

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan EPS 677 v.
ASPAC Developments Ltd.,
2025 BCSC 511*

Date: 20250313
Docket: S178251
Registry: Vancouver

Between:

The Owners, Strata Plan EPS 677

Plaintiff

And:

ASPAC Developments Ltd., Hillsboro Investments Ltd., Ledcor Construction Limited, IBI/HB Architects, Oldcastle Building Envelope Canada Inc., Morrison Hershfield Limited, Jones Kwong Kishi Consulting Engineers, and Creo Stone Inc., and Solarfective Products Limited

Defendants

And:

Ledcor Construction Limited, Oldcastle Building Envelope Canada Inc., Morrison Hershfield Limited, Jones Kwong Kishi Consulting Engineers, Nor-West Architectural Millwork Ltd., Aligned Floor Coverings Inc., McGregor & Thompson Hardware Ltd., Nightingale Electrical Ltd., Fastgo System (2011) Inc., Isackson Rimes Enterprises Ltd., GML Mechanical Ltd., Stordor Investments Ltd., M & L Painting Ltd., Edmonds Appliance Centre Ltd., Snaidero Kitchens & Design Inc., Nexgen Technologies Inc., Creo Stone Inc., Solarfective Products Limited, IBI/HB Architects, ASPAC Developments Ltd. Hillsboro Investment Ltd. Garibaldi Glass Industries Inc., RPM Canada, HP Construction Ltd., Villa Roofing & Sheet Metal Ltd., Project 143000 Investments Ltd., Keith Panel Systems Co., Arcadia Architectural Products Inc., Signature Plastics Ltd., Concorde Glazing Systems (a sole proprietorship), Concorde Glazing Systems (2006) Ltd., Cascade Aqua-Tech Ltd., Mara Projects Ltd., Alternate Glazing Systems Ltd., Adriatic Concrete Cutting & Coring Ltd., and A.T. Westside Projects Ltd.

Third Parties

Before: Associate Judge Harper

Oral Reasons for Judgment

In Chambers

Counsel for Oldcastle Building Envelope
Canada Inc.: A.D. Kask

Counsel for Dow Silicones Corporation: P. Palmer

No other appearances

Written Submissions of Dow Silicones
Corporation: December 2, 2024

Written Submissions of Oldcastle Building
Envelope Canada Inc.: January 10, 2025

Further Written Submissions of Dow
Silicones Corporation: January 24, 2025

Place and Date of Hearing: Vancouver, B.C.
November 1, 2024

Place and Date of Judgment: Vancouver, B.C.
March 13, 2025

[1] **THE COURT:** These are my oral reasons. If a transcript is required, I reserve the right to edit for clarity.

[2] This is an application by Dow Silicones Corporation ("Dow") for leave to file a third party notice against Oldcastle Building Envelope Canada Inc. ("Oldcastle") pursuant to Rule 3-5(4). Rule 3-5(1) states:

Making a third party claim

(1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that

(a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,

(b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or

(c) a question or issue between the party and the person

(i) is substantially the same as a question or issue that relates to or is connected with

(A) relief claimed in the action, or

(B) the subject matter of the action, and

(ii) should properly be determined in the action.

[3] The litigation arises from alleged deficiencies in the design, development, and construction of a strata complex. Dow is in the business of the design, manufacture, and supply of caulking products. Oldcastle is a defendant and a third party named by other defendants. Oldcastle filed a third party notice against Cascade Aqua-Tech Ltd. ("Cascade"). Oldcastle makes the typical claims against Cascade of contribution and indemnity pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333.

[4] The litigation has moved very slowly. The plaintiff, The Owners, Strata Plan EPS 677, has not identified which defendants it does not intend to pursue. Dow says that the plaintiff's claims are vague. The plaintiff has said through a letter from counsel to all parties dated August 15, 2024, that the relevance of the various roles of the parties will "hopefully acquire greater clarity once we produce the plaintiff's

expert opinion evidence later in September", meaning September 2024. The expert opinion has not been provided. Dow says it was brought into the action as a fourth party based on bald and unparticularized pleadings of fault. Dow is in the dark as to its exposure. In light of this lack of clarity, Dow wishes to preserve its cause of action against Oldcastle prior to the expiry of the limitation period for filing a third party notice.

[5] Dow points out that in complicated multiparty proceedings such as this, a precise assessment of the merits of the claims against the third party is not necessarily realistic or informative of the discretion given to the court. Dow cites *Canfor Pulp Limited Partnership v. Siemens Building Technologies Ltd.*, 2016 BCSC 2089 at para. 61 in support of that proposition.

