

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Section 1 of the Owners, Strata Plan LMS  
2643 v. Kwan,  
2009 BCCA 342*

Date: 20090730

Docket: CA036495

Between:

Section 1 of the Owners, Strata Plan LMS 2643

Respondent  
(Plaintiff)

And

James Kwan, Yvonne Kwan

Appellants  
(Defendants)

And

Harold Developments Ltd., William Kwan, Harold Holdings Ltd.,  
Andrew Cheung Architects Inc., Andrew Cheung,  
Aqua-Thermal Consultants Ltd., Larry Wood, Jones Kwong Kishi  
(a partnership), Thomas Leung Structural Engineering Inc.,  
Matthew M.K. Mok, Jakin Engineering & Construction Ltd., James Yong,  
Dino Chies, William Kelly & Sons Plumbing Contractors (1989) Ltd.,  
Anthony Kelly, Almetco Building Products Ltd., R.D. Wilson, Tony Wong,  
O.G. Installations (1995) Ltd., Oscar Gazzola, Artec Glazing Contractors Inc.,  
Chris Husson, Villa Roofing & Sheet Metal Ltd., Payam Imani,  
Eltex Enterprises 2000 Ltd., Ralph Wilcott, Preswitt Manufacturing Ltd.,  
Quality Auditing Institute Ltd., Steven Harris, Hil-Ron Cladding Ltd.,  
Ian Ballam, Tony McGrail, Ezio Bortolussi, Newway Forming (1994) Ltd.,  
City of Richmond, Metro Testing Laboratories Ltd.,  
Alligator Installations Ltd., 0516997 B.C. Ltd. (formerly known as  
Tower Systems Ltd.), VSL Canada Ltd./VSL Canada Ltée., and  
Harris Steel Limited Acier Harris Limitée

Respondents  
(Defendants)

Before: The Honourable Mr. Justice Mackenzie  
The Honourable Mr. Justice Lowry  
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, September 22, 2008, **Section 1 of the  
Owners, Strata Plan LMS 2643 v. Harold Developments Ltd.**, 2008 BCSC 1271

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Place and Date of Hearing:

Vancouver, British Columbia  
February 18, 2009

Place and Date of Judgment:

Vancouver, British Columbia  
July 30, 2009

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Lowry

Reasons for Judgment of the Honourable Madam Justice Neilson:

## INTRODUCTION

[1] The appellants, James and Yvonne Kwan, appeal the dismissal of their motion to have their claims for construction deficiencies added to this action without being subject to a fully accrued limitation defence.

[2] The Kwans are the sole directors of the respondent Harold Developments Ltd. (“HDL”), a company that developed and built Lighthouse Place, a condominium with residential and commercial units in Richmond, B.C. The Kwans personally own 43 of the 106 residential units in the building.

[3] The occupancy permit for the building was issued on December 20, 1996. By 2000, building envelope problems allegedly arising from construction deficiencies had developed in the residential portion of the development. On November 2, 2005, the respondent Section 1 of the Owners, Strata Plan LMS 2643, which represented all owners of residential units except the Kwans (the “other owners”), commenced an action against the other respondents to this appeal, who were the parties involved in the development and construction of the condominium (the “construction defendants”), and the Kwans (the “other owners’ action”).

That action alleges that breach of warranty and negligence on the part of the construction defendants caused damage to both individual units and the common property in Lighthouse Place. It was commenced under ss. 171 and 172 of the *Strata Property Act*, S.B.C. 1998, c. 43, the relevant parts of which state:

- 171 (1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
- ...
- (b) the common property or common assets;
- ...
- 172 (1) The strata corporation may sue on behalf of one or more owners about matters affecting only their strata lots if, before beginning the suit,
- (a) it obtains the written consent of those owners, and
- (b) the suit is authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.
- (2) Only those owners on whose behalf the suit is brought must contribute to the expense of suing under this section.
- ...

[Emphasis added.]

[4] Since the Kwans were defendants in the other owners' action, s. 171(1) of the *Strata Property Act* precluded them from advancing their claims as plaintiffs in that action. On July 15, 2008, they brought an application before the case management judge seeking an order for the following relief:

1. The Applicants have leave, notwithstanding Case Management Directions and Orders herein, to issue and serve a Third Party Notice in the form attached hereto as "Schedule A," which Third Party Notice is not subject to any fully accrued limitation defence, pursuant to Rule 22(1)(c) and section 4(1) of the *Limitation Act* R.S.B.C. 1996, c. 266 and amendments thereto.
2. The Applicants have leave pursuant to Rule 15(5)(a)(iii)(A) and (B) to issue herein and serve a Writ and Statement of Claim, separate from all existing Writs and Statements of Claim, but in the same Action, in the form attached hereto as "Schedule B," which Writ and Statement of Claim are not subject to any fully accrued limitation defence, pursuant to section 4(1) of the *Limitation Act* aforesaid.

The pleadings in Schedule A and Schedule B essentially mirrored the allegations against the construction defendants in the other owners' statement of claim. The proposed third party notice also included a claim for contribution and indemnity with respect to any judgment recovered by the other owners, and expenses incurred in defending that claim. That part of the third party notice is not contentious.

