

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Section 1 of the Owners, Strata Plan
LMS 2643 v. Harold Developments Ltd.,
2008 BCSC 1271***

Date: 20080922
Docket: L052627
Registry: Vancouver

Between:

Section 1 of the Owners, Strata Plan LMS 2643

Plaintiffs

And

**Harold Developments Ltd., James Kwan, Yvonne Kwan, William Kwan
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,
William Kelly & Sons Plumbing Contractors (1989) Ltd., Anthony Kelly,
Almetco Building Products Ltd., R.D. Wilson, Tony Wong,
O.G. Installations (1995) Ltd., Oscan Gazzola, Artec Glazing Contractors Inc.,
Christ Husson, Villa Roofing & Sheet Metal Ltd., Payam Imani, John Doe #1,
Ralph Wilcott, Preswitt Manufacturing Ltd., Quality Auditing Institute Ltd.,
Steven Harris, Hil-Ron Cladding Ltd., Ian Ballam, Tony McGrail,
Ezio Bortolussi and City of Richmond**

Defendants

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for the plaintiff

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Development, James Kwan and Yvonne Kwan

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Ltd., and Ian Ballam

G. May

Date and Place of Trial/Hearing:

July 15 – 16, 2008
Vancouver, B.C.

[1] A condominium was developed and built by the defendant, Harold Developments Ltd. ("HDL"). The Occupancy Permit for the condominium was issued on December 20, 1996. The condominium consists of a residential section and a commercial section. The individual defendants, James and Yvonne Kwan, are the sole directors of HDL. They own 43 of 106 residential units in the condominium.

[2] For the purposes of the present application, it is sufficient to say that building envelope problems involving construction deficiencies in the residential portion of the condominium became evident in 2000. The plaintiff, suing on behalf of all owners of residential units except the Kwans, filed its action on November 2, 2005.

[3] The present application is brought by the Kwans who seek an order under Rule 15(5)(a)(iii)(A) or (B) to be added as plaintiffs under a separate action to be filed under the same action number, or in the alternative, to institute third party proceedings under Rule 22(1)(c). In either case, they seek not to be subject to any fully accrued limitation defence. It is agreed that this application should proceed on the assumption that the limitation period has now passed, but no conclusive finding should or could be made on that issue at this time.

[4] The form of the present application is somewhat irregular. Leave is required to add parties to an existing action, although that is not the relief sought by the Kwans. They seek to start a companion action under the same action number on terms that would allow them to take advantage of the original plaintiff's position on limitations. There appears to be nothing to prevent the Kwans from filing their own action, seeking

to have it heard with or consolidated with the present action and dealing with a limitations defence in the normal course.

[5] Leave is not required to file a third party notice. However, it appears that the Kwans have chosen to seek leave to file a notice in the present application because the date for filing such a notice has passed under the current case management plan. The respondents do not rely on that as a basis for opposing the motion; however, they have presented arguments as to why the third party notice as proposed by the Kwans should not be allowed to proceed in this action, as if the notice had been filed and they were applying to set it aside pursuant to Rule 22(6).

[6] The Kwans were previously represented by two other firms, one acting as solicitors (“the solicitors”) and one acting as barristers (“the barristers”), until late 2007. One of the issues addressed by counsel on this application is the explanation as to why no action was commenced on behalf of the Kwans at an earlier date. Upon application by the respondents to the present application (the defendants and the plaintiff) an order for production of the files of the previous firms was made. Those files were reviewed by an independent lawyer and documents were produced, substantially edited to contain only information relevant to this issue. Although cross-examination of the Kwans was also ordered, this was not pursued.

Background Chronology

[7] A brief and selective chronology emerges from the documents filed on this application.

[8] After it became apparent that there were problems in the condominium, a building envelope assessment was done and the report of an expert was provided in July of 2000.

[9] On November 29, 2000, HDL and the Kwans were advised by their previous solicitor that they were in the awkward position of being “potential claimants for compensation for losses suffered to their units,” but at the same time, their company would be a defendant in a claim for compensation. They were told that they should investigate the prospects of recovery against their architects, project manager and contractors.

[10] On March 16, 2001, James Kwan wrote to the architects, who are defendants in this action, to say that their case was being reviewed by their legal counsel for recovery of any damages they may suffer.

[11] On June 5, 2001, the Kwans’ barrister wrote to Mr. Kwan saying she was attempting to achieve protection of HDL’s position as the developer, should litigation ensue, “including what if any claims over you can make against the professionals and contractor whom you engaged for the construction of the project.”

