2025 NSSC 210 (CanLII)

SUPREME COURT OF NOVA SCOTIA

Citation: *Gardiner v. P.J.C. Land Developments Limited*, 2025 NSSC 210

Date: 20250618
Docket: Hfx No. 516535
Registry: Halifax

Between:

Tanyse Lea Gardner and James David Gardner

Plaintiffs

v.

P.J.C. Land Developments Limited and Nature Ridge Homes Ltd.

Defendants

Decision

Judge: The Honourable Justice Darlene Jamieson

Heard: June 18, 2025, in Halifax, Nova Scotia

Oral Decision: June 18, 2025

Counsel: Noah Entwisle and Ian Dunbar (not appearing), for the Defendants (Moving Parties)
David Coles, K.C., for the Plaintiffs (Responding Parties)

By the Court:

Background

2025 NSSC 210 (CanLII)

[1] This is a motion to amend pleadings brought by the Defendants. In the action, the Plaintiffs claim the Defendants terminated an Agreement of Purchase and Sale (“the Agreement”) for new home construction and land transfer. The Plaintiffs claim in repudiating/and or fundamentally breaching the contract that the Plaintiffs have incurred special damages and are entitled to general damages.

[2] The following sets out the procedural history of the matter to date. The Action was commenced on July 22, 2022. The Defendants filed a defence on September 6, 2022. The Plaintiffs filed an amended notice of action on November 24, 2022 adding a loss of income claim for James Gardner and adding specifics to the prior claim for general damages. This was a consent amendment.

[3] The Defendants then filed an amended defence on November 25, 2022. The Defendants say in the defence that pursuant to the Agreement, the Plaintiffs agreed to purchase lands and a house to be constructed by the Defendant, Nature Ridge Homes Ltd. (“Nature Ridge”). The Defendants say Nature Ridge included a termination clause in the Agreement. They say this entitled them to terminate the Agreement on or about June 17, 2022.

[4] The pleadings closed, disclosure and discovery examinations took place and a Request for a Date Assignment Conference (“RDAC”) was filed on August, 21 2024. In the RDAC, the Plaintiffs estimated the trial would take seven days (including an estimate of two days for the defence) and forecasted the parties would be ready for trial by February of 2025.

[5] The Memorandum for Date Assignment Conference filed by the Defendants on December 20, 2024 indicated they needed 3 days to present their defence at trial, meaning the parties will need 8 days in total for trial. They said they would be ready for trial by September of 2025. The Defendants stated they anticipated seeking leave to amend paragraph 3 of the statement of defence to “specifically deny paragraph 1 of the Plaintiffs’ Amended Statement of Claim.”

[6] A Date Assignment Conference (“DAC”) was scheduled for January 3, 2025, but was adjourned as counsel were discussing amendments. A further DAC was scheduled for January 24, 2025 and counsel advised they were addressing a

contested pre-trial motion to amend the defence. A further DAC scheduled for May 2, 2025 was adjourned due to this motion. Another is scheduled for July 4, 2025.

[7] On January 6, 2025 counsel for the Defendants forwarded the proposed amended defence to counsel for the Plaintiffs. The amendments sought by the Defendants are as follows:

> 5A. The Defendant P. J. C. Land developments Limited ("PJC") states that it was the fee simple owner of the Property as of the date of the Agreement and signed the Agreement only in that limited capacity. PJC states that it had no obligations, duties, or responsibilities under the Agreement whatsoever apart from the conveyance of title provided the Agreement closed as contemplated. All other obligations, duties and responsibilities were owed solely between the Plaintiffs as purchasers and Nature Ridge as vendor and builder.
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> …
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> 10A. The Agreement required the Plaintiffs to obtain financing approval for no less than 95% of the purchase price on or before June 24, 2021. Unbeknownst to Nature Ridge at the time, the Plaintiffs did not secure this necessary approval.
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> …
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> 19A. In the further alternative, Nature Ridge states that the Plaintiffs breached the Agreement prior to June 17, 2022, by failing to firmly and irrevocably secure the financing it contemplated, *inter alia*.

