CITATION: 6680283 Canada Inc et al v. Ontario Power Authority et al, 2024 ONSC 6124
COURT FILE NO.: 18-84-A1
DATE: 2024/11/07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 6680283 Canada Inc. O/A Ferme V3 Farm, The Estate of Bertrand Villeneuve, Deceased, By His Estate Trustees Emmanuelle St. Jean And Micheline Villeneuve, Micheline Villeneuve, Ferme Bertrand Villeneuve Registered, 7170301 Canada Inc., Carl Villeneuve, Michel; Lahaye, Fabienne Cote and Enviro Science & Faune Inc.,

Plaintiffs

AND

Ontario Power Authority, Independent Electricity System Operator, Hydro One Networks Inc., Hydro Once Inc., Current Technologies Ltd., Sonepar Canada Inc., Randy Martin, Cooper Lighting International, S. De R.L. De C.V., John Doe Ballast Distributor, John Doe Ballast Supplier, John Doe Light Manufacturer, John Doe Light Distributor, John Doe Light Supplier, Philips Lighting Co., John Doe Distributor, John Doe Supplier, John Doe Contractor 1, John Doe Contractor 2 and John Doe Contractor 3

Defendants

AND

Nedco o/b Rexel Canada Electrical Inc./ Rexel Canada Electrique Inc.

Third Party

BEFORE: Justice Marc R. Labrosse

COUNSEL: Martin P. Forget, Counsel for the Plaintiffs

Martin A. Smith, Counsel for the Defendants Ontario Power Authority, and Independent Electricity System Operator

Iain Peck, Counsel for the Defendant SLP Lighting, Koller Enterprises and David Koller

Stephen Schenke, Counsel for the Defendant Cooper Lighting International, S. De R.L. De C.V.

Andrew K. Lee, Counsel for the Defendant Philips Lighting Co.

David M. Powrie, Counsel for the Defendant Current Technologies Ltd.

Monica E. Caceres, Counsel for the Defendants Hydro One Inc., and Hydro One Networks Inc.

Vagmi Patel, Counsel for the Defendants Sonepar Canada Inc., and Random Martin

Brian Sunohara, Counsel for the Third Party

HEARD: July 5, 2024, and July 24, 2024

ENDORSEMENT

Overview

[1] The Plaintiffs have brought a motion seeking to correct misnomer. There are essentially two motions before the court involving two classes of proposed defendants.

[2] In Motion #1, the Plaintiffs seek relief against what will be referred to as the Cooper Lighting Defendants:

a. An Order that leave be granted to correct the title of the proceeding by correcting the misnomer of the Defendant "Cooper Lighting Internacional, S. de R.L. de C.V." with "Cooper Lighting de Mexico S. de R.L. de C.V.", and "Cooper Lighting LLC";

b. An Order that leave be granted to correct the title of the proceeding by correcting the misnomer of the Defendant "John Doe Light Distributor" with "Cooper Lighting Canada Limited".

[3] In Motion #2, the Plaintiffs seek to correct the misnomer with respect to Defendants who will be referred to as the Koller Defendants. The Plaintiffs seek to correct the misnomer of "John Doe Manufacturer" with SLP Lighting LLC, Koller Enterprises and David Koller.

[4] There is also related relief relating to the amendments to the title of proceedings, corresponding amendments to the Amended Statement of Claim and an order for the new Defendants to file their defences.

[5] These motions arise from a fire which occurred on or about March 7, 2017, in St. Eugene, Ontario. A Notice of Action was issued on December 31, 2018, roughly 21 months after the fire. The Plaintiffs alleged that a fluorescent light fixture or light bulb is the origin and cause of the fire. The Statement of Claim was issued on January 30, 2019. The action named 12 "John Doe" Defendants and seven named Defendants.

[6] On April 2, 2020, an exemplar light fixture, or luminaire, installed at the property and supplied to the Plaintiffs was found to have a label identifying "Cooper Lighting – Monterrey

Mexico N.L." and determined that Philips Lighting Co and SLP Lighting LLC were involved as manufacturers.

[7] Following the discovery of the label identifying the names Cooper Lighting – Monterrey Mexico N.L., the Plaintiffs have embarked on numerous steps and proceedings in an attempt to serve all the Defendants it seeks to include in the litigation. There have been numerous disputes surrounding the service of the Amended Statement of Claim along with the identification of whom should properly be named as a Defendant in this litigation. At certain times during these proceedings, counsel for various parties have been guilty of not being explicit as to the proper corporate names of the various corporate entities and this has led to much confusion for the court.