[12] On June 14, 2001, apparently in response to a query from Mr. Kwan respecting mediation, the barrister told him that a notice to mediate could not be issued until proceedings were commenced. She said the owners could claim against HDL, or HDL could claim against the contractors on the basis that the owners had threatened proceedings. In the latter case, HDL would have to agree to undertake the repairs, and

in the absence of agreement with the owners about adequacy and costs, she did not recommend that course at that time.

[13] On June 21, 2001, the barrister sent a letter to the architect and the contractors asking for a meeting with their representatives and their insurers to discuss the expert report in the interests of avoiding litigation.

[14] In 2003, the strata corporation alleged that the Kwans were attempting to thwart repair attempts, and applied successfully before Romilly J. to have an administrator appointed (**Strata Plan LMS2643 v. Kwan** 2003 BCSC 293). The Kwans were represented at this hearing by the barristers.

[15] On January 4, 2005, the solicitor sent an email to one of the lawyers at the barristers' firm saying:

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."

[16] On April 21, 2005, the solicitor sent an email to the Kwans of which only the following sentence remains after editing:

5. 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?

[17] On April 27, 2005, the solicitor sent a letter to the barristers containing the identical question, again numbered "5," followed by: "Please provide the Kwans with your advice on these points." On May 3, 2005, the barrister replied:

5. Again this is just too remote at the present time.

[18] In April and September of 2005, two repair levies were assessed, totalling approximately \$7 million. The Kwans paid their proportionate share of about \$3.5 million.

[19] On May 6, 2005, the strata unit owners authorized the strata corporation to bring this representative action pursuant to ss. 171 and 172 of the **Strata Property Act** S.B.C. 1998, c. 43 (“the **Act**”). The writ was filed on November 2, 2005. The Statement of Claim was filed on March 13, 2006. HDL, Yvonne Kwan, and James Kwan were named as defendants. The Kwans’ statement of defence was filed June 15, 2006.

[20] On April 6, 2007, the plaintiffs applied before Sigurdson J. to amend its statement of claim to provide particulars of its claim against the Kwans personally for damages for negligence and duty to warn. The Kwans, represented by the barristers, opposed the application on the basis that the proposed amendments disclosed no cause of action and were barred by the **Limitation Act**, R.S.B.C. 1996, c. 266. The application to amend was allowed (**Strata Plan LMS v. Harold Developments Ltd.** 2007 BCSC 1095, 75 B.C.L.R. (4th) 161 (S.C.)).

[21] Present counsel, Mr. Sutherland, was retained by the Kwans in November of 2007.

Statutory Sections

[22] Section 171 of the **Act** deals with actions respecting, *inter alia*, common property, and provides:

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. [emphasis added]

[23] Section 172 deals with damage to individual strata lots. It provides:

(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 $\frac{3}{4}$ 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.

The Present Application

[24] Mr. Sutherland, counsel for the Kwans, raised a preliminary point in passing – that the designation of a “section” of strata owners is not a legal entity. The defendants responded by referring to s. 194 of the **Act**, which indeed refers to sections and provides that a section can sue. It therefore appears that the present action is properly brought by the plaintiff representing a section of the owners.

[25] Mr. Sutherland also argues that the Kwans are not prevented from being parties to the action under s. 171 merely because they are defendants. He urges a “purposive” reading of the section, submitting that it must contemplate only defendants who are adverse in interest. Here, the Kwans operate in two capacities – as developers who may be liable for defects and deficiencies, and as owners of suites who have a common interest with the other owners in seeking reimbursement for the remediation moneys

they have contributed (see *Esteem Investments Ltd. v. Owners, Strata Plan No. VR 1513*, (1988), 53 D.L.R. (4th) 377, 32 B.C.L.R. (2d) 324 (C.A.).

[26] In my view, it makes no sense to say that the Kwans could be plaintiffs in the very action in which they are defendants, despite having allegedly suffered similar losses to the owners who are suing as Section 1. As they do not actually seek to be added as plaintiffs to the existing action, but instead to formulate a similar if not identical action under the same action number, they must implicitly concede that s. 171 means what it says, and makes sense on its face.

[27] This is further supported by reference to the applicable section that existed at the time of *Esteem* – s. 15(1) of the *Condominium Act*, R.S.B.C. 1979, c. 61. That section did not contain the words “except any who are being sued” presently found in s. 171; thus, the defendants were exposed to a claim for expenses for litigation in which they were being sued themselves, but, being included in the owners’ representative action, they could also gain from a successful result. The change in wording in the present *Strata Property Act* demonstrates that the meaning of s. 171 is clear on its face – the strata corporation, as plaintiff, does not represent owners who are being sued. This means, in this case, the Kwans.