[5] Exactly what "fully accrued limitation defence" the Kwans sought to avoid was somewhat obscure, because the parties agreed to argue the motion on the unusual assumption that the limitation period governing the Kwans' claim had passed, but that no conclusive finding could or should be made on that issue at this time. The only issue to be determined was whether the Kwans could meet the requirements of

R. 15(5)(a)(iii) or R. 22(1)(c) and s. 4 of the *Limitation Act*. Thus, regardless of the outcome of this application the factual basis for any limitation defence raised by the construction defendants remains to be determined in future proceedings.

## FACTUAL BACKGROUND

[6] The facts are not significantly in dispute. HDL and Ms. Kwan, or a representative on her behalf, were members of the strata council from 1997 to 2001. In 1997-98 several owners of residential units complained about water leaks. In 1999, the owners passed a special resolution authorizing expenditure for a building envelope inspection by R.D.H. Building Engineering Limited (“RDH”). That report was delivered in July 2000.

[7] In September 2000, Mr. and Ms. Kwan provided written comments on the report to the Lighthouse Place property manager. On November 27, 2000, RDH made a presentation to the strata council. From November 2000 until late 2007, the Kwans were represented by a firm of solicitors and a firm of barristers with respect to these developments.

[8] On November 29, 2000, HDL and the Kwans were advised by their solicitors that they were in “the awkward position of being potential claimants for compensation for losses suffered to their units,” but at the same time HDL would be a defendant in a claim for compensation by the other owners. They were advised to investigate the prospects of recovery against the parties involved in the construction of the building.

[9] On March 16, 2001, Mr. Kwan gave notice to the building’s architects (now one of the construction defendants) that legal counsel was reviewing the case with respect to “any damages we may suffer from the parties concerned”.

[10] On June 5, 2001, the barrister acting on behalf of the Kwans advised that she was trying to protect HDL’s position “should litigation ensue including what if any claims over you can make against the professionals and contractors whom you engaged for the construction of the project”.

[11] Mr. Kwan apparently inquired about mediation, and on June 15, 2001 the barrister advised him that a notice to mediate could not be issued until proceedings were commenced. Her letter also stated:

First, the Owners could issue a claim against Harold Developments claiming the cost of repairs. Alternatively, Harold could issue proceedings against the Contractors (excluding Jakin Engineering in respect of whom it provided a release) and claim that the Owners have threatened proceedings. The latter course would require Harold Developments to agree to undertake the repairs, and in circumstances where it is unknown what the Owners will accept as adequate repairs, or the costs of those repairs, I do not recommend this course at this time.

[12] On June 21, 2001, the barrister wrote to a number of the construction defendants indicating that her clients were hoping to avoid litigation, and suggesting that a “without prejudice” meeting be convened to discuss RDH’s recommendations, and the means of proceeding.

[13] In 2003, the strata corporation applied successfully before Mr. Justice Romilly to have an administrator

appointed on the basis that the Kwans were attempting to thwart repair attempts: *Strata Plan LMS 2643 v. Kwan*, 2003 BCSC 293, 7 R.P.R. (4th) 42. The Kwans were represented by the barristers at this hearing.

[14] On January 4, 2005, the Kwans' solicitor sent an e-mail to the barristers' firm which stated:

I further confirm your advice that because Harold Dev. and the Kwans are not assigning to the strata corp their rights to sue anyone to the strata corp [*sic*] we don't need to disclose the release from Harold Dev and the Kwans to the property manager, Jakin.

[15] On April 21, 2005, the solicitor sent an e-mail to HDL asking "if the consultants/trades are willing to pay something, does it mean the Kwans may have to start their own action as owners to participate?"

[16] On April 27, 2005, the solicitor wrote to the barristers framing the identical question, and asking that she provide the Kwans with advice on that point. The barrister's reply of May 3, 2005 was "... this is just too remote at the present time".

[17] In April and September 2005, two repair levies were assessed by the strata council, which totalled approximately \$7 million. The Kwans paid their proportionate share of about \$3.5 million.

[18] On May 6, 2005, the unit owners authorized the strata corporation to bring the other owners' action. The writ was filed on November 2, 2005, and served on the Kwans around December 1, 2005. The Kwans filed a statement of defence on June 15, 2006, which included a limitation defence.

[19] On April 6, 2007, the other owners appeared before Mr. Justice Sigurdson on an application to amend their statement of claim with respect to their claim against the Kwans for damages for negligence and duty to warn. The Kwans were represented by the barristers, and unsuccessfully opposed the application on the basis, among other things, that the proposed amendments were barred by the *Limitation Act: Strata Plan LMS 2643 v. Harold Developments Ltd.*, 2007 BCSC 1095, 75 B.C.L.R. (4th) 161.

[20] The Kwans retained their present counsel in November 2007. On December 13, 2007, he notified the other owners and the construction defendants that he intended to bring the application that forms the basis for this appeal. He delivered the notice of motion on February 22, 2008.

[21] Ms. Kwan swore an affidavit in which she maintained that, until she retained her present counsel, she did not appreciate that her claims for remediation costs were not included in the other owners' action, that she would have to take steps to advance her own claims, and that her claim might be precluded by a limitation defence. Mr. Kwan swore a brief affidavit that simply adopted Ms. Kwan's affidavit. Ms. Kwan swore a second affidavit with respect to a number of personal difficulties in 2005-06 that she said diverted her attention from this litigation.