[8] The remaining amendments at paragraph 15, 16, 17, 18, and 32, in essence, replace the plural word "Defendants" with "Nature Ridge."

[9] On January 29, 2025, counsel for the Defendants wrote to counsel for the Plaintiffs enclosing a document "my clients located when reviewing its materials for fiscal year-end. Please advise if you will require this to be formalized into a supplemental production." The document is entitled The Working Relationship and Contractual Obligations Between: Real Estate Developer and Residential Homebuilder ("MOU") and is between PJC and Nature Ridge. At the discovery of Mr. Josh Norwood in May of 2023, Plaintiffs' counsel requested a copy of any Agreement between PJC and Nature Ridge. As noted, it was not until January 29, 2025 that this MOU was disclosed.

Parties' Positions

[10] The Defendants say the pleadings are aimed at both Defendants equally and their defence did not distinguish between the contractual obligations owed by each. They say it is that issue that the proposed amendments primarily seek to clarify.

2025 NSSC 210 (CanLII)

[11] The Defendants say there is no bad faith and the Plaintiffs have failed to lead any evidence whatsoever in support of their allegations. They say amendment 5A is compatible with the Agreement, in that the Agreement almost exclusively refers to Nature Ridge. They say PJC first appears at the signature page of the Agreement.

[12] The Defendants acknowledge they are responsible for the delay in seeking the amendments approximately 2.5 years after filing their defence. However, they say there has not been undue delay that creates a rebuttable presumption. They say the Plaintiffs knew the Agreement focused on Nature Ridge. They do not concede further discoveries will be needed (although they will not oppose a reasonable request) as the Defendant's had an opportunity to ask about PJC's contractual obligations and did so. They say any re-discovery would be narrow in scope concerning the amendments and any responses to undertakings. Trial dates have not yet been set.

[13] The Plaintiffs say the effect of the proposed amendments is to introduce an entirely new defence which is at odds with portions of the defence on file since September of 2022. They say the President of PJC was discovered on the existing pleadings on January 5, 2024. They further say the amendments seek to remove PJC from co-pleading defences advocated by Nature Ridge so as to limit PJC's potential exposure to damages as the owner of property assets and signatory to the Agreement. They say in essence the amendments will allow PJC to argue it had no substantive involvement in the matter.

[14] The Plaintiffs say the Defendants have known of the alleged facts they are relying upon to advance the amendments since the inception of the action. They say these amendments were not alleged prior to document disclosure or discoveries and it was only after the Plaintiffs filed for a DAC that the amendments were raised. They say the delay in seeking the amendments is inordinate and that further discovery examinations will be required, causing additional expense to the Plaintiffs.

[15] The Plaintiffs say there is bad faith on the part of the Defendants and there are four indicia of that bad faith, which I summarize as follows:

1. Under oath, on discovery on January 5, 2024, the President of both company Defendants testified that the arrangements between the two companies was oral. This was not true given the MOU that was produced on January 29, 2025.

2025 NSSC 210 (CanLII)

2. The officers and directors of PJC were Mr. Paul Norwood and his wife yet decisions respecting the project were made by the broader group "the family."

3. The proposed amendment 5A is false on its face as was known to the Defendant companies. The Defendant's Affidavit of Documents used for discovery of both Defendants did not include the MOU and no explanation is offered by the Defendants as to why the MOU was located and sent approximately one year and 10 months after the Affidavit Disclosing Documents was produced. They say the MOU itself is contrary to the proposed amendment at paragraph 5A.

4. No comprehensive, acceptable justification for the above-mentioned conduct is offered and to permit the amendments in the face of such conduct is to license such conduct.