[28] Before examining the provisions in Rules 15(5)(a)(iii) and 22(1)(c) and the interpretations of those Rules in the case law, I will turn first to the general explanations put forward by the Kwans to explain the delay in commencing their actions.

[29] These explanations are advanced in support of the Kwans' contention that, insofar as an explanation for delay is a relevant factor to consider in the exercise of discretion under Rule 15(5)(a)(iii) or Rule 22(1)(c), it would be appropriate to allow them to join the present action in some capacity without regard to limitation periods. One branch of the explanation for the delay relies on the Kwans' state of knowledge; the second relies on their previous lawyers' state of knowledge. Those explanations are, to some extent, inconsistent.

[30] Yvonne Kwan deposes that she retained Mr. Sutherland in November of 2007. Mr. Sutherland, upon taking conduct of the matter, immediately notified all other counsel that he would be bringing the present application.

[31] Yvonne Kwan deposes:

Until advised by David F. Sutherland, in the late fall of 2007, I did not appreciate:

(a) That the claims of my husband and I for reimbursement of our contribution toward the remediation, by virtue of our ownership of individual suites, was not included in the present lawsuit; nor

(b) That in order to make a claim for reimbursement for remediation costs contributed, my husband and I would have to instruct a lawyer to sue or apply to add my husband and I as Plaintiffs or issue Third Party Proceedings

(c) That a limitation might preclude the claims of my husband and I for reimbursement of our contribution to remediation costs.

[32] James Kwan filed a short affidavit adopting the contents of Yvonne Kwan's affidavit. Mr. Sutherland submits that there is nothing in the excerpts from the files of

previous counsel that suggest the Kwans were ever provided with clear advice one way or another on these issues.

[33] Yvonne Kwan filed a second affidavit deposing to many personal, business and family difficulties occupying her time during 2005 and 2006 – the period between the commencement of the plaintiff’s action and the assumed expiration of the limitation period. Mrs. Kwan says that while she was undergoing all these difficulties, she had the sole responsibility for running the company. She states that her confidence in the previous firm of barristers deteriorated at that time and through 2007, until she decided to engage other counsel.

[34] The respondents point to the correspondence set out above, and the involvement of the Kwans in the various motions and defences filed in the existing action, which was commenced and then defended by the Kwans during the period Yvonne Kwan alleges her life became complicated and distracting. Counsel for the plaintiff suggests that it is not reasonable for the Kwans to have thought they were included in the present action when they were not paying any legal fees to plaintiff’s counsel. As well, the Kwans have denied everything in their statement of defence; they would not do this if they thought they were part of the action. Neither of the Kwans has deposed that they were given or relied on any erroneous legal advice.

[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. (4th) 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."

[36] While there is no evidence before the court to support the contention that the rule in **Foss v. Harbottle** played any part in creating the situation in which the Kwans now find themselves, Mr. Sutherland took the position that such an alleged misapprehension on the part of their counsel would have been reasonable. The respondents argued that no competent counsel could have held that view and relied on it to such obvious prejudice to their clients.

[37] **Hamilton v. Ball** was a case in which certain individual owners of strata units sued members of the strata council for having caused certain repairs to be done, not only without the approval of the owners, but defectively. The chambers judge assumed the plaintiffs, although suing in their individual capacities, were actually suing on behalf

of all of the owners because of the form of proposed amendments to the pleadings which were put before her. She purported to follow **Ang v. Spectra Management Services Ltd. et al**, 2002 BCSC 1544, which in turn referred to **Foss v. Harbottle**, and **Extra Gift Exchange Inc. v. Brian Collins Land Surveying Inc.**, [2004] B.C.J. No. 2421 (C.A.), which referred with approval to **Ang**. In oral reasons delivered November 10, 2003, the chambers judge held that individual owners may not bring an action for wrongs alleged to have occurred to the common property. She dismissed the action.

[38] Newbury J.A. noted that counsel for the appellants clarified the meaning of their pleadings before the appellant court and contended that they were suing only as individual owners for injury to their own interests.

[39] She examined **Ang** in some detail, noting that the judge in that case had found that the plaintiff, who challenged the validity of certain leases of the common property, had been unable to muster the required $\frac{3}{4}$ vote required by s. 171, and was therefore attempting to circumvent that section by filing her own action. The judge had found that the wrong the plaintiff complained of was not one to her in her personal capacity; rather, if any wrong had been committed it was to the strata corporation itself.

