SUPREME COURT OF YUKON

Citation: *Lavoie v Ewert*,
2026 YKSC 8

Date: 20260210
S.C. No. 21-A0128
Registry: Whitehorse

BETWEEN:

Émilie Lavoie and Scott Westberg

PLAINTIFFS

AND

Barbara Anne Ewert, Gerry Darrel Ewert, 535885 Yukon Inc. dba RE/MAX Action Realty, Wendy Close, Northern Guardian Inspection Ltd., Darryl Fraser, The City of Whitehorse, and Rodney Scott Breitenbach

DEFENDANTS

AND

Barbara Anne Ewert, Gerry Darrel Ewert, 535885 Yukon Inc. dba RE/MAX Action Realty, Wendy Close, Northern Guardian Inspection Ltd., Darryl Fraser, and Rodney Scott Breitenbach

THIRD PARTIES

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs	Gary Whittle
Counsel for Barabara Anne Ewert, Gerry Darrel Ewert	Donald Dear
Counsel for 535885 Yukon Inc. dba RE/MAX Action Realty, Wendy Close	Russell Mann
Counsel for Northern Guardian Inspection Ltd, Darryl Fraser	Michael Colwell
Counsel for The City of Whitehorse	Brian Rhodes
Counsel for Rodney Scott Breitenbach	Luke Faught

REASONS FOR DECISION

Overview

[1] The plaintiffs bring an application under s. 2 of the *Jury Act*, RSY 2002, c 129 for an order that the trial of this action be before a jury. It is an action in tort and contract related to the purchase of a family home by the plaintiffs which they claim had latent defects that were not disclosed to them and which have made the property and home unfit for residential purposes.

[2] The defendants are the individual vendors, the plaintiff's realtor, the home builder, the home inspector, and the City of Whitehorse. The defendant vendors and the City of Whitehorse oppose the application, and the other defendants take no position.

[3] The issue is whether the test for a civil jury under ss. 2 (2) of the *Jury Act* has been met: that is, that the trial will not involve any prolonged examinations of documents, accounts, or any scientific investigation that in the opinion of the judge cannot conveniently be made by a jury.

[4] A further issue is whether this determination can or should be made at this time or whether it is premature.

[5] I find that this application is premature and should be adjourned to be decided by the case management judge, who will also be the trial judge, after the next Case Management Conference (CMC) scheduled for April 15, 2026. By that time, the expert reports of the defendant vendors will have been disclosed, further discovery will have occurred, the issue of the consolidation of the action may be resolved or at least an application to resolve may have been scheduled. The prejudice to the plaintiffs is minimal, because there are no trial dates set, the next CMC has been scheduled, and

the additional information available by that time or shortly thereafter will allow the Court to make a more informed decision.

Background

[6] This action was started on February 24, 2022. Documentary and oral discoveries are complete, with one exception. Counsel for the vendors wishes to examine the plaintiff Ms. Lavoie further on the special damages claimed, the supporting documentation, and on answers to the requests. Vendors' counsel further advises they have one expert report to be provided on February 23, 2026, and a second expert report expected around the same time. Plaintiffs' counsel has disclosed four expert reports which are helpfully included in the application material. He has advised the defendants that he has five other expert reports but has not stated he will be relying on them. Counsel for the vendors says if that changes, they may require further expert reports in rebuttal.

[7] The plaintiffs have started an insurance coverage action against their home insurer/brokerage as well as against their title insurer. The coverage action arises from the insurers' denial of the plaintiffs' claim for loss arising from the alleged defects in their home, the same defects described in and forming the basis of their claim in this action. Documentary discovery has occurred in the insurance action, but oral discovery has not. The defendant vendors and City of Whitehorse have stated their intention to bring an application for consolidation or hearing together of the two actions. Counsel for the insurer has indicated by letter their opposition to any such application.

[8] Plaintiffs' counsel suggests consolidation or trying together is not necessary; their action can proceed and the findings made by a jury can become an agreed statement of facts for use in the subsequent insurance action.

Law

[9] Section 2 of the *Jury Act* provides:

> (1) If, in any action for libel, slander, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, or in any action founded on a tort or contract in which the amount claimed exceeds $1000, or in any action for the recovery of real property, either party to the action applies to the Supreme Court, not less than 90 days before the time set for the trial of the action before a jury, the action shall, subject to subsection (2) and to section 3, be tried before a jury, but in no other case shall an action be tried before a jury.
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> (2) If, in any action of a class specified in subsection (1), application is made for the trial of that action before a jury and it is the opinion of a judge, at any time that the trial will involve any prolonged examination of documents or accounts or any scientific investigation that, in the opinion of the judge, cannot conveniently be made by a jury, the judge may direct that the action be tried without a jury or that the jury be dismissed, in which case the action shall be tried or the trial continued, as the case may be, without a jury

[10] Section 3 of the *Jury Act* requires the applicant to deposit with the clerk of the court a prescribed amount for payment for the costs of the jury.

[11] At the hearing there was some discussion about who bears the onus in this application, given the different wording in the Yukon *Jury Act* from the jury acts in other jurisdictions such as British Columbia, Ontario, and Nova Scotia, as well as the different processes in other jurisdictions, including the confirmation of civil jury trial once a jury notice is served and filed, subject to an application to oppose.