[22] On September 9, 2008, the chambers judge dismissed the Kwans' application. Her order did not, however, preclude them from bringing future proceedings. Paragraph 3 stated:

3. If an action is pursued by the Kwans or if the Kwans issue a Third Party Notice in respect of a claim for separate loss, those proceedings are subject to any fully accrued limitation

defences.

## GROUND OF APPEAL

[23] The Kwans advance these grounds of appeal:

1. with respect to the application under R. 15(5), the chambers judge inappropriately fettered her discretion in deciding that they could not advance a companion action as plaintiffs in the other owners' action;
2. with respect to the application under R. 22(1)(c), the chambers judge erred in applying the principles in *Lui v. West Granville Manor Ltd. et al.* (1985), 18 D.L.R. (4th) 391, 61 B.C.L.R. 315 (C.A.) [*Lui No. 1* cited to B.C.L.R.], and *Lui v. West Granville Manor Ltd. et al.*, [1987] 4 W.W.R. 49, 11 B.C.L.R. (2d) 273 (C.A.), [*Lui No. 2* cited to B.C.L.R.], in particular:
  - a. in rejecting the Kwans' explanations for delay;
  - b. in failing to conduct her analysis in accord with the principles in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161, 19 B.C.L.R. (3d) 282; and
  - c. in placing too much weight on the failure to adequately explain the delay, and the lack of dependence between the Kwans' claims and those of the other owners, and ignoring other relevant factors.

## ANALYSIS

### 1. The Standard of Review

[24] The order made by the chambers judge was discretionary. Accordingly, this Court may only interfere with it if she misdirected herself, or erred in law or principle, or if the result is so plainly wrong on the facts as to work an injustice. This Court is not entitled to interfere just because it might have exercised the discretion in a different fashion: *Ward v. Kostiew* (1989), 42 B.C.L.R. (2d) 121 (C.A.); *Dhillon v. Pannu*, 2008 BCCA 514, 86 B.C.L.R. (4th) 88.

### 2. The Application Under R. 15(5)(a)(iii)

[25] Rule 15(5)(a)(iii) reads:

15(5)(a) At any stage of a proceeding, the court on application by any person may

...

- (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected

(A) with any relief claimed in the proceeding, or

(B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party

[26] The Kwans sought to use that rule to be added as plaintiffs to the other owners' action, and to advance their own "companion claim" against the construction defendants within that action.

[27] The chambers judge dealt with this in her reasons as follows:

[60] Even exercising wide discretion, Rules 2(1) and 1(5) cannot be stretched in such a way as to allow the unusual step of allowing the plaintiff to file a companion action under the same action number as the existing one, on the basis that it would be just and convenient to allow them to become some kind of co-plaintiffs while being defendants in the companion action. The unwieldy nature of such an exercise supports the respondents' and plaintiff's positions that it is prejudicial by its very abnormality. The Kwans cannot be plaintiffs in the present action, as they are prohibited from assuming that status by the [**Strata Property**] Act. They are defendants in the present action. Their positions are at odds with the present plaintiffs on many issues. It makes no sense to attempt to accommodate all these factors by allowing a second action to be filed under the same action number, and there is no basis in law or in the judicial exercise of discretion that would allow such a step to be taken. This is simply an attempt to avoid the consequences of having failed to file their own separate action in time, an action which is by its very nature, separate and distinct from the plaintiff's representative action brought pursuant to resolutions under the Act.

[61] The Kwans can file their own action and confront the limitations defence if and when raised with whatever arguments arise on the evidence or the law.

[28] The Kwans argue that the chambers judge inappropriately fettered her discretion in dismissing their application. They say that even though R. 15(5)(a)(iii) does not expressly provide for such an order, she should have exercised her inherent jurisdiction to grant the remedy sought, since this is the best means of doing justice between the parties.

[29] The Supreme Court does have inherent jurisdiction to craft procedural rules when there is a gap in procedure that must be filled in the interests of justice: *Bell v. Wood and Anderson*, [1927] 2 D.L.R. 827, [1927] 1 W.W.R. 580 (S.C.). However, that is not the situation here. As the chambers judge noted, the Kwans have a remedy. They are free to commence their own action, and deal with any limitation defence in the ordinary course.

[30] In my view, the chambers judge accurately identified the potential and considerable difficulties that would arise from the anomalous procedure proposed by the Kwans, and properly exercised her discretion in rejecting it. Adding them as plaintiffs in a companion action would be neither just nor convenient.

[31] I find no merit in this ground of appeal.

3. The Application Under R. 22(1)(c)

a) *The Legal Framework*

[32] The legislative context for this aspect of the appeal is provided by R. 22(1) of the *Rules of Court*, and ss. 4(1)(b) of the *Limitation Act*:

22(1) A party of record who is not a plaintiff may file a third party notice in Form 17 if the party of record alleges against any person (in this rule called “the third party”), whether or not the third party is a party to the action, that

- (a) the party is entitled to contribution or indemnity from the third party in respect of a claim made against the party in the action,
- (b) the party is entitled to any relief against the third party relating to or connected with the original subject matter of the action, or
- (c) a question or issue relating to or connected with any relief claimed in the action or with the original subject matter of the action is substantially the same as a question or issue between the party and the third party and should properly be determined in the action.