[40] Newbury J.A. noted that **Ang** had been followed in **Extra Gift Exchange Inc. v. Brian Collins Land Surveying Inc.**, 2004 BCCA 588, and characterized that case as another one in which the wrong being alleged was to the strata corporation, rather than to the individual owners or all the owners as a group, and was thus distinguishable on its facts. At para 26, she states:

This is enough to distinguish **Extra Gifts** from the case at bar. I take the view, however, that **Foss v. Harbottle** does not apply to strata corporations in respect of an action for injury to common property. As has been seen, in this province the common property is not owned by the strata corporation, but by the strata owners in proportion to their respective unit entitlements. [Emphasis in the original.]

[41] She went on to state that the action belongs to the individual owners and that the only way the strata corporation can sue is under the mechanism created by s. 171.

That section provides a method by which the owners can use the strata corporation to launch the action and thus share costs, but does not affect the right to pursue individual causes of action. The court relied, *inter alia*, on the statements of Seaton J.A. in **Strata Plan No. VR 368 v. Marathon Realty Co.** (1982), 41 B.C.L.R. 155 and referred to **Strata Plan LMS 1468 v. Reunion Properties Inc.** 2002 BCSC 929, (2002) 3 B.C.L.R. (4th) 79, to the same effect.

[42] Mr. Sutherland suggests that it was not clear, prior to **Hamilton v. Ball**, that owner-developers would not be left without a remedy for building deficiencies if they were barred from participating in a representative action under s. 171. There is no affidavit from a member of the previous firm filed in the present application setting out their understanding of the law. Mr. Sutherland advised the court he did not seek one, as he did not wish to compromise their insurance claim. He indicated in reply that if the court were to see this lack of an affidavit from the previous counsel as important, he would seek leave to adduce further evidence at some future date. No adjournment of the present application was requested, and the court must decide it on the material put before it by counsel.

[43] The issue of mistake of law as an explanation for delay beyond the expiry of a limitation period was dealt with in ***Teal Cedar (1977) Ltd. v. Dale Intermediaries Ltd.*** (1996) 71 B.C.A.C. 161, 19 B.C.L.R. (3d) 282 (C.A.). In that case, the plaintiff received legal advice that it had a cause of action in negligent misrepresentation, but not in contract. The lawyer subsequently came to a different view and applied to amend to add the contract claim after the contractual limitation period had expired.

[44] The court said the considerations under s. 6(3) of the ***Limitation Act***, which apply to postponement and which set out concepts of due diligence, do not apply to an application to amend pleadings under s. 4 of that ***Act***. The court referred to its earlier statements in ***Knight Towing Ltd. v. General Motors of Canada Ltd. et al.*** (1981), 27 B.C.L.R. 335 (C.A.), and ***Lui v. West Granville Manor Ltd.*** (1987), 11 B.C.L.R. (2d) 273 (C.A.) ("***Lui No. 2***") in which the effect of the expiration of the limitation period was held to be an important factor but not a decisive one. The court referred to the following statement contained in ***Lui No. 2***, which will be referred to in more detail below:

The fundamental principle should be to balance the interests of justice and convenience in relation to all the parties.

[45] In ***Teal***, the lawyer filed an affidavit explaining how he came to give advice not to sue, and how he subsequently came to alter his views. The court said a party should not be punished for having obtained advice that may have been mistaken, and an honest error in judgment on a difficult legal question should not be fatal to an application to amend.

[46] As well as pointing to the lack of evidence from previous counsel as to their alleged misunderstanding of the law, and the lack of evidence from the Kwans as to any legal advice sought, given, or relied on in respect of commencing an action, the respondents to the present motion, whose argument was presented by Mr. D. Twining for the City of Richmond, say the law has been clear since at least 1980; previous counsel for the Kwans could not have been under the impression that the Kwans had no cause of action. The respondents refer to a number of cases standing for the proposition that the cause of action for damage to individual units and to common property belongs to the individual strata lot owners, not the strata corporation: **Owners, Strata Plan No. NW 651 v. Beck's Mechanical Ltd.** (1980), 20 B.C.L.R. 12 (S.C.); **Strata Plan VR 368 v. Marathon Realty Co.** (1982), 41 B.C.L.R. 155 (C.A.); **The Owners, Strata Plan VR 2000 v. Shaw et al** (1998), 55 B.C.L.R. (3d) 103 (S.C.); **Strata Plan No. VR 1720 v. Bart Developments Ltd.**, (1998), 53 B.C.L.R. (3d) 304 (S.C.), aff'd 1999 BCCA 585, 49 C.L.R. (2d) 161 (C.A.); **Owners, Strata Plan LMS 1468 v. Reunion Properties Inc.**, 2002 BCSC 929 3 BCLR (4th) 79; **The Owners, Strata Plan LMS 888 v. The City of Coquitlam**, 2003 BCSC 941, 15 BCLR (4th) 154.