2025 NSSC 210 (CanLII)

[16] The Plaintiffs say that the Defendants:

> …in providing false sworn evidence, failing to apply for amendments in anything close to a timely fashion, seeking an amendment which is patently on its face false, all speak to the Defendants bad faith conduct which was/is either intentional so as to delay proceedings and/or cause increased legal cost to the Plaintiffs, or their conduct evidences a cavalier attitude toward the Court proceedings and the Plaintiffs so as to constitute bad faith on the Defendants part.

The Law and Analysis

[17] The *Civil Procedure Rules* relevant to amendments are as follows:

> **83.01 Scope of Rule 83**
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> (1) This Rule allows a party to amend certain documents the party files.
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> (2) This Rule requires a party who wishes to amend a court document to obtain permission from the other parties or a judge, except documents may be amended without permission early in an action.
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> (3) A party may amend a court document filed by the party, in accordance with this Rule.
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> **83.02 Amendment of notice in an action**
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> (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.

(2) The amendment must be made no later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.

…

83.11 Amendment by judge

(1) A judge may give permission to amend a court document at any time.

2025 NSSC 210 (CanLII)

[18] The test for whether an amendment to the pleadings should be granted is well settled in Nova Scotia and turns on whether there has been bad faith or serious prejudice that cannot be compensated by costs. In *APA Inc. Experts Conseils/Consultants and Forgeron Engineering Limited v. Fares Construction Ltd.*, 2025 NSCA 42 the Nova Scotia Court of Appeal recently commented once again on the established test for amendment of pleadings:

> [6] Under Nova Scotia's practice, an amendment to a pleading is permitted if it raises a "justiciable issue", is proposed in good faith and would not cause to the other party serious prejudice that is non-compensable in costs.
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> …
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> [8] As is normal on a motion to amend, I assume the pleaded allegations.
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> …
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> [33] *Civil Procedure Rules* 83.01, 83.02 and 83.11 permit an amendment with the permission of a judge.
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> [34] A series of rulings by this Court has established the principles that govern the judge's discretion whether to permit an amendment of pleadings: *Stacey v. Electrolux Canada* (1986), 76 N.S.R. (2d) 182 (S.C.A.D.), at pp. 182-3, per Clarke, C.J.N.S; *Point Tupper Terminals Company v. Global Petroleum Corporation*, 1998 NSCA 174, per Bateman J.A.; *Lamey v. Wentworth Valley Developments Ltd.*, 1999 NSCA 69, at paras. 12-23, per Glube, C.J.N.S.; *Garth v. Halifax (Regional Municipality)*, 2006 NSCA 89, at para. 30, per Cromwell J.A. (as he then was); *EllisDon Corporation v. Southwest Construction, SWP Maple Operating Partnership and Southwest Properties Limited*, 2021 NSCA 20, at para.26, per Wood, C.J.N.S.
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> [35] From these authorities, the following principles emerge:
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> - An amendment is permissible if it (1) is offered in good faith, (2) would not occasion to the opposing party serious prejudice that is non-compensable in costs, and (3) raises a justiciable issue.

- Justiciability is assessed by a standard like that on a motion for summary judgment on the pleadings under Rule 13.03, i.e. whether the proposed pleading is absolutely unsustainable on its face.

- "On its face" means the judge on an amendment motion neither hears evidence on the underlying merits, nor decides a contested fact pertaining to the merits, nor forecasts merits-related evidence and potential findings. Rather, the motions judge assumes the facts as pleaded or agreed.

- A contested allegation of material fact or mixed fact and law, or a debatable submission on an issue of law or contractual interpretation is not absolutely unsustainable on its face for an amendment motion.

…

> [50] …Whether a proposed amendment is absolutely unsustainable is decided on the face of the pleadings, meaning the party moving for an amendment has no evidentiary onus to prove the merits of its proposed pleading.

[19] The pleadings have long since closed in this action, and the Plaintiffs do not agree to the proposed amendments to add paragraphs 5A, 10A and 19A nor the resulting amendments to change the plural use of the word Defendants to Nature Ridge. Therefore, the proposed amendments may only be granted through judicial discretion under Rule 83.