4(1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

...

- (b) third party proceedings,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

...

(3) Subsection (1) does not operate so as to interfere with any judicial discretion to refuse relief on grounds unrelated to the lapse of time limited for bringing an action.

[33] As well, four decisions of this Court provide the framework for the Kwans’ grounds of appeal: *Lui No. 1*; *Lui No. 2*; *Cementation Co. (Canada) Ltd. v. American Home Assurance Co.* (1989), 37 B.C.L.R. (2d) 172, 36 C.P.C. (2d) 147 (C.A.) [*Cementation* cited to B.C.L.R.]; and *Teal*. I will set out the relevant principles from these cases, outline the manner in which the chambers judge applied them, and then examine the Kwans’ allegations that she failed to apply them properly.

[34] In *Lui No. 1* and *Lui No. 2*, this Court established guidelines for the exercise of the discretion to permit third party proceedings to issue when a limitation period has expired. The chambers judge accurately summarized the facts underlying these decisions as follows:

[69] *Lui No. 1* and *Lui No. 2* are based on the same facts. The defendant, West Granville, wished to build an apartment building on the lot next to a building owned by the Luis. The excavation collapsed and the Luis’ building subsided slightly. The Luis sued a number of defendants. They sued West Granville under the indemnity agreement West Granville had provided and also in tort for breach of duty of care in carrying out the excavation. West Granville and its contractor filed a third party notice after the relevant limitation period had expired, claiming contribution and indemnity against certain defendants and also making a separate claim against two other defendants for damages for economic loss alleged to have been suffered as a result of the excavation. The third parties applied to set aside the notice. Their application was dismissed by the chambers judge.

[35] Since the third party claim advanced by West Granville was considerably different from that of the Luis’

in both kind and amount, the court in *Lui No. 1* set aside the third party notice, but gave leave to have the original application reconsidered by the Supreme Court as its decision had raised new issues. West Granville reapplied accordingly. The Supreme Court struck its third party notice. *Lui No. 2* is the unsuccessful appeal taken from that decision.

[36] In *Lui No. 1*, Mr. Justice Lambert, writing for the Court, observed that Rule 22(1)(c) encompasses two tests. First, there must be a close connection between the original subject matter of the action and the question or issue between the applicant and the proposed third party. Second, the applicant must show that the two claims “should properly be determined” in the same action. The second test is a matter of judicial discretion, and should be activated by consideration of the policies that underlie R. 22(1)(c), notably to avoid a multiplicity of proceedings and the possibility of divergent decisions on the same issue. Mr. Justice Lambert set out these factors to be considered in exercising that discretion at 328:

My third general point is that there are a number of factors that should always be considered in the exercise of a discretion. What is the fair thing to do? Who suffers prejudice if the discretion is exercised? How much prejudice? Who suffers prejudice if the discretion is not exercised? How much prejudice? Have the parties acted properly and reasonably in their own interests? If a party has not acted properly and reasonably, should he be relieved from the consequences of his own behaviour? Is there another course available to one or other of the parties? Where does the balance of convenience lie? This list is illustrative, but not exhaustive, of the questions that should be asked with respect to the parties before the court. But part of the purpose of the rule is to avoid multiplicity of proceedings for the benefit of other litigants, so that congestion in the courts is avoided. So it is proper to ask questions in that area as well.

[37] Lambert J.A. also identified several other significant factors in deciding whether third party proceedings should be allowed. These included the expiry of a limitation period, and the closeness of the connection between the claims. As well, the Court introduced at 331 the requirement of dependency between the third party proceedings and the original action, and the importance of an explanation of the delay and the dependence from the party seeking to issue the third party notice:

In my opinion, permitting third party proceedings to stand and not be struck out, where the third party proceedings are capable of standing alone as a separate cause of action, and where they are brought after the effluxion of a limitation period that would apply if the third party proceedings were standing alone, must depend on the establishment of some real and substantive connection between the third party proceedings and the original action. That real and substantive connection must also operate to explain why the third party proceedings were not brought as an independent action. There must be some degree of dependence by the third party proceedings on the original action before the third party proceedings setting up a separate cause of action can be piggy-backed over the limitation period.

To put it another way, where the limitation period has expired, and the third party proceedings set up a separate cause of action, prejudice to the third party must be presumed, and an explanation is required, from the defendant who issued the third party notice, to explain the delay and to explain the dependence of the third party proceedings on the original action, before the third party notice will be allowed to stand.

[38] In *Lui No. 2*, Mr. Justice Lambert wrote the majority judgment and affirmed much of *Lui No. 1*. He identified the legislative purpose of ss. 4(1) and 4(3) of the *Limitation Act* in this manner at 300:

The legislative purpose must surely have been to permit those proceedings which are brought within the applicable limitation period to go ahead, and to permit all subordinate proceedings which are dependent on the main proceedings to go ahead with them, but to prevent any proceedings which are truly independent from using bogus subordinate status to avoid a limitation period which would otherwise be applicable.