[47] The respondents, including the plaintiff, submit that any competent lawyer would have been aware that the Kwans had to have a remedy, especially once they paid their share of the remediation costs for their own units. The correspondence shows that the previous firms were alive to the issue, but did not take steps to ensure their clients' rights were protected. Those communications show the Kwans knew they would likely be sued, that they were in an awkward position because they would be both defendants and plaintiffs, they apparently gave instructions to their solicitors that they would not

assign their rights to sue (although as Mr. Sutherland points out, there is no evidence of their instructions. There is only the solicitor's email of January 4, 2005, referred to in the chronology. He also argues that the contents of the email do not mean the Kwans were not consenting, only that they were not assigning their rights. However, in the absence of their written authorization to allow an action under s. 172, or an explanation for the email of January 4, 2005, there is no persuasive weight to that contention).

[48] The respondents point out that Yvonne Kwan was a "member at large" of the strata council at the time the owners passed a resolution authorizing the commencement of litigation against, *inter alia*, the Kwans, as well as a resolution authorizing a levy of up to \$150,000 for legal costs for each lot listed in an attached schedule. The list did not include the Kwans' units. Each of the Kwans was individually served with the writ. The Kwans' units were not listed in the endorsement to the writ; they denied all the allegations in their statement of defence; they raised a limitations defence in their statement of defence; they raised a limitations defence in the application before Sigurdson, J.

[49] Aside from the oral reasons for judgment at the trial level in ***Hamilton v. Ball***, which are apparently not readily available and were not produced to me, there are some statements in ***Ang*** and ***Extra Gifts*** which, taken in isolation, might give rise to a misapprehension as to the role of ***Foss v. Harbottle*** in relation to strata corporations. However, there are many clear statements of the law in the cases referred to by the respondents, one of which was ably argued by current counsel for the Kwans. Previous counsel for the Kwans successfully argued a separate but related technical point

regarding the ability to commence an action under s. 171 in **Strata Plan LMS 888 v. Coquitlam (City)** 2003 BCSC 941.

[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 restate it with clarity. There is, unlike the situation in **Teal**, no affidavit from previous counsel setting out their alleged misapprehension of the law.

[51] Mr. Sutherland says it is the Kwans' appreciation of their legal position that should be relevant, not the lawyer's suggested mistake. 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.

[52] Counsel for the Kwans referred to a number of cases in which personal circumstances were considered to be relevant in relieving against limitation provisions in municipal statutes. I agree with the respondents' position that the personal considerations that form part of the reasoning in those applications, which involve the draconian limitation provisions of municipal statutes where notice must be given within two months, have no application here. In any event, Yvonne Kwan's problems were of short duration when considered in the context of the relevant period during which the Kwans were obviously instructing counsel; definitive steps were taken by the Kwans in the existing action at the very time of the difficulties she describes in her affidavit.

[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. **Lui No. 1** and **Lui No. 2** will be discussed further below.

[54] I will now move on to the application of the Rules under which the present application is brought.

Rule 15(5): Should the Kwans become plaintiffs?

[55] Rule 15(5)(a)(iii) provides:

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.

[56] The Kwans do not seek to be added to the present action brought by Section 1 of the Owners pursuant to s. 171 and 172. Given the wording of those sections and the fact that they are defendants in the present action, they could not reasonably seek to do so. Instead they ask to start their own action, identical to the existing plaintiff's (*mutatis mutandis*), and file it under the same action number, taking advantage of the plaintiff's status as having sued within the limitation period. Mr. Sutherland acknowledges that Rule 15 does not contemplate such a procedure, but suggests that, using Rule 2(1) and Rule 1(5), such a course of action might be undertaken. Those rules provide:

Rule 1(5) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Rule 2(1) Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding.

[57] Ms. Whately on behalf of the plaintiff argues that it would be prejudiced by any such action, even if it were possible, which all respondents say it is not. The plaintiff has pursued and paid for its action to date; it resists strongly another plaintiff's counsel entering into the proceedings, especially where the new set of proposed plaintiffs have interests that conflict with those of the existing plaintiff and have taken steps inimical to the present plaintiff's position at every stage of the action to date. As well, such a change to the nature and scope of the action will potentially prejudice the trial date of October 5, 2009 and the mediation set for December 2008.