[6] This application does not raise the question of the merits of the claim or the exercise of discretion, in my view, because the issue of whether a proposed pleading discloses a reasonable cause of action is a question of law. In *DGBK Architects v. CWMM Consulting Engineers Ltd.*, 2024 BCSC 1356, Justice Tammen held:

[9] With respect to standard of review, the appellant relies on para. 52 of *Situmorang [v. Google, LLC]*, 2024 BCCA 9], which is crystal clear that whether a notice of civil claim discloses a cause of action is a pure question of law, reviewable for correctness. If all that was at issue on this appeal was the ability of SRC to claim against Nemetz within the DGBK action, the appellant would succeed. If the sole question decided by the Harper A.J. was whether the third-party notice disclosed a cause of action in that context, I would likely find that the decision was incorrect. The appellant's argument on that score is unassailable, and there is only one answer to that question. Within the DGBK action, SRC could never be required to pay more than its proportionate share as determined by the liability findings in the Prime Time action, and thus could have no claim over against Nemetz.

[7] Dow is not a defendant. Dow is only a fourth party because of a third party notice filed against it by Cascade. Cascade's claim against Dow contains no claim other than a claim for contribution and indemnity under the *Negligence Act*. It is really an application for leave to file fifth party proceedings.

[8] In its proposed third party notice, Dow denies that its caulking products were used in the construction of the strata complex, but that if they were used, denies any defects.

[9] The proposed third party notice states that if Dow is found liable to the plaintiff, then Dow is entitled to contribution and indemnity from Oldcastle. Dow says that the pleadings leave Dow exposed to joint and several liability pursuant to the operation of the *Negligence Act*. Dow says there is a risk that Dow may be required to pay more than its proportionate share of damages. Dow says it is not plain and obvious that it would not be found liable to the plaintiff.

[10] Cascade's third party notice alleges that Dow owed duties to the plaintiff and seeks a declaration that the plaintiff's damages were caused in whole or in part by Dow's alleged breach of those duties. Dow denies those allegations and denies that it is liable to the plaintiff but says that nonetheless, on the current pleadings, the trial judge will be asked to make a finding on Dow's liability to the plaintiff.

[11] However, Cascade's third party notice seeks relief only for contribution and indemnity. Dow is not a defendant and, therefore, will not be held liable to the plaintiff. Dow is only a fourth party.

[12] From a proportionality perspective, Oldcastle might have decided not to oppose the application because the costs of acquiescing are low. In fact, other potential third, fourth, or fifth parties have not opposed similar applications. They took the path of least resistance, presumably on the basis that these third, fourth, or fifth party notices are not likely to see the light of day. They would probably be put in counsel's filing cabinets and never seen again.

[13] There are no cases that have been provided on this application where a case of this nature has gone to trial, so there is no track record available for either the parties or the court to rely on with respect to how this arcane practice point has been resolved.

[14] Although the question for the parties and their legal counsel might be what is the most practical and cost-effective way to conduct the litigation (for instance, not oppose the application because the third party proceeding is not likely to ever go anywhere), the question on the application is whether the proposed third party notice discloses a cause of action.

[15] I am grateful to counsel for providing their thorough written submissions, which I have reviewed carefully. I agree with Oldcastle's position. The proposed third party notice discloses no reasonable cause of action and has no reasonable prospect of success. Dow could never be required to pay more than its proportionate share as determined by the liability findings of the trial judge, and thus could have no claim over against Oldcastle for contribution and indemnity.

[16] Section 4-2(a) of the *Negligence Act* provides the basis for defendants to be held jointly and severally liable to a plaintiff, absent contributory negligence on the part of a plaintiff, which would trigger s. 1(1). When a plaintiff commences a claim as the person or entity suffering damage or loss, they claim as against the defendants, and those defendants are liable, each on a joint and several basis.

[17] Section 4(2)(b) provides the basis for claims for contribution or indemnity. As between multiple at-fault parties, as between themselves, they can only seek contribution to the extent of their relative degree of fault. The parties from whom contribution or indemnity is sought are only exposed to contribute or indemnify to their respective degree of fault. In other words, the parties from whom contribution or indemnity is sought face only several liability. A defendant can be held jointly and severally liable to compensate a plaintiff. A third party is only severally liable to contribute to the joint and several liability of the defendant.

[18] There is a dearth of case authority on the issues raised by this application. Although the facts of *DGBK Architects, supra*, are somewhat different from the present case, there is support for Oldcastle's position in para. 9 of Justice Tammen's reasons.

[19] Dow suggests that leave should be granted in order to avoid a multiplicity of proceedings, among other reasons, but overlooks the reality that introducing an ineffectual fifth-party proceeding which seeks to recover that which Dow will not be exposed to in itself merely increases the complexity of an already complex proceeding.

[20] For these reasons, the application is dismissed.

[SUBMISSIONS ON COSTS]

[21] THE COURT: All right. The order on costs will be costs will be in the cause.

“Harper A.J.”