[39] In discussing the standards to be applied in deciding whether a subordinate claim should be allowed to proceed after a limitation period has expired, Lambert J.A. affirmed the guidelines at 331 of *Lui No. 1*, set out above. He also introduced balancing the interests of justice and convenience as a fundamental consideration, a concept found expressly in R. 15(5)(a). He concluded at 306-07 by reiterating the importance of an explanation for the delay, rooted in the dependence of the third party proceeding on the original action:

The crux of the determination about whether para. 13 of the third party notices should be struck out, in accordance with the guidelines discussed in *Lui v. West Granville (No. 1)* and affirmed in Pt. IV of these reasons, rests on whether, on all the material, there is shown to be a real and substantive connection between the claim made in para. 13 of the third party notices and the claim made in the original action, such that a reasonable explanation is provided for the delay in bringing the para. 13 claim, and such that the demonstrated dependence of the para. 13 claim on the original claim provides a reasonable explanation of why the para. 13 claim was not brought as a separate action within the limitation period.

A number of indicators were discussed in *Lui v. West Granville (No. 1)* which would assist in showing that the third party proceedings were dependent on the original proceedings. I refer particularly, to this passage at pp. 330-31:

Where is the reason, in justice and fairness, for permitting West Granville to bring its claim against Shotcrete and SCS after the limitation period had expired? Why should it be allowed to piggy-back its claim over the limitation barrier on the back of the Luis' claim? Was it misled as to its own position against Shotcrete and SCS by the existence of the original proceedings by the Luis? Was its own loss significantly affected by the Luis' loss? If the Luis' apartment building had not subsided, would West Granville have suffered no loss? Or if it had suffered loss, but the Luis had suffered no loss, would West Granville have forgiven Shotcrete and SCS?

[40] The next case, *Cementation*, dealt with an application under R. 15(5) to add a defendant after the limitation period had expired. Lambert J.A., again writing for the majority, confirmed that the fundamental consideration in both applications to add a party and to initiate third party proceedings was the interests of justice and convenience. However, he also acknowledged at 176-77 that there are differences in the criteria used to judge the presence of a "real and substantial connection" when the issue is joinder of a third party, and reiterated the importance of dependence:

The concept of one part of the proceeding being "dependent" on another part is used to describe the "real and substantive connection" between the principal action and a subordinate proceeding in a case where the joinder of a third party is being considered. The word "dependent" and the words "some degree of dependence" describe the kind of close relationship that exists in third party proceedings. ...

[41] The fourth case, *Teal*, dealt with the plaintiff's application to add a new cause of action under R. 24(1)

and s. 4(4) of the *Limitation Act*. Finch J.A. (as he then was) held that since those provisions had no stated criteria, the discretion to permit amendments was unfettered, subject to the evidence and guidelines in the authorities. He found that the considerations of justice and convenience, found in R. 15(5) and in *Lui No. 2*, provided guidance. He also stated that while delay and the reasons for delay are relevant, no one factor should be given over-riding importance. After reviewing *Lui No. 1* and *Lui No. 2*, and other authorities, he set out these views at para. 67 as to the factors governing the addition of a claim:

In the exercise of a judge's discretion, the length of delay, the reasons for delay and the expiry of the limitation period are all factors to be considered, but none of those factors should be considered in isolation. Regard must also be had for the presence or absence of prejudice, and the extent of the connection, if any, between the existing claims and the proposed new cause of action. Nor do I think that a plaintiff's explanation for delay must necessarily exculpate him from all "fault" or "culpability" before the court may exercise its discretion in his favour. ...

b) *The Decision of the Chambers Judge*

[42] The chambers judge first examined the explanations proffered by the Kwans to explain the delay in advancing their claim. She observed that they relied on their own state of knowledge, as well as their previous lawyers' state of knowledge, but the two were to some extent inconsistent. While the Kwans contended that they thought they were part of the other owners' action all along, they also argued that the state of the law prior to this Court's decision in *Hamilton v. Ball*, 2006 BCCA 243, [2006] 6 W.W.R. 1, may have led their previous lawyers to believe that they had no cause of action.

[43] The chambers judge rejected both explanations. She found that the argument based on the views of the Kwans' former lawyers as to the law could not succeed because there was no affidavit from those lawyers to support it. She also rejected the view that the decision in *Hamilton* changed the law. As to the Kwans' explanation, she found that the assertion that they thought they were part of the other owners' action was not credible. She gave Ms. Kwan's explanation based on her personal difficulties little weight, finding they were of short duration, and the Kwans had taken definitive steps in the other owners' action at the same time Ms. Kwan claimed these difficulties existed.

[44] The chambers judge concluded her discussion on the explanation for delay by rejecting the Kwans' argument that she should exercise her discretion in accord with the principles advocated in *Teal*. It was her view that an application under R. 22 was not governed by the same analysis as an application to amend pleadings under R. 24.

[45] The chambers judge then turned to consideration of the guidelines established in *Lui No. 1* and *Lui No. 2*. At para. 75 of her reasons she set out this summary of the factors to be considered in exercising her discretion:

1. What is the fair thing to do?
2. Who suffers prejudice if the discretion is not exercised?
3. Have the parties acted properly and reasonably in their own interest?
4. If a party has not acted properly and reasonably, should he or she be relieved from the

consequences of his or her behaviour?