[58] Mr. Rhodes for the defendant Almetco addressed the prejudice to his client. Aside from losing the limitations defence, he agreed with the submissions of

Ms. Whately that two different counsel for two different sets of plaintiffs would be confusing and prejudicial, and would add to the length and complexity of the trial. There were no other submissions from the defendant respondents on the issue of prejudice.

[59] Mr. Sutherland said he would ensure the pleadings were amended so that there was no conflict or contradictions in them. He said he would remove the limitations defence from their statement of defence.

[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 **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.

Rule 22: Should the Kwans be allowed to enter the action as Third Parties?

[62] The Kwans apply in the alternative to issue a Third Party Notice under Rule 22(1)(c). The plaintiff takes no position on this aspect of the Kwans' application. The respondent defendants oppose it. Of course, the Kwans can file a Third Party Notice without leave. This issue is whether that notice will be without regard to accrued limitation periods.

[63] In the draft Third Party Notice attached to the Notice of Motion, the Kwans seek contribution and indemnity for any judgment recovered by the plaintiff, and for expenses incurred in defending the plaintiff's claim. They also seek judgment against the defendant for damages.

[64] While the application is brought only under Rule 22(1)(c), I will set out Rule 22(1) in its entirety:

(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 if 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.

[65] Mr. Sutherland claims this rule is “tailor-made” for the Kwans’ situation. He submits that while the proposed notice may not be dependant on the existing action, it is connected with it.

[66] In respect of the claim for contribution and indemnity for damages assessed against them in the original action, there appears to be no issue that such a third party claim is proper. Counsel did not address it specifically, but it is clear from a reading of the cases set out below that such a claim should be allowed to stand.

[67] A consideration of whether the Kwans should be allowed to include in their third party notice a claim for their own damages without regard to accrued limitation periods requires an examination of **Lui No.** and **Lui No. 2**. The court, in Part III of the reasons in **Lui No. 2**, differentiates between proceedings that do not bring in a new party and where the court has no power to permit or prevent the issue being raised (counterclaims and set-offs), and those that do bring in a new party for which the court does possess the power to permit or prevent the proceedings (third party proceedings and the addition or substitution of a new party in a counterclaim or in the original claim). The way in which that discretion is to be exercised is set out in detail in these two cases.

[68] No argument was addressed on the present application to Rule 22(1)(b), although it seems on its face to be applicable, and perhaps even more apt than Rule

22(1)(c). The principles respecting the exercise of discretion set out in **Lui No. 1** and **Lui No. 2** apply to both subsections (see para. 39 of **Lui No. 1**).

[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.

[70] On appeal, the court thoroughly considered the principles applicable to the exercise of discretion under Rule 22(1)(c) and (4) [now (6)], which allows the court, on application, so set aside a third party notice. Rule 22(1)(b) was not the focus of the discussion in this case because the court was of the view that the particular type of relief or remedy sought in the third party notice was not substantially the same as the one advanced by the plaintiff in the statement of claim. However, the court accepted that the notice did raise a question or issue relating to or connected with the original subject matter, and so met the first test under Rule 22(1)(c), a test which the court said was not a matter of discretion, but required the application of fact and law. The court

then moved onto the discretionary aspect: whether the issues should be “properly determined” between all parties at the same time. The court decided that a proper exercise of discretion, applying their reasons, would be to strike out the part of the notice which alleged a separate claim for loss.

[71] Since the court was of the view that their reasons refocused the issues in a way that the parties and the chambers judge could not have been expected to know, they gave the parties leave to have the issue reconsidered before the Supreme Court, filing new material if they wished.

[72] The application was reargued, and the second chambers judge struck out the portion of the third party notice relating to the separate claim for loss. West Granville sought and was granted a five person bench on the second appeal on the basis that the court would be asked to reconsider its conclusions in **Lui No. 1**, and to overrule several previous decisions. The court in **Lui No. 2** reaffirmed **Lui No.1**.

[73] There was a dissent on the issue of whether a judge hearing such an application should, in exercising his or her discretion to add parties (whether under Rule 15 or Rule 22), bear in mind that the limitation period has expired. The majority said the court has the power to permit or prevent the addition of party even if it will remove a limitation defence, but that the removal of such a defence is a relevant factor to consider when making the decision; the dissenting judge said it was not.