[8] In the end, the court is satisfied that the guiding principles of the law of misnomer have been complied with by the Plaintiffs and that there are not grounds upon which the court should exercise its discretion and refuse the requested relief. The bottom line is that a generous reading of the Statement of Claim would have allowed any of the proposed corporate defendants to realize that the litigation finger was pointed at them and that the law of misnomer allows the Plaintiffs to have them named as defendants.

Factual Background

[9] This action relates to a fire which occurred on March 7, 2017, in St. Eugene, Ontario.

[10] A Notice of Action was issued on December 31, 2018 and the resulting Statement of Claim issued on January 30, 2019. It is alleged that the fire was ignited by a failure of a light fixture in the subject premises. The substantive paragraph of the claim relating to the light fixture is set out as follows:

> 39. The origin of the Fire was within the garage and the cause of the Fire was an electrical short within a Fluorescent Fixture and/or Fluorescent Light Bulb.

[11] The Statement of Claim included a number of pseudonyms related to the said light fixture including: John Doe Ballast Manufacturer, John Doe Ballast Distributor, John Doe Ballast Supplier, John Doe Light Manufacturer, John Doe Light Distributor, John Doe Light Supplier, John Doe Manufacturer, John Doe Distributor, John Doe Supplier, John Doe Contractor 1, John Doe Contractor 2, and John Doe Contractor 3.

[12] On this motion, the respondents (the proposed defendants to the action) advance that the presumptive limitation period ended on or about March 7, 2019. As of that date, the Plaintiffs had not taken any steps to modify any of the "John Doe" pseudonyms in their original Statement of Claim.

[13] On April 2, 2020, an investigation by the Plaintiffs revealed an exemplar light fixture contained a label indicating the name "Cooper Lighting – Monterrey, N.L., Mexico" would have been at the cause of the fire. There was also a ULC file number on the label associated with Cooper Lighting LLC.

[14] On April 22, 2021, over two years after the original Statement of Claim was issued, the Plaintiffs brought a motion returnable on August 6, 2021, for an Order to correct misnomers. The relief requested was as follows:

> a. An Order that leave be granted to amend the Statement of Claim by:
>
> i. correcting the misnomer, "John Doe Manufacturer", by naming Philips Lighting Co. and SLP Lighting, LLC as Defendants; and
>
> ii. correcting the misnomer, "John Doe Ballast Manufacturer" by naming Cooper Lighting Internacional, S. de R.L. de C.V. as a Defendant.

[15] The misnomer motion proceeded on August 6, 2021. Justice Williams ordered the style of cause to be corrected and the Defendants, John Doe Ballast Manufacturer and John Doe Manufacturer, were substituted with Cooper Lighting Internacional S. de R.L. de C.V. and Philips Lighting Co.

[16] The Plaintiffs had sought relief against SLP Lighting, LLC. There were communications between counsel for the Plaintiffs and counsel for SLP Lighting and it was agreed amongst them that the motion to include SLP Lighting, LLC would be withdrawn without costs. The wording of the order signed stated that the motion as against SLP Lighting, LLC was dismissed without costs. There is no evidence that the motion against SLP Lighting, LLC was adjudicated on the merits. SLP Lighting, LLC is purported to be a related company to Koller Enterprises and David Koller.

[17] An Amended Statement of Claim was issued on September 8, 2021, and served on the Defendants on December 22, 2021, at the place of business of Philips Lighting Co.

[18] There is a lengthy history concerning various corporate entities which are related to Phillips Lighting and Cooper Lighting brand names. The Plaintiffs allege that since May 2018, Philips Lighting was recognized as Signify. Following the name change, Signify purchased and acquired Cooper Lighting. As of December 22, 2021, Signify owned, operated and had fully integrated Cooper Lighting.

[19] There is clearly a complex corporate structure to the corporations who operate under the names Signify, Cooper Lighting, and Philips Lighting. The Cooper Defendants have done little to clarify those relationships for the court. The materials and submissions seem to almost use the various entities associated to Signify, Cooper Lighting and Philips Lighting interchangeably which is confusing at time.