5. Is there another course of action available to one or the other of the parties?
6. Where does the balance of convenience lie?

[46] She also observed that in *Lui No. 2* the majority held that loss of a limitation defence is a factor that must be weighed in accordance with those guidelines. She then referred to those parts of *Lui No. 2* which I have set out at paras. 37 and 39, emphasizing those parts that deal with the requirement of dependence in deciding whether third party proceedings should be permitted.

[47] The chambers judge then applied those principles to the Kwans' circumstances. She found that ss. 171 and 172 of the *Strata Property Act* reinforced the independence of their claim since, once named as defendants in the other owners' action, they could not participate in it and had no choice but to pursue their claim independently. She considered the potential prejudice to the parties arising from the manner in which she exercised her discretion. She observed that in considering what was just, convenient, and fair, one concern was who should bear the potential loss of the \$3.5 million that represented the Kwans' share of the claim for remediation costs: the Kwans, their former lawyers, or the construction defendants. She acknowledged that there was potential for a multiplicity of proceedings, and possibly inconsistent findings on at least some of the issues if she dismissed the Kwans' application.

[48] The chambers judge was satisfied that there was a real and substantial connection between the other owners' action and the Kwans' proposed third party claim, describing them as "identical". However, she noted that the *Lui* decisions required more: the connection must also operate to explain why the third party proceeding was not brought as a separate action. Here, she found the Kwans failed to provide that explanation.

[49] The chambers judge acknowledged that it was "tempting" to allow the application, in that it would permit a just, speedy, and inexpensive determination of the claims. As well, she found that, aside from the lack of a convincing explanation for delay, the factors established by *Lui No. 1* and *Lui No. 2* favoured the Kwans. She concluded, however, that the absence of such an explanation and the lack of dependence on the original action combined to defeat the Kwans' application:

[91] The Kwans cannot, however, overcome the guidelines set out in *Lui No. 1* and affirmed by the majority in *Lui No. 2*, which deal with this specific situation – a stand-alone claim brought after the expiration of a limitation period and sought to be advanced as a third party proceeding. There is no convincing explanation as to why the action was not commenced. The two explanations that are advanced, even if accepted, conflict. Most importantly, the failure to take independent proceedings cannot be explained by any degree of dependence on the original action because there is none. The Kwans' claim is completely independent and not only capable of standing alone, it must be brought separately and independently from the existing action by virtue of s. 171 and the Kwans' noncompliance with the requirements of s. 172 of the *Act*.

[92] On the material presently before the court, then, the Kwans cannot show the necessary degree of dependence on the original action in the context of explaining why they did not bring their own action for damages within the limitation period. Whether and to what extent subsequent consideration of this issue is appropriate, as suggested by Mr. Sutherland in argument, would have to be addressed by counsel at the relevant time.

[93] In short, the tests set out in *Lui No. 1* and the principles enumerated in *Lui No. 2* are not met, except with respect to the claims for contribution and indemnity and for the costs of defending the plaintiff's claim which are contained in the proposed third party notice. Those claims relate only to the plaintiff's losses that are the subject of the existing action and are subordinate to it. Any claim the Kwans may have against the defendants for the portion of the remediation levy they paid themselves cannot be piggy-backed into the existing action over the limitation period.

[Emphasis in original.]

c) *The Kwans' Position*

[50] The Kwans argue that the chambers judge erred in applying the principles from *Lui No. 1* and *Lui No. 2* in three respects. First, she should not have rejected their explanations for the delay in issuing a third party notice. Second, she should have conducted an analysis that was modelled on the more flexible approach advocated in *Teal*. Third, she failed to properly exercise her discretion in placing too much weight on the concept of dependency and the failure to explain the delay, to the exclusion of other more important factors.

d) *Inadequate Explanation for Delay*

[51] The Kwans advanced two explanations for the delay in commencing their claim, the first based on Ms. Kwan's state of mind, the second based on their surmise as to their former lawyers' state of mind. They say that the chambers judge erred in rejecting both.

i) *Ms. Kwan's Explanation*

[52] The chambers judge made these findings with respect to Ms. Kwan's credibility and her explanation for delay:

[51] ... Even though the solicitors and barristers are alleged to have been under the misapprehension that there was no cause of action available to the Kwans, Yvonne Kwan deposes that she thought they were always part of the action, and there is no evidence to the contrary. Nor was she cross-examined on her affidavit. However, Mrs. Kwan was, as mentioned above, a member of the strata council at the time the resolutions were passed which allowed the plaintiff's action to proceed and assessed a levy for legal costs. The Kwans have not paid money in response to the levy for legal costs. Mrs. Kwan was personally served with the writ, which listed all the lots whose owners were part of the action. The Kwans' lots are not listed. She was involved in litigation even before this action commenced when she contested the application which resulted in the appointment of an administrator, an unusual order which the judge noted was necessary because of the struggle between the Kwans and the other owners over repairs. The positions taken by the Kwans were contrary to the positions taken by the plaintiff at every stage of this dispute. Taking all of the evidence into consideration, and despite the lack of cross-examination on Yvonne Kwan's affidavit, her assertion that she believed she was always part of the plaintiff's action is not credible. Whether or not she was advised that she should commence her own action is between her and her previous counsel, but in the absence of any evidence on this issue, it does not form a part of the considerations relevant to the present analysis.