[12] After careful review of the Yukon *Jury Act*, of the similar Alberta *Jury Act*, RSA 2000, c J-3, I am of the view that a party seeking a jury trial must apply and establish that the basic criteria in ss. 2(1) and s. 3 are met: that is, the action is in one of the listed subject areas, with a claim in the requisite amount, the application is brought 90 days before trial, and the security deposit has been confirmed. If these conditions are satisfied, the applicant has a *prima facie* right to a jury trial. This interpretation is supported by the heading of that section "Right to jury in civil matters". However, the matter does not end there. Once a *prima facie* right to a jury trial has been established, the court has the discretion to deny the application. The onus then shifts to the party opposing the jury application to show the matter cannot be conveniently tried by a jury for one of the reasons set out in s. 2(2). The court on its own motion may also dismiss the jury at any time.

[13] The test requires the judge to determine first if the trial will involve any prolonged examination of documents or accounts or any scientific investigation. If it does, the judge must then determine if such examination or investigation cannot conveniently be made by a jury.

[14] In the absence of any Yukon jurisprudence, the Alberta King's Bench decision of *Shaw v Standard Life Assurance Company*, 2006 ABQB 156 helpfully sets out some of the principles and considerations that may apply when interpreting this section of the *Jury Act*, given its similarity to the Alberta statute wording. Given my finding that this application is premature it is not necessary for me to embark on this analysis. I note its potential relevance here, however, because Alberta jurisprudence was not submitted by any counsel in support of arguments at the hearing.

Analysis

[15] Plaintiffs' counsel has provided a significant amount of evidence to show the documentary discovery that has occurred to date, and provided assurance at the application that he does not intend at trial to repeat the oral discovery evidence, except to the extent of some read–ins. He states that delaying this decision is prejudicial to his clients because there have already been in his view significant delays caused by the defendants. His clients need and want certainty. He notes that the defendants could have provided their expert reports much earlier and as well could have brought their application for consolidation or hearing together earlier.

[16] I appreciate the frustration created by the lengthy period of time it has taken to bring the action to this stage. However, I agree with the defendants that this application is premature for the following reasons.

[17] First, the evidence required by the court to determine whether the test in ss. 2(2) is met should include information from and about the expert reports. In a faulty workmanship property action in tort and contract such as this, there will be technical expert evidence that should be part of the assessment by the judge. The words 'scientific investigation' and prolonged examination of documents are sufficient to encompass expert evidence. The judge must assess that expert evidence to assist in the determination of whether it is convenient for the jury to make scientific investigations or examinations of documents in this case. While the plaintiffs have properly included their expert evidence for review in this application, there may be additional reports provided. More importantly, the defendants' expert reports have not yet been produced and are not available for review by the court at this time.

[18] Second, the completion of oral discovery and disclosure of any further documentation arising from it is preferable before deciding the jury issue for similar reasons. Once the full potential record is available to all counsel, the judge will be able to receive more complete and definitive arguments from counsel about the applicability of the test in s. 2(2).

[19] Third, and perhaps most significantly, the matter of consolidation or trying to together of this action with the insurance action must be determined before a decision is made about a jury. In both actions, the underlying issue is the condition of the house. This requires factual findings. If the actions were to proceed separately, there could be contradictory findings of fact on the common underlying issue.

[20] Counsel for the plaintiffs' suggestion that the insurance action can proceed after a jury verdict, based on an agreed statement of facts, is not workable for several reasons. First, juries render verdicts or provide answers to questions without reasons. Nowhere do they set out their findings of fact the way a judge does. It would not be possible to develop an agreed statement of facts for use in the insurance action trial arising from the trial of this action by a jury (although it might if it were a judge alone trial). Further, even if this were possible through extrapolation from a jury verdict and/or through negotiation among counsel, the defendants in the insurance action would have to agree to this approach. They are not before the Court at this time so it is not possible to ascertain whether this proposal would be workable and agreeable to them.

[21] If the application to consolidate or hear together is successful, then the defendants in the insurance action will be given an opportunity to provide their position and any argument on the application for a jury trial. The outcome of this consolidation

application could also affect the argument of the appropriateness of a jury, depending upon the additional documents and/or expert reports produced in that action.

[22] Counsel for the plaintiffs' concern about prejudice caused by further delay of costs is not well-founded, frustration aside. Expert reports remain to be delivered. Further documentary and oral discovery has yet to occur. Trial dates have not yet been set. The next CMC has been scheduled in approximately two months' time. Delay to this point is not relevant to the assessment under s. 2(2).

[23] I note that any party at any time may request a CMC with this Court to set deadlines by Court order for completion of stages in the proceeding, including trial dates, binding all parties and providing a temporal framework for the action. Frequently, trial dates and other deadlines are set at the outset of an action in an attempt to prevent the kind of delay about which the plaintiffs now complain.

[24] In any event, adjourning the decision on this application will not delay further steps in the action, will not delay the CMC, and may not delay the setting of trial dates. Adjourning until the steps I have referenced above have been taken will allow the deciding judge to make the assessment on a more complete record. Certainty is in fact more assured by waiting: if a decision on a jury were made now, it may be subject to a further application, or determination by a judge, based on the new information that remains to be provided.

Conclusion

[25] This application is adjourned to be decided by the CMC judge.

DUNCAN C.J.