[20] On November 16, 2021, the Defendant Philips Lighting Co. retained counsel, Andrew Lee of Bell Temple LLP, to represent both Philips Lighting Co. and Cooper Lighting Internacional S. de R.L. de C.V. ("Cooper Lighting Internacional"). Mr. Lee advised that he prepared a Statement of Defence for his clients and would serve and file them once his clients had been properly served with the Amended Statement of Claim.

[21] On June 13, 2023, the Plaintiffs appointed Martin P. Forget as solicitor of record.

[22] Over many months, there were numerous disputes between the parties to ascertain if the Defendants had been properly served. Specifically, Cooper Lighting Internacional took the position that service had to be through the Hague Convention.

[23] The Plaintiffs took the position that they served Cooper Lighting Internacional in the following ways:

a. On Philips Lighting (who changed its name to Signify) on December 21, 2021;

b. On the Headquarters Cooper Lighting LLC on March 25, 2024;

c. On Signify Canada Ltd. on February 12, 2024;

d. On Cooper Lighting Canada Limited on May 15, 2024; and

e. On Cooper Lighting Internacional on or about July 2, 2024 through the Hague.

[24] In or about April of 2024, the Plaintiffs became aware that the entity Cooper Lighting Internacional S. de R.L. de C.V. had ceased to exist in or about 2004 after being amalgamated into a subsidiary of Cooper Lighting LLC known as Cooper Lighting de Mexico, S. de R.L. de C.V. (now referred to as "Cooper Lighting Mexico"). In addition, it became known that Cooper Lighting Canada Limited was a distributor for Cooper Lighting Mexico.

[25] As set out above, service of the Amended Statement of Claim which included the corrected misnomers by Justice Williams was made through the Hague Convention in early July 2024 in respect of Cooper Lighting Internacional.

[26] Accordingly, and leading into this motion, the issue of service or substituted service was resolved. With the service of Cooper Lighting Internacional through the Hague Convention, the proposed Cooper/Phillips/Signify Defendants have agreed with the Plaintiffs that if the court grants the Plaintiffs' motion and permits their addition to the case, then the Plaintiffs can serve them through Lerners LLP via an email to Steve Schenke at sschenke@lerners.c on a condition that by agreeing to accept service in this alternative way, none of these proposed new Defendants will not be waiving any of its legal, procedural, substantive, appellate or other rights by doing so.

[27] Accordingly, the court was only asked to deal with the misnomer motions.

Position of the Parties

[28] The Plaintiffs advance that the law of misnomer has progressed beyond the point of simply correcting spelling errors. The Plaintiffs state that it was clear that the litigation finger was pointed towards the proposed defendants and that the lack of due diligence raised by the proposed defendants is not a reason to deny the misnomer.

[29] The Cooper Defendants claim that the proposed amendments sought by the Plaintiffs are not the correction of misnomers as the Statement of Claim did not provide sufficient information to allow for the litigation finger to be pointed at these proposed defendants as the allegations were too vague. On a fair reading of the Statement of Claim, the Cooper Defendants would not have known that they were being sued.

[30] In addition, the Cooper Defendants state that the court should be exercising its discretion to refuse the requested relief on the basis that the Plaintiffs delayed bringing a motion to correct the misnomer and that they have flouted the limitation period by doing so. In addition, there is nothing in the motion record that provides any excuse or explanation for the delay in presenting this motion.

[31] The Koller Defendants claim that the proposed amendments are not merely correcting a misnomer. Rather, these amendments constitute the addition of new defendants to the litigation. Neither the original Statement of Claim nor the Amended Statement of Claim point the litigating finger at the Koller Defendants because none of the descriptions of the "John Doe" defendants are consistent with their business. The description and the allegations in the initial and subsequent pleadings issued by the Plaintiffs do not reasonably and objectively indicate the proposed defendants were ever intended as defendants.

[32] Further, the limitation period for the Plaintiffs to add the Koller Defendants as defendants has long expired. Indeed, more than two years ago, the Plaintiffs tried to add SLP Lighting, LLC as a Defendant arguing a misnomer and that motion was dismissed.