[53] The Kwans argue that the chambers judge erred in making adverse findings as to Ms. Kwan's

credibility, and in concluding that her explanation for the delay was not convincing, when Ms. Kwan had not been cross-examined on her affidavit. They point out that the construction defendants obtained an order to cross-examine her, but did not pursue this. They maintain that, had Ms. Kwan been cross-examined, she would have provided a satisfactory explanation for the concerns expressed by the chambers judge.

[54] I find no merit in this ground of appeal. Both *Lui* decisions are clear that an applicant in the Kwans' position bears the burden of providing an explanation for delay, and that this is a central factor to be considered in deciding whether third party proceedings may issue. It is reasonable to assume that an applicant's affidavit will set out that explanation in its best possible light. The opposing party has no obligation to cross-examine the applicant. Nor is it reasonable to assume that cross-examination would necessarily have enhanced Ms. Kwan's explanation.

[55] The finding of the chambers judge that Ms. Kwan's explanation for delay lacked credibility was based on a comprehensive review of the relevant evidence, which was largely undisputed. No error has been demonstrated in her conclusion.

*ii) The Explanation Based on the State of Mind of the Kwans' Former Lawyers*

[56] At the hearing below, the Kwans argued that their former lawyers may not have commenced an action on their behalf because they were reasonably under the misapprehension that such an action was barred by the rule in *Foss v. Harbottle*. The chambers judge summarized out this argument as follows:

[35] Despite the affidavits from the Kwans stating that they were not aware that their claims were not included in the present law suit, the main argument advanced by Mr. Sutherland is that the previous solicitors and barristers were, or more accurately, could reasonably have been, under a misapprehension that the Kwans' action was barred by the application of the rule in *Foss v. Harbottle* (1943) 2 Hare 189, 67 E.R. 189. Mr. Sutherland submits the Kwans' previous counsel could have thought the rule applied to strata corporations, a notion of which they were disabused too late, by the decision of Newbury J.A. in the Court of Appeal in *Hamilton v. Ball*, 2006 BCCA 243, 42 R.P.R. (4<sup>th</sup>) 171 (C.A.), handed down on May 17, 2006. Thus, while the Kwans contend they thought they were part of the action all along, it is submitted on their behalf that it was reasonable for their previous lawyers to have been under the impression that there was no relief available for the Kwans as individuals. *Foss v. Harbottle*, conveniently summarized by Newbury J.A. at para 11 of the judgment, "established the seminal rule in company law that a shareholder of a limited company may not sue for wrong done to the company, since the company is a separate legal person at law whose affairs are managed by a board of directors."

[57] On this appeal, the Kwans reiterated this argument, and said that they should not suffer from the failure of their previous lawyers to act quickly in bringing action on their behalf once the decision in *Hamilton* clarified the law.

[58] This ground of appeal can be briefly dealt with by observing that there is no factual basis to support it. In the absence of an affidavit from the Kwans' former legal representatives, this argument is mere speculation.

[59] The chambers judge acknowledged this, but went further and reviewed *Hamilton* and the authorities

that existed prior to that decision, as well as the communications between the Kwans, their lawyers, and the other owners. She concluded:

[50] When the state of the case law referred to by the defendants is considered together with the scant information available in the file as set out above, the argument that previous counsel for the Kwans were under the misapprehension that the Kwans had no action available to them cannot succeed. The wording of s. 171 is clear; the case law is abundant. The appellate decision in *Hamilton v. Ball* did no more than re-state it with clarity. There is, unlike the situation in *Teal*, no affidavit from previous counsel setting out their alleged misapprehension of the law.

[60] I find no error in those conclusions. The chambers judge correctly found that *Hamilton* did not substantially change the law. For example, in *Strata Plan VR 2000 v. Shaw* (1998), 55 B.C.L.R. (3d) 103, 19 R.P.R. (3d) 305 (S.C.) [cited to B.C.L.R.], Madam Justice Levine summarized at paras. 37 - 45 a number of cases decided prior to *Hamilton* that clearly held that while the strata corporation is empowered to sue on behalf of the owners that comprise it, the cause of action belongs to the individual owners for whose benefit the lawsuit is brought.

[61] This ground of appeal cannot succeed.

e) *Failure to Adopt the Approach in Teal*

[62] The Kwans argued before the chambers judge that she should adopt an analysis similar to that in *Teal*, in which justice and convenience were given paramount consideration, and the explanation for delay had the same weight as other factors in the exercise of her discretion. The chambers judge rejected this argument, stating:

[53] The significance of an explanation for delay in the exercise of discretion is, in any event, different when considered in the context of amending pleadings after the expiration of a limitation period under Rule 24(1) and s. 4(4) of the *Limitation Act*, as in *Teal*, as opposed to allowing a new claim to be advanced through a third party notice under Rule 22. Section 4(4) of the *Limitation Act* expressly provides for amendment after a limitation period. The question for the court in *Teal* was how that discretion should be exercised. In considering this issue, the court imported the general principle of what is "just and convenient" from Rule 15(5)(a)(iii) and *Lui No. 2* into its consideration of Rule 24 and s. 4(4) of the *Limitation Act*, and said the discretion is otherwise unfettered. However, the exercise of discretion under Rule 22 where a new stand-alone claim is purported to be advanced through a third party notice after the limitation period has expired has been carefully considered and circumscribed in *Lui v. West Granville Manor Ltd.* (1985), 61 B.C.L.R. 315 (C.A.), ("*Lui No. 1*") and *Lui No. 2*. The general remarks in *Teal* focussing the discussion only on what is "just and convenient" are not necessarily directly applicable. ...