[74] I mention the dissent because it serves to focus the important issue in **Lui No. 2**. The dissenting judge would have had the court, in exercising its discretion, consider all

the relevant factors allowed by the sub-rules, and make its decision accordingly without regard to limitations. The majority emphasized that the removal of a limitation defence for proceedings which has the effect of bringing a new party into an existing action (a new party being the third party), although not an absolute bar, is an important factor for the court to consider when deciding to add a party or to allow a third party notice to proceed. In relation to that specific issue, the court affirmed its statements from **Lui No. 1**, upheld previous decisions that had reached a similar conclusion and overturned the cases that were inconsistent.

[75] **Lui No. 1** sets out, at paras. 39 to 43, a number of other factors to take into account in the exercise of discretion under Rule 22(1)(c):

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?

[76] According to the dissent in **Lui No. 2**, the inquiry ends there. The judge must consider those factors and exercise his or her discretion. However, according to the majority, the loss of the limitation defence is a factor that must be weighed, and that consideration is done according to the guidelines set out in **Lui No. 1**, summarized this way at the commencement of **Lui No. 2**:

...for the sake of consistency in the exercise of the discretion to strike out third party proceedings, the third party proceedings should be struck out if they were begun after the expiry of a limitation period for an original action stemming from the same incident, if they were capable of standing alone, and if it was not established by the defendant in the proceedings that there was a real and substantial connection between the third party proceedings and the original action, such that the third party proceedings were to some degree dependent on the original action, and such that the failure to take independent proceedings within the time limit was explained by that dependence. [emphasis added]

And later, in part VII of the reasons:

The crux of the determination about whether [the relevant paragraph advancing a separate claim for loss] 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 Part 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 [the relevant paragraph] 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 claim], and such that the demonstrated dependence of [the claim] on the original claim provides a reasonable explanation of why [the claim] was not brought as a separate action within the limitation period. [emphasis added]

[77] While prefacing its reference to the guidelines for the exercise of discretion with the statement: “The fundamental principle should be to balance the interests of justice and convenience in relation to all the parties,” the court then set out the following quote from *Lui No. 1* at p. 331:

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. [emphasis added]

[78] In *Lui (No. 2)*, the court referred to the potential for abuse if the legislative purpose of the *Limitation Act* were defeated through the elimination of limitation defences in every case where a new party is added to an existing action. The court considered the proper interpretation of s. 4 of the *Limitation Act* and its relationship to the exercise of discretion on an application to permit “subordinate proceedings” to begin or continue under Rule 15(5), Rule 21(13), or Rules 22(1) and (4). The court gave an example: a number of passengers were injured in a bus accident, all represented by the same lawyer who missed the limitation period. However, one passenger was an infant, thus postponing the running of the limitation period. Could the other adult passengers join him in his postponed action?

[79] The court stated:

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 proceeding which are truly independent from using bogus subordinate status to avoid a limitation period which would otherwise be applicable. In the example I have given, the principal action by the infant should go ahead, as the *Limitation Act* allows; any claim by the infant’s mother or father that is closely dependent on the infant’s claim should probably go ahead; any claim by the car driver against a mechanic for contribution should probably go ahead; but the independent claims of the injured adult bus passengers should not be permitted outside their own limitation period. [emphasis added]

Application to this case

[80] In the context of the example just referred to, the new claims for the injured adult passengers would all involve parties that were not involved in the action at that point. The Kwans are presently defendants in the existing action. However, although that might appear to be an obvious point of dissimilarity with the present case, that was also the case in ***Lui No. 1*** and ***Lui No. 2***. West Granville was already a defendant in the original action, but for the purposes of the analysis in those cases, was treated as a new party in the context of the third party notice.

[81] The respondents submit that the court should not allow the Kwans' third party notice to proceed. They say the Kwans' claim for damages arises from a cause of action separate and independent from the original action. The Kwans could never have been part of the action brought pursuant to s. 171 of the **Act** for damage to the common property as they are defendants. Their individual claim for damages to common property as owners of units is necessarily independent of any other individual owner's claim for damages. In order to be part of a representative action under s. 172 for damage to their own units, they had to consent. They did not. There is nothing in the present statement of claim that is necessary to give life to an action by the Kwans to recover their costs of remediation for their proportionate share of the common property or their damages to their own units.

[82] The respondents also submit that the Kwans have provided no valid explanation for why they did not commence the proceeding within the limitation period – an issue which was dealt with above.

[83] Counsel for the Kwans says there is no prejudice to any of the defendants, other than losing the limitation defence. They have all been sued by the plaintiff for exactly the same claims that are contemplated by the Kwans. They will already have taken steps to preserve their files. They will have to defend the very same things under the contemplated Third Party Notice as they will have to do in the existing action. The Kwans' share of the remediation levies benefited all of the owners, and the defendants are correspondingly the recipients of a windfall - the reduction of the claim against them from \$7 million to \$3.5 million. On the other hand, he argues, the prejudice to the Kwans is much greater – they will lose their ability to bring their cause of action in respect of their payment of \$3.5 million.