Applicable Law

[33] Rule 5.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, allows for an order to be made to add, delete or substitute a party or correct the name of a party on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[34] All parties agree that the current Canadian law on misnomer stems from the principles set out in *Loy-English v. The Ottawa Hospital et al.*, 2019 ONSC 6075, 149 O.R. (3d) 129, at para. 21:

> [21] As with most discretionary remedies, results are fact driven and case specific. Despite, this, a number of principles may be derived from the jurisprudence. It is useful to summarize these as follows (references omitted):
>
> > (a) When a plaintiff does not know precisely who to name as defendants it is permissible to name unidentified defendants by way of a pseudonym. It would be better to bring transparency to this practice by naming them as "certain unidentified physicians collectively referred to as Dr. Doe" but the use of "Dr. Doe" or "Dr. X" is a practice that the courts have accepted as appropriate shorthand.
> >
> > (b) It is not necessary to name multiple Dr. Doe's and to precisely guess how many defendants to implicate. Providing the claim is drafted in a manner to

identify what allegations are made against individuals filling specific roles, the "litigation finger is divisible" and may point at more than one unknown defendant.

(c) Unlike a claim relying on discoverability to postpone the running of the limitation period, use of a pseudonym and subsequent correction of a misnomer is not subject to a due diligence requirement and will not be defeated by mere delay.

(d) Use of a pseudonym does not give *carte blanche* to get around the limitation period. Although the Act does not narrow the common law understanding of misnomer and preserves the power of the court to correct it, it does prohibit addition of parties if the limitation period has expired. The distinction is critical. It is the difference between correcting the claim to properly name a party already included in the action and adding a new party.

(e) To be a misnomer, the plaintiff must clearly have intended to sue the proposed defendant. The pleading must be drafted with sufficient particularity that an objective and generous reading of the pleading would demonstrate that the "litigation finger" is pointing at the proposed defendant. To put this another way, the pleading must be sufficiently clear that a properly informed defendant reading the allegation would be able to recognize that he or she was the target of the allegation. The allegation must be clear and definite on its face and not held together through a series of assumptions about what the person reading the statement of claim might know.

(f) Notice to the defendant within the limitation period cannot be a factor in deciding whether or not misnomer applies for the simple reason that, as discussed earlier, there is no requirement to serve a defendant within the limitation period. The question is not whether the defendant did know he or she was being sued but whether on a fair reading of the claim he or she would have known.

(g) Notice is relevant to the question of prejudice and the exercise of discretion. Actual notice to the proposed defendant will generally obviate any injustice in subsequently correcting the misnomer. Delay is also relevant to the issue of prejudice and to the exercise of discretion.

(h) Notice may be sufficient if the claim against an unknown party has been brought to the attention of the named defendant and to an employer, organization or insurer with the means to determine who was involved in the alleged acts or omissions. In that case it may not be unfair to correct the misnomer once the identity of the other defendant is known even in the absence of actual notice.

(i) It is not useful for misnomer motions to be decided based on technicalities or vagaries of pleading. The object of pleading analysis should not be one of looking for traps, tricks or loopholes. We should not be engaged in the legal equivalent of "whack a mole" or "gotcha". Rather, the question in every case should be whether it is reasonable and just to allow the pleading amendment and whether it is permitted by the governing legislation.

[35] In addition, the Plaintiffs rely on additional principles of misnomer to assist the court in analyzing the present case:

a. Due diligence is not a requirement for the plaintiff to be granted relief to correct a misnomer: see *Loy-English*, at para. 21(c).

b. Knowledge of the purported defendant, before issuing of the action, is also not a requirement for the misnomer to be corrected: see *Loy-English*, at paras. 21(a)-(b).

c. That the law has evolved and that it is no longer necessary for the target of litigation to be evident without the need to make further inquiries: see *Loy-English*, at para. 15.

d. That test for a "litigating finger" is whether a claim points at the intended defendant, not whether there is merit to the claim: see *Essar Algoma Steel Inc. v. Liebherr (Canada) Company*, 2010 ONSC 4623 at para 21.

[36] Turning to the discretion of the court, the proposed defendants state that this is the type of action where the court should exercise its discretion by denying the amendments sought by the Plaintiffs.

[37] As a result of the law of misnomer having been broadened in recent years, it is appropriate to take a wider view of the court's discretion to refuse the correction of a misnomer: see *Ormerod v. Strathroy Middlesex General Hospital*, 2009 ONCA 697. 97 O.R. (3d) 321, at para. 31.

[38] Where the plaintiff fails to address, directly or indirectly the failure to include a defendant within the applicable limitation period, this may warrant a refusal to grant the request to add a defendant: see *Montcalm v. Trillium Health Care Centre*, 2006 CanLII 32998 (Ont. S.C.).

