NOVA SCOTIA COURT OF APPEAL

Citation: *EllisDon Corporation v. Southwest Construction, SWP Maple Operating Partnership and Southwest Properties Limited*, 2021 NSCA 20

Date: 20210223
Docket: CA 499687
Registry: Halifax

Between:

EllisDon Corporation

Appellant

v.

Southwest Construction Management Limited, Summer Wind Partners II Limited, Summer Wind Partners III Limited and Summer Wind Holdings Limited in Partnership as SWP Maple Operating Partnership and Southwest Properties Limited

Respondents

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	January 27, 2021, in Halifax, Nova Scotia
Subject:	Amendment of Pleadings – Joinder of New Plaintiffs – Limitation Period
Summary:	Southwest Construction Management Ltd ("SWC") made a motion to join related corporations as plaintiffs in the action alleging mismanagement of apartment construction project on the part of EllisDon. Additional plaintiffs were entities alleged to have suffered some of the losses. EllisDon opposed the motion on the basis that the amendments did not set out a cause of action by the new plaintiffs and that the limitation period had expired. The motion judge allowed the amendments. He concluded that the pleadings were sufficient and that s. 22 of the *Limitation of*

Actions Act ("the *Act*") permitted the addition of the new plaintiffs even though the limitation period had expired.

Issues: Was the trial judge correct in allowing the amendments to the Statement of Claim?

Result: Appeal Dismissed. The amended pleadings set out a sufficient cause of action by the new plaintiffs against EllisDon. Although the motion judge incorrectly calculated the limitation period for some of the claims, he properly applied s. 22 of the *Act*. EllisDon received sufficient information about the new claims within the limitation period and time for service of pleadings so as not to be prejudiced in defending the allegations.

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Respondents

Judges:	Wood, C.J.N.S.; Beveridge and Scanlan, JJ.A.
Appeal Heard:	January 27, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Wood, C.J.N.S.; Beveridge and Scanlan, JJ.A concurring
Counsel:	C.C. Robinson, Q.C. and Kevin Gibson, Q.C., for the appellant William L. Ryan, Q.C. and John Shanks, for the respondents

Reasons for judgment:

[1] EllisDon Corporation entered into a construction management contract with Southwest Construction Management Limited ("SWC") in August 2013 in relation to an apartment building to be built on Hollis Street in Halifax ("the Project").

[2] On July 2, 2015, SWC sued EllisDon alleging breach of contract and negligence resulting in delay of the Project. The Statement of Claim described the damages claimed from EllisDon:

> (a) additional engineering and consulting costs;
>
> (b) additional construction management costs;
>
> (c) general conditions costs, including, but not limited to, additional on-site overhead, including supervision, costs of the site office and equipment and labour costs for the extended period;
>
> (d) costs of financing, and bonding;
>
> (e) interest costs;
>
> (f) property taxes;
>
> (g) head office overheads;
>
> (h) loss of revenue;
>
> (i) lost profits;
>
> (j) loss of productivity;
>
> (k) loss of use;
>
> (l) other costs of delay; and
>
> (m) such further and other losses and damages as may appear.

[3] On August 6, 2015, EllisDon filed a Defence and Counterclaim and commenced third party proceedings against Southwest Properties Limited ("SWP"). It also filed a builder's lien proceeding against SWC, SWP and Summer Wind Partners II Limited ("SW Partners"). In the pleadings filed on August 6, 2015, EllisDon denied any allegations of breach of contract or negligence and claimed damages for breach of contract against SWC and SWP. EllisDon alleged SWC acted as agent for SWP throughout. SW Partners was named as defendant in the builder's lien proceeding as the owner of the land on which the Project was constructed.

[4] The SWC action and the EllisDon lien proceeding were consolidated by Consent Order in February 2017. In February 2019, a further Consent Order was issued permitting SWC to amend its Statement of Claim to add the following allegations:

> 13. Southwest further states that EllisDon's breach of contract and/or negligence in the performance of its duties under the Contract caused delay in the completion of the Project such that Southwest was prevented from finalizing its financing for the Project at a time when the interest rates for such financing were