[84] It is not so much a question of the Kwans losing their ability to bring their cause of action as they may have already lost that ability through their own fault and/or that of their previous counsel. The vexing question at this stage is whether, assuming the limitation period has passed, the Kwans should be able, despite their own carelessness and/or their counsels' negligence (or at least their unexplained failure to commence proceedings), to regain their ability to recover their losses by piggy-backing into the present action commenced in time by the plaintiff.

[85] Of some concern, when considering what is just, convenient, and fair is the issue of who should bear the loss of the \$3.5 million (assuming some is attributable to parties other than the Kwans) in these circumstances – the Kwans themselves because they chose not to sue (an evidentiary issue that is not resolvable on the material before the court at this time), the previous lawyers (or their insurers) who arguably did not protect

their clients' interests (also an issue that is not before me), or the defendants who caused the loss (assuming that is eventually proven). The Kwans argue that they should be allowed the opportunity of establishing that it is the defendants, and should thus be allowed into the present action. Otherwise another action may have to be commenced to resolve those issues. This does, of course, raise the spectre of a multiplicity of proceedings and potentially inconsistent findings on at least some of the issues. The court in **Lui No. 1** recognized the avoidance of these problems as the purpose behind Rule 22.

[86] There is indeed a connection between the original action and the Kwans' proposed action, in that they both make the same allegations against the same defendants in order to recover their respective shares of the remediation costs. There is at this point no evidence before me as to how the repairs were done, but Mr. Sutherland's contention that the Kwans' share of the remediation levies was of benefit to all the owners seems to be a reasonable one. However, the necessary "real and substantive connection" referred to in the above passage from **Lui No. 1** is qualified and defined further: "that real and substantive connection must also operate to explain why the third party proceedings were not brought as a separate action" (see excerpt set out at para. 76 above).

[87] In determining whether the third party proceedings were dependent on the original proceedings, the court in **Lui No. 2** (at part VII of its reasons) referred again to **Lui No. 1** and the sort of questions that might be asked:

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?

[88] Unlike the respective claims of Luis and West Granville, the Kwans' proposed claim is identical in nature to that of the plaintiff's claim. Nevertheless, the questions are apt. Given the evidence set out above, the Kwans could not have been misled as to their own position by the existence of the original action. If anything, the original action and the steps leading up to its filing should have prompted them to be aware of their own position, and the limited correspondence available suggests that this occurred.

[89] It is not clear at this stage how much damage, if any, accrued to individual units. Such damage would be the subject of a claim under s. 172 of the **Act**, and the Kwans did not consent to be part of that action. Their main concern relates to damage to the common property for which the remediation levies were assessed. The Kwans' loss is their share of those remediation levies. Their loss, though of the same nature as the other owners' loss, is not affected by the loss suffered by the other owners. Each owner, including the Kwans, suffered their own loss. Each owner has paid their own share of the remediation costs. There is no suggestion that if the present plaintiff chose not to proceed further, the Kwans would forgive the defendants and abandon their own claims. Thus the application of the suggested questions from **Lui No. 1** demonstrates further the independence of the Kwans' proposed claim.

[90] Because the court is always disposed to a just, speedy and inexpensive determination of a matter on its merits and should not be thwarted in this goal by irregularities or technicalities, it is tempting to allow the application on the basis of simply weighing the prejudice and sorting it out in costs later – the approach allowed for by statute when considering amendments to pleadings under s. 4(4) of the **Limitation Act**. The relief claimed by the Kwans, though a separate loss, is related to the original subject matter of the action, the issues to be determined are substantially the same (if the proposed pleadings were properly amended to be brought into line with the existing statement of claim), and it would make sense to determine all these issues at one time. As well, the usual factors to be weighed in exercising discretion under Rule 22(1)(c) (or (b) for that matter) as set out in **Lui No. 1** and **Lui No. 2**, all favour the Kwans, aside from a convincing explanation for the delay. If the dissent in **Lui No. 2** were the law, the Kwans' position would be much stronger.

[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.

Result

[94] In the result, the application to commence a new action or to file a third party notice in respect of a claim for separate loss without regard to any fully accrued limitation defence is dismissed. If the Kwans pursue their action or their Third Party Notice in this respect, those proceedings are subject to any fully accrued limitation defence.

“M.A. Humphries J.”

The Honourable Madam Justice M.A. Humphries