[39] There is a presumption that the proposed defendants will be prejudiced by a plaintiff's inordinate delay. Where there is a presumption of prejudice there is no onus on the defendant to prove actual prejudice: see *Al-Enzi (Litigation Guardian of) v. Gyurik*, 2010 ONSC 3313, at para. 22, citing *Woodheath Developments Ltd. v. Goldman* (2001), 56 O.R. (3d) 658 at p. 665, aff'd (2003), 66 O.R. (3d) 731 (Div. Ct.).

Analysis

Correction of name for Cooper Lighting Mexico

[40] The first issue to be addressed is the change of name from Cooper Lighting Internacional to Cooper Lighting Mexico, as per the Plaintiffs' draft order. While I appreciate that the appeal of Justice Williams' endorsement has just recently been made in reliance on the recent service of the claim through the Hague Convention, it is difficult to understand how this change of name is not a proper claim for misnomer.

[41] Although the endorsement of Justice Williams is now under appeal, I am put in the position where I must deem that her order is correct until an appeal court finds otherwise. As such, Cooper Lighting Internacional became a named defendant following Justice Williams' endorsement. Further, Cooper Lighting Internacional was served through the Hague Convention in July 2024.

However, the evidence is that even council for Cooper Lighting Internacional was not aware of the proper name for his own client and failed to properly refer to that entity as "Cooper Lighting de Mexico S. De R.L. De C.V."

[42] Although council for that entity took the position that proper service had to be effected through the Hague Convention, it was incumbent upon that lawyer to notify the Plaintiffs that his client's purported name, Cooper Lighting Internacional, had been discontinued since 2004 and was no longer the proper corporate entity name for the related Cooper Lighting manufacturing company in Mexico.

[43] If that entity's own lawyer was not aware of the proper corporate name or neglected to advise the Plaintiffs of it, how can the Plaintiffs be expected to have known, back in 2021, that the corporate name used for the misnomer motion was incorrect. I specifically disagree with counsel for the Cooper Lighting Defendants who blamed the Plaintiffs for not figuring out the difference between Cooper Lighting Internacional and Cooper Lighting Mexico.

[44] Consequently, the correction required to properly name Cooper Lighting Mexico cannot be considered otherwise than a proper and even classic misnomer which satisfies the principles set out *Loy-English.*

[45] Accordingly, leave is granted to correct the name of the Defendant Cooper Lighting Internacional, S. de R.L. de C.V. with Cooper Lighting de Mexico S. De R.L. de C.V.

Misnomer – Motion #1

[46] I now turn to the motions to add the remaining Cooper Lighting Defendants. In terms of qualifying as a proper request for misnomer, the crux of the issue comes down to if the defendants before the court would have known that the litigation finger was pointing at them upon reading the Statement of Claim and particularly at paragraph 39, which sets out that the cause of the fire was an electrical short within a fluorescent fixture and or fluorescent light bulb. There is also relevant reference in the Statement of Claim to high output fluorescent fixtures and the location of the fire in Eastern Ontario along with the timing of the fire and the Small Business Lighting Program.

[47] The fire happened on March 17, 2017, and it is argued that the limitation period ended two years after that event. There was a further one-year delay during which the Plaintiffs investigated the fire, which revealed that a light fixture contained a label directing the fixture to the Cooper Lighting brand. The evidence before this Court is that it was not until 2020 that this information became known to the Plaintiffs. The limitation period had likely expired as discoverability has not been advanced. The misnomer motion before Justice Williams was prepared in April 2021 and the motion was heard on October 6, 2021.

[48] There is little to no evidence to explain the reason for the delay in bringing the misnomer motion.

[49] However, by the latest in November 2021, Signify Canada was served with a Statement of Defence and Cross-Claim of a co-defendant. Signify Canada then retained Mr. Lee to represent

both Philips Lighting and Cooper Lighting Internacional even though that legal entity no longer existed.

[50] In what I refer to Motion #1, there is no evidence to suggest that the two Cooper Lighting Defendants, Cooper Lighting LLC and Cooper Lighting Canada Limited, would not have had access to the knowledge of this litigation through its relationships with Signify Canada. The Cooper Defendants have not presented evidence to suggest otherwise. I appreciate that corporate entities are deemed to be distinct and that in this case, it appears that Signify Canada may have over 150 wholly owned subsidiaries. However, knowledge of the claim certainly existed within some of those related corporate entities when Mr. Lee was retained.