[20] No issue was raised in the written materials as to whether the amendments are justiciable. Plaintiffs' counsel acknowledged at the hearing that they are justiciable. I am of the view the amendments do raise justiciable issues. The proposed pleading is not, to quote the Court of Appeal in *APA Inc*, *Supra,* absolutely unsustainable on its face. It is not up to me to assess the merits, I simply assume the facts as pleaded. Amendment 5A and 19A both relate to interpretation of the Agreement and issues of contractual interpretation are not absolutely unsustainable on their face.

Serious Prejudice Non-compensable in Costs

[21] In *Thornton v. RBC General Insurance Co. / Cie d'Assurance Generale RBC*, 2014 NSSC 215 (N.S. S.C.), at para. 33, Justice Wood (as he then was), described prejudice that cannot be compensated in costs:

> [34] … That type of prejudice is typically evidentiary in nature, which requires a consideration of whether documents and witnesses have been lost due to the passage of time.

2025 NSSC 210 (CanLII)

[22] The onus to prove prejudice lies with the responding party to the motion. There must be a causal connection between the non-compensable prejudice and the amendment. Non-compensable prejudice does not arise because the amendment may be potentially successful. Nor does it arise because the amendment could lengthen the pre-trial procedures or the trial or increase the complexity of the trial. Demonstrating prejudice alone is not sufficient. The responding party must also demonstrate that the prejudice caused cannot be compensated in costs.

[23] In their pre-hearing brief the Plaintiffs submit that they will suffer prejudice because the amendments are being sought after an inordinate delay, they introduce an entirely new defence, will result in further discovery examinations, additional expense, and will delay the matter.

[24] First of all, I am not satisfied the delay in seeking the amendments (approximately 2.5 years since the defence was filed) is of sufficient length to presume prejudice. (See *Unisys Canada Inc. v. Pineau-Pandya*, 2023 NSSC 328 at paras 41-43.) Further, the Plaintiffs say that granting the amendments may allow PJC to escape liability by satisfying the court it had no real involvement, thereby limiting its potential exposure to damages as the owner of property. The potential success of a plea/a proposed amendment does not give rise to a serious and non-compensable prejudice. (See *Altschuler v. Bayswater Construction Limited*, 2019 NSSC 197, at para. 17.)

[25] Undoubtedly these amendments, if permitted, will necessitate some further discovery, however, there is no evidence of any evidentiary prejudice. There is no evidence that witnesses are no longer available or cannot be found, memories have faded, documents have been lost due to the passage of time, etc. The only prejudice claimed is additional discovery and delay. For example, counsel for the Plaintiffs, as of today's date, is of the view the eight days of trial estimated in the DAC forms is still achievable with the proposed amendments. In my view, the inconvenience and expense arising from these amendments is likely to be limited to further brief discovery examination and perhaps delay in setting the trial dates. Additional expense caused by further discovery and delay of trial dates can be compensated in costs. The instances of prejudice alleged by the Plaintiffs can be fully compensated in costs.

[26] In short, I am not satisfied that the Plaintiffs have discharged the burden upon them to demonstrate that as a result of these amendments, they will suffer prejudice that cannot be compensated in costs.

2025 NSSC 210 (CanLII)

Bad Faith

[27] The evidence put forward by the Plaintiffs in support of their bad faith argument is a solicitors affidavit of Mr. Coles. It attaches excerpts from discovery examination and several pleadings. Bad faith is a serious allegation and there must be strong and compelling evidence in support of it. I am not satisfied that sufficient evidence has been offered to raise even a mere suspicion, let alone strong and compelling evidence.