[63] I find no error in that analysis. The chambers judge is correct that R. 24(1) and s. 4(4) provide a broader ambit for the exercise of judicial discretion than that permitted by R. 22 as interpreted in *Lui No. 1*, *Lui No. 2*, and *Cementation*. Those cases are clear that, while considerations of justice and convenience form part of the analysis, other factors must also be considered in deciding whether a third party proceeding may be taken after the expiry of a limitation period. Notably, there must be a demonstrated dependence of the third party's claims on the original claim, and that dependence must provide a reasonable explanation as to why the third party claim was not brought as a separate action before the limitation period expired. The

chambers judge correctly found that these features preclude adoption of the approach advocated in *Teal*.

[64] I would not give effect to this ground of appeal.

f) *The Chambers Judge Erred in her Application of the Principles in Lui No. 1 and Lui No. 2*

[65] The Kwans point out that the chambers judge found that all of the factors that comprise the analysis established in *Lui No. 1* and *Lui No. 2* favoured them, except their failure to provide a convincing explanation for the delay, and to establish the required degree of dependency on the other owners' action. They argue that she misdirected herself and was plainly wrong in allowing those two factors to dominate her analysis. They say that the *Lui* decisions and *Cementation* all emphasize that the guidelines they establish must be applied flexibly, with a view to achieving the over-arching goal of justice and convenience. The Kwans say that goal was not met here because the chambers judge failed to properly balance all of the relevant factors.

[66] The Kwans point to the extremely close interconnection between their claim and that of the other owners, and say the interests of justice and convenience clearly favour having their claim against the construction defendants heard in the other owners' action to avoid a multiplicity of proceedings and possible inconsistent findings. They say the prejudice to them is evident if they are barred from pursuing their \$3.5 million claim. The construction defendants, by contrast, will suffer little harm as the delay in bringing this motion was relatively short, and they were already on notice due to the other owners' action. The Kwans are critical of the chambers judge for failing to consider the brevity of their delay.

[67] I am not persuaded that the chambers judge misdirected herself or was plainly wrong in exercising her discretion. She clearly understood the principles that governed her decision, and considered each in the context of the facts before her. She acknowledged that many of those principles favoured the Kwans' position. She found that their claim and that of the other owners had a real and substantial connection. She also recognized that considerations of justice and convenience must play an important role in her decision, and that there were advantages to having both claims heard together. However, she properly acknowledged that when a defendant applies to add third parties after the expiry of a limitation period, the authorities are clear that those considerations are qualified by the requirement that the defendant establish a degree of dependence on the original claim, and provide an explanation for delay linked to that dependence.

[68] With respect to dependence, she correctly characterized the Kwans' proposed third party claim as a "stand-alone" claim that was independent of the other owners' action. She found that its inherent independence was conclusively reinforced by ss. 171 and 172 of the *Strata Property Act*. Once the Kwans became defendants in the other owners' action, the statutory framework left no doubt that their claim had to be a separate and independent action.

[69] As to the explanations proffered by the Kwans, it was open to the chambers judge to reject these. There was then no convincing explanation as to why they could not have commenced their own action as soon as they learned about the alleged construction defects. In my view, the chambers judge was entitled to give this considerable weight. To do otherwise would have been to effectively reward Ms. Kwan's lack of

credibility.

[70] The Kwans also argue that the chambers judge did not consider that the time between the expiry of the limitation period and this application was relatively brief, and so the construction defendants would suffer little prejudice if the application was allowed. The chambers judge acknowledged this argument, but it does not appear that she gave it any particular weight. I am not convinced, however, that the duration of the delay would or should have led the chambers judge to exercise her discretion in favour of the Kwans. It does not change or affect the independence of their claim, or their failure to explain the delay, regardless of its duration.

[71] In short, I am satisfied that the analysis of the chambers judge was faithful in every respect to that set out in *Lui No. 1* and *Lui No. 2*. Those decisions clearly establish that the requirements of dependence and a related explanation for delay are significant and unique factors in exercising the discretion to permit third party proceedings after expiry of a limitation defence. In my view, on the circumstances before her the chambers judge was entitled to consider them determinative.

[72] I would not interfere with her decision to dismiss the Kwans' application for leave to issue third party proceedings without being subject to a fully accrued limitation defence.

## CONCLUSION

[73] I would accordingly dismiss this appeal.

[74] The unusual terms on which counsel agreed to argue this application apparently leave it open to the Kwans to commence a separate action or issue third party proceedings despite the outcome of this appeal, and confront any limitation defence on a factual basis in the future. The terms on which that may be done, and the impact of the findings made on this application, are left to the judge presiding at that time.

“The Honourable Madam Justice Neilson”

I AGREE:

“The Honourable Mr. Justice Mackenzie”

I AGREE:

“The Honourable Mr. Justice Lowry”