[51] I am satisfied that upon reading the Statement of Claim, representatives for both Cooper Lighting LLC and Cooper Lighting Canada Limited would have identified themselves as a manufacturer or distributor of the fluorescent light fixture described in the Statement of Claim.

[52] The various relationships between the Cooper Lighting and Philips Lighting entities make it clear that they had knowledge of the manufacturing role of Cooper Lighting Mexico and that this would extend to Cooper Lighting LLC as one of the possible manufacturers of the light fixture and Cooper Lighting Canada limited as one of the possible distributors.

[53] In coming to this conclusion, I do not allow myself to get bogged down with all of the complex corporate structures within the Signify Canada umbrella. It is evident that even their corporate lawyer retained for this litigation and their representative for cross-examination purposes did not fully grasp the complicated structure and the various corporate entities involved.

[54] In the present case, I am satisfied for the purposes of motion #1 that when the proposed corporate entities became aware of the Statement of Claim and the allegations in it, that they would have recognized that the litigation finger was pointed at them as potential manufacturers or distributors of the light fixture in question. There is also no evidence from the Cooper Defendants that they were confused or mislead by the Statement of Claim.

[55] It is sufficient that the proposed defendants would have seen themselves as manufacturers and distributors of fluorescent light bulbs and high output fluorescent fixtures.

[56] Given the existing corporate structures within the Signify Canada umbrella, it is almost impossible for the Plaintiffs to have been able to know exactly which corporate entity needed to be involved when representatives and lawyers of those entities themselves were not apparently aware that Cooper Lighting Internacional had not been in existence since 2004. If their counsel was aware, then his correspondence was misleading.

[57] In the end, the pleading that the fire caused in this case was as a result of the failure of a fluorescent light fixture or fluorescent light bulb (including a high output fixtures), manufactured or distributed in or about 2015 and distributed in Eastern Ontario is sufficient in my view to have pointed the litigation finger at Cooper Lighting LLC and Cooper Lighting Canada Limited and that these entities would have known upon reading the Statement of Claim that they were one of the targets of this litigation.

Misnomer - Motion #2

[58] Turning now to Motion #2. I am of the view that in reading the Statement of Claim which alleged that the fire was caused by a failure of a fluorescent light fixture and points the finger to the manufacturer, distributor, and contractor of that light fixture, that SLP Lighting LLC would have felt the litigation finger pointed at them. This is due to their role as a manufacturer of plastic components which they sell to manufacturers for use in luminaires or light fixtures. Those components are significant components of fluorescent light fixtures.

[59] I reject the position advanced by the Koller Defendants that it should be seen as simply a designer or manufacture of the casing alone and not as a manufacturer or part manufacturer of the light fixture. They advertise themselves as manufacturers. It will be a question in this litigation as to what component of the light fixture failed. If there is a separate manufacturer for an important component of the light fixture, clearly that party is properly named as a defendant to this claim. The Koller Defendants were aware that they provided parts to fluorescent light fixtures and there is no evidence that the Koller Defendants were confused by the claim but there is evidence of David Koller that he did not see his companies as having a role in the fire.

[60] I agree with the position of the Plaintiffs who suggest that to conclude otherwise would require the Plaintiffs to list a pseudonym for every part of the light fixture and that it should foresee the role of each party who may participate as a manufacturer of a separate part of the light fixture. This is certainly not the status of the law since *Loy-English* which requires that courts read the claim generously.

[61] Furthermore, this is not a situation where a new defendant is being added to the claim beyond the limitation period. I am of the view that Koller Lighting LLC properly formed part of the defendants which were included in the original Statement of Claim as manufacturers of part of the light fixture. When reading the claim generously, it must be found that if multiple parties are involved in the manufacturing of the light fixture, those parties fall under the description of John Doe Manufacturer.

[62] The law in terms of misnomer in Canada has evolved beyond the point of restricting the analysis in the manner proposed by the Koller Defendants. It would be inconsistent with the current law as set out in *Loy-English* to distinguish between the manufacturer of the electrical or metal components of the light fixture and the manufacturer of the plastic casing for the light fixture or part of it. It would be unjust to find that a pleading is not specific enough for having failed to make that distinction. In the end, the Koller Defendants are part of the manufacturing process for the light fixture and should be properly named as Defendants.