[28] The Plaintiffs argue one indicia of bad faith is that the President of both companies gave discovery evidence that is not true. I have difficulty seeing how this allegation is relevant in the present circumstances. Assessing the credibility of a witness, with respect to evidence concerning the merits of a proposed pleading on a motion to amend, is not for the chambers judge. Regardless, the evidence before me indicates the Agreement first references PJC on the signature page. The excerpts of discovery evidence indicate Mr. Paul Norwood (President) initially said at discovery there was no contract between the two companies and then said "Not that I recall, I don't think there's any contract, no." The MOU produced in January of this year is dated February 4, 2014, approximately 10 years prior to his discovery evidence. I fail to see how the Plaintiffs allegation could possibly equate to bad faith in the above circumstances.

[29] I agree with the Defendants that the existing defence, while referencing things like "a house to be constructed by the Defendant Nature Ridge" and "Nature Ridge included the Termination Clause in its Agreement," (emphasis added) does not specifically allege that there were different contractual obligations owed by each Defendant under the Agreement. In my view, the amendment adding paragraph 5A simply seeks to make this clarification, albeit 2.5 years late.

[30] The Plaintiffs further say that Paul Norwood and his wife were officers and directors of PJC, however, decisions were made by the family and this is somehow an indicia of bad faith. Mr. Norwood's discovery evidence also indicates he is the sole shareholder of Nature Ridge. He says the decision to terminate the Agreement was a family decision. He further referred to employees of Nature Ridge including family members. It is not unusual for employees to be involved in decision making. Again, I fail to see any connection to bad faith.

[31] The Plaintiffs say a further indicia of bad faith is that proposed amendment 5A is false on its face. They point to the first page of the MOU to argue its wording

2025 NSSC 210 (CanLII)

is contrary to the proposed amendment. Further, they argue the affidavit disclosing documents produced by the Defendants did not reference the MOU nor was a satisfactory explanation offered as to why it was not produced until January of 2025. It is not my role to assess the merits of a proposed amendment against the evidence on the motion to, in essence, interpret the Agreements. There is no onus on the Defendants to prove the merits of its proposed pleading. The merits of the proposed amendment is a matter for the trial judge. Further, a bald assertion of omitting the MOU from the original disclosure does not point to bad faith. Clearly, parties are under disclosure obligations and failure to comply can and should have significant consequences, including in costs, but I see no basis in the current circumstances to find the failure to produce the MOU in a timely way is indicative of bad faith.

2025 NSSC 210 (CanLII)

[32] There is simply no evidence before me to give rise to a presumption or inference of bad faith that requires the Defendants to rebut such evidence. The allegations that the Defendants are intentionally delaying the matter or intentionally causing added expense are mere suspicions without any evidentiary foundation whatsoever. Bad faith can be established if an amendment is motivated by an improper purpose. The Plaintiffs' allegations of the proceeding having an "aura" of bad faith, and giving as examples, the President at discovery saying he did nothing to prepare for his discovery or the affidavit of documents not including the 2014 MOU, do not assist in establishing the amendments being sought for an improper purpose. These are mere suspicions and not strong and compelling evidence of bad faith. In my view, the amendments were not, "motivated by an improper purpose such as delay or obstruction of the proceeding or to subvert the ends of justice" (*Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* 2001 NSSC 178 at para 29)

[33] The Plaintiffs have not satisfied me that the Defendants are seeking the amendments in bad faith, nor have they shown that they will suffer serious prejudice that cannot be compensated by costs if the amendments are granted. The motion to amend is granted. I order that the proposed amendments to the statement of defence be allowed.

[34] With respect to the costs of this motion, I award Tariff C costs of $1,000, inclusive of disbursements, to the Defendants. The law in the area of amendments is well settled and in situations where there is, in essence, no merit to the arguments advanced in opposition to the amendments, costs should follow and be awarded to the successful moving party. Any ultimate costs created by the amendments themselves, such as the cost of further discovery, are a separate matter and, in my view, better assessed by the trial judge.

Jamieson, J.

2025 NSSC 210 (CanLII)