that they did not, in any way, act in a manner as to delay proceedings. They submit the following in support of this contention (Plaintiffs' written submissions, paras. 26-38):

> 26. … The Buteaus supported both settlement and a proper inspection. Counsel indicted throughout that they required the inspection report before they would discuss settlement and only mentioned adding a third party after the inspection was completed. As per the Rundle affidavit paragraphs 24, 25, and 26, counsel raised the third party claim issue immediately after the inspection was completed and prior to their clients discussing Mr. MacDonald's finding with them.
>
> 27. The Defendants are implying that the MacDonald report (see Exhibit "T" of the Rundle Affidavit) is new evidence, however, the deficiencies identified in the MacDonald report were evident to Gilles Bourgeois in November 2022 during his inspections as evidenced in Image 25 of the MacDonald Report (see Exhibit "T" of the Rundle Affidavit).
>
> 28. On October 31, 2022, Ms. Rundle wrote to the Buteaus indicating that they were looking for a third-party inspector (See Exhibit "5" of the Buteau affidavit).

29. The Defendants did not take any steps toward securing a third-party inspection until after January 29, 2023, when the Buteaus advised that they were going to proceed with their own inspections. On January 29, 2023, the Buteaus made it very clear that Mr. Bourgeois was not permitted back on their property (See Exhibit "7" of the Buteau affidavit).

30. On January 31, 2023, Erin McSorley confirmed their agreement to the Buteaus proposed inspection (See Exhibit "8" of the Buteau affidavit).

31. On February 1, 2023, the Buteaus reiterated that Mr. Bourgeois was not permitted at their property and that no more Interlock product would be allowed to leave the property (See Exhibit "9" of the Buteau affidavit).

32. On February 9, 2023, at 5:57 pm Erin McSorley sent an email to the Buteaus indicating that the Defendants' engineer was canceling the inspection for February 10, 2023 (due to a weather forecast) (See Exhibit "F" of the Rundle affidavit).

33. The Buteaus engineer attended their property on February 10, 2023, however, due to MPR refusing to facilitate the agreed upon inspection his scope was limited.

34. Between February 10, 2023, and April 18, 2023, the Defendants took no tangible steps toward securing a third party inspection. On April 16, 2023, the Buteaus invited and encouraged the defendants to secure their own experts and complete their own inspections. On April 24, 2023, Erin McSorley sent Mr. Bourgeois to the Buteaus property (after being advised a number of times that he was not permitted on the Buteaus property) (see Exhibit "K" of the Rundle affidavit).

35. On April 24, 2023, Mr. Ivor MacDonald was provided with open access to the Buteaus home and property. The Buteaus provided scaffold access to both the north and south faces of their roof. Mr. MacDonald further requested and was provided with all the same documentation that the Buteaus experts relied upon along with their summary of finding reports.

36. On April 24, 2023, Mr. MacDonald indicated to Mr. Buteau that he needed the temporary wrap rolled back so he could examine the trusses. Mr. Buteau advised that he required a letter from counsel indicating that request and a proposed date. Counsel did not make any attempt to secure another inspection date until the eve of the first Case Management Conference on June 27, 2023 (see Exhibit "L" of the Rundle affidavit).

37. Between June 28, 2023, and January 2024, the Buteaus made multiple attempts to work out the mechanics of the Defendants' inspection with very little cooperation from the Defendants or their counsel.

> 38. On January 12, 2024, Mr. Ivor MacDonald attended the Buteaus property and merely peeled back the temporary wrap to look at the trusses and ended his inspection despite the long list of items on his scope of inspection.

[71] The Plaintiffs further argue that they have not caused any delay, as all the delay has been caused by the Defendants. They contend that if the motion to add 331 Co. as a third party is granted, it will take years to complete the action (Plaintiffs' written submissions, at para. 41). Thus, this will cause them to suffer serious, non-compensable prejudice. They cite *Blumenfeld v. Coleman*, 2005 NSSC 319, wherein Justice LeBlanc wrote:

> [7] In *Hardy v. Prince George Hotel* (2004), 226 N.S.R. (2d) 1 (S.C.) Murphy J. stated that it was necessary to consider "the potential prejudice to all parties and the explanations given, and the implications involved in adding third parties ... " (para. 26). In order to determine whether the application should be granted, I must consider whether the parties will suffer prejudice, with particular emphasis on the costs, complexity and time involved. I must also consider whether the defendant has a reasonable excuse for the delay in making an application. The burden is on the applicant to establish a reasonable excuse for the delay. On an application of this kind, I note that the court is exercising its discretion.
>
> [8] Under Rule 9.07 this court has consistently applied several factors when determining prejudice. These include increased costs, loss of evidence, or the likelihood of a party leaving the jurisdiction. In *Minkoff v. Poole* (1991), 101 N.S.R. (2d) 143 (S.C.A.D.) the Appeal Division held that "long delay of itself gives rise to an inference of prejudice. The strength of the inference depends ... on all the circumstances" (para. 23). This case involved an appeal of the dismissal of an application to renew an originating notice pursuant to Rule 9.07(1). In allowing the appeal, the Court of Appeal stated that the respondents had failed to adduce any evidence to support their claim that they had been prejudiced (para. 34). The respondent must show actual prejudice, even when there has been inordinate delay. Minkoff was followed by Hood J. in *Turner v. Belitsky et al.* (2003), 216 N.S.R. (2d) 64 (S.C.), another case involving the renewal of an originating notice. She stated that there must be evidence of prejudice beyond the inference alone in order to outweigh the prejudice to the plaintiff that would result from not renewing the originating notice (para. 3). Delay, in and of itself, is not a stand-alone consideration when balancing prejudices.

[72] The Plaintiffs contend that this action is "a very simple action dealing with a leaking roof, an unsubstantiated vented space, and physical damage to the Buteau's property" (Plaintiffs' written submissions, at para. 43).

[73] The Plaintiffs acknowledge the existence of pre-existing damage, as they have always "agreed to accept a degree of responsibility." They say that "the Defendants'

are taking a simple case and trying to make it far more complex than it needs to be and appear to be doing so maliciously to cause harm to the Plaintiffs" (Plaintiffs' written submissions, at para. 43).

[74] Lastly, the Plaintiffs say that the MacDonald report indicates the ongoing leaks need to be addressed as soon as possible. Thus, by adding the third party, they will not be able to take any mitigating steps until the third party has had an opportunity to do all their inspections (Plaintiffs' written submissions, at para. 46).

[75] As stated in *158844 Ontario Ltd* (*c.o.b Alfredo's)* the onus to prove actual prejudice lies with the responding party. In circumstances where the delay in seeking an amendment will be so lengthy and the justification so inadequate, such prejudice to the responding party will be presumed. Once actual prejudice has been proven by the responding party, the onus shifts to the moving party to rebut the presumed prejudice (at para. 25).

[76] The demonstration of prejudice alone, however, does not satisfy the legal test to be applied in this motion, which requires the responding party to demonstrate further that the prejudice caused cannot be compensated in costs. Undoubtedly, adding 331 Co. as a third party to the action will necessitate further costs and some measure of delay. I say that mindful that this case is in the very early stages of the litigation. Documents have been disclosed but discoveries have not been scheduled. Unlike the above cases, where the matters were close to or on the eve of trial, this matter has not been set down for trial and is, in fact, years away from trial.

[77] The prospect of a lengthier discovery process or trial which may arise from adding 331 Co. as a third party does not constitute serious prejudice. As noted in *Mitsui & Co. (Point Aconi) Ltd.*:

> 32 The demonstration of prejudice alone, however, does not satisfy the legal test to be applied on this application. The burden is on Mitsui to further demonstrate that the prejudice caused cannot be compensated in costs. Undoubtedly these amendments, if permitted, will necessitate further discovery and the re-instruction of experts which inevitably will result in more cost and some measure of delay. There has not as yet been any discovery of experts, however, and although there is always a risk of fading memories, any lay witnesses who do need to be re-examined will at least have the benefit of the transcripts of their earlier discovery evidence in a situation where the factual underpinning of the case has not changed.

[78] I am not satisfied that the delay in this case rises to the high threshold of serious, non-compensable prejudice warranting denial of the third-party claim in the very early stages of this litigation and well within the limitation period.

[79] Though the overarching purpose or objective of the Nova Scota *Civil Procedure Rules* is to promote a just, speedy and inexpensive determination of every proceeding, civil trials in this province can take years to complete. Unfortunately, that is the realty of the situation. I say that mindful that a culture of complacency towards delay in civil proceeding must be discouraged. Unnecessary procedures and adjournments, including applications and/or motions, result in inefficient practices which give rise to ever-increasing costs and delay. The culture of delay causes great harm to public confidence in civil proceedings in that it frustrates the well-intentioned litigant.

[80] In this case, as noted above, the Plaintiffs are understandably frustrated with the time in which this case will likely take to complete. This frustration, however, must be considered and weighed with the right of the Defendants to properly defend their case.

[81] As stated in *1588444 Ontario Ltd. (c.o.b. Alfredo's),* 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 (at para. 25). Where such prejudice is alleged, however, there must be specific details provided. An assertion such as "many of the witnesses are no longer available" lacks specificity. The Plaintiffs' assertion that they are further prejudiced because they "cannot have their chimney safely cleaned, which increases the risk of fire and all progress on their home has been stalled including repairs and any steps to mitigate damage" does not rise to the threshold of being serious, non-compensable prejudice.

[82] There also must be a causal connection between the non-compensable prejudice and adding the third-party claim (*1588444 Ontario Ltd. (c.o.b. Alfredo's*, at para. 25). In other words, the prejudice must flow from the adding of the third-party claim and not from some other source (at para. 25). In *Thornton*, Justice Wood (as he then was) described non-compensable prejudice as being "typically evidentiary in nature, which requires a consideration of whether documents and witnesses have been lost due to the passage of time" (at para. 33). Arguably, the unavailability of witnesses because of the passage of time is an example of what could be described as non-compensable prejudice. However, there must be a casual

connection between the non-compensable prejudice and the addition of the third-party claim. Where such prejudice is alleged, specific details must be provided. 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 (at para. 25). However, 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 (at para. 17). In the case at bar, this presumption does not arise, because the delay is not inordinately long and the addition of the third party will not affect the complexity of the trial.

[83] In the case at bar, there are no specific details provided to establish that the Plaintiffs will suffer actual prejudice; that is, evidence that the responding party will lose an opportunity in the litigation that cannot be compensated because of the motion to add a third party to the action. Though the responding party says that they are prejudiced by the fact that Gilles Bourgeouis destroyed evidence by removing large sections of their roof and by not documenting the removal, they do not demonstrate the casual connection between that and adding 331 Co. as a third party. Again, the onus to prove actual prejudice lies with the responding party (*1588444 Ontario Ltd*. (*c.b.o. Alfredo's*), at para. 25).

[84] As emphasized by Justice Cromwell (as he then was) in *Garth v. Halifax (Regional Municipality),* (2006), 245 N.S.R. (2d) 108:

> [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.

[85] Having considered the totality of the evidence, case law and the submissions of the parties, I find that there is insufficient evidence to conclude that adding 331 Co. as a third party will result in serious, non-compensable prejudice to the responding party, which would justify a denial of leave to bring the third-party claim.

Limitation Period

[86] As stated above, the limitation period for the third-party claim has not expired. Hence, in accordance with the presumption under Rule 35.08, and the just and efficient administration of justice, it is in the interest of the parties to the issues in this action to be determined by the court in one proceeding, rather than multiple proceedings.

Conclusion

[87] For all the foregoing reasons, I am not satisfied that the responding party has demonstrated that the granting of the motion to allow the adding of a third party to the action would cause serious, non-compensable prejudice to them. Nor am I persuaded that there is any element of bad faith involved and the limitation period for the third-party claim has not expired.

[88] Accordingly, the moving party's motion with leave to add 331 Co. as a third party to the action is granted.

[89] I will leave it to the parties to try to reach agreement on costs. If an agreement cannot be reached, the parties may make further written submissions within thirty days of the date of release of this decision.

Hoskins, J.