[63] With that said, the court distinguishes as to the personal role of David Koller and the role of Koller Enterprises as the owner of SLP Lighting. The Plaintiff's factum makes no mention of Mr. Koller or Koller Enterprises either as a manufacturer or distributor. The affidavit evidence states that Koller Enterprises does not manufacture products of any kind. No proper submissions were made to the court and no evidence was supplied which would suggest that either Mr. Koller or Koller Enterprises is involved as a manufacturer and accordingly, the request for their addition as Defendants in this claim is dismissed.

Discretion

[64] Turning to the discretion of the court to refuse the relief requested, the exercise of discretion turns on the delay issue and why it took two years to issue the Statement of Claim, followed by another year to investigate the light fixture and discover the reference to Cooper Lighting and then a further one-year delay to bring the misnomer motion. The absence of evidence to explain this delay militates in favour of the use of discretion to refuse to grant the requested amendments.

[65] However, the court also looks at what has happened in this litigation since 2021 when the Cooper Lighting Defendants, the Koller Defendants, and their related entities became aware of the litigation.

[66] Since that date, the parties have largely argued over who should be a named Defendant and service of the claim while being fully aware of the allegations within the claim. If delay was such a significant issue for the proposed defendants, then they had a prime opportunity to protect their rights by seeking to move promptly within the litigation and avoid further delay. To the contrary, these entities made a choice to challenge their status as Defendants by looking to avoid the service of the claim and to avoid the misnomer motion in 2021 in the hopes of not having to participate in the claim. This is inconsistent with claimed prejudice caused by delay.

[67] It is also relevant that in December 2021, Signify Canada had been served with the Statement of Claim and did not file its Statement of Defence until February 8, 2023, which is inconsistent with concern about delay.

[68] Furthermore, much of the case law relied upon by the respondents to both motions (as stated above, the proposed defendants to the action) predate the direction found in *Loy-English* and one of the guiding principles that a subsequent correction of a misnomer is not subject to a due diligence requirement and will not be defeated by mere delay.

[69] If I were to exercise my discretion to refuse the requested relief, I would be doing so solely as a result of the issue of the unexplained delay. While I accept that there is no onus on the proposed defendants to prove prejudice, there is still very little evidence of any actual prejudice and this is a factor that the court can consider in exercising its discretion.

[70] I agree with the proposition that mere delay in itself should not form the basis of a refusal to grant the correction of a misnomer. I come to this conclusion cognizant of the fact that there can be a presumption of prejudice as a result of the passage of time in this case. However, in looking at the entire period, the respondents to this motion have contributed to this delay by focusing on trying to avoid being included in the litigation. Overall, there is an element of shared delay when considering the entire period.

[71] In the end, I cannot conclude that the respondents would suffer any non-compensable prejudice if they are substituted as defendants. They have not testified to any real prejudice and the litigation has not progressed to an extent that they have been prevented from participating in any stage. There is no evidence as to the unavailability of documents or the testimony of

individuals and I conclude that this is not a proper case to exercise my discretion to refuse the requested relief.

[72] Furthermore, I do not agree with the position taken in Motion #2 by the Koller Defendants that the 2021 withdrawal or dismissal of the misnomer motion would impact the courts exercising of discretion in this case. The law is fairly established that a consent order dismissing the claim does not suggest any adjudication of the motion on the merits and the doctrine of *res judicata* cannot flow from it.

[73] Finally, I do not purport to make any findings on the merits of the appeal of Justice Williams' endorsement.

Conclusion

[74] For these reasons, the relief requested by the Plaintiffs an their Fresh as Amended Notice of Motion is granted.

Costs

[75] The parties are encouraged to resolve the issue of costs and if unable to do so, may provide written submissions on costs. The Plaintiffs will have 30 days from the date of this Endorsement to provide its written submissions on costs and the Defendants will have 30 days to respond. The Plaintiffs will then have 15 days for reply. These submissions on costs should be no longer than five pages plus attachments and shall comply with Rule 4.01.

Justice Marc R. Labrosse

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David M. Powrie, Counsel for the Defendant Current Technologies Ltd.

Monica E. Caceres, Counsel for the Defendants Hydro One Inc., and Hydro One Networks Inc.

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ENDORSEMENT

Justice Marc R. Labrosse

Released: November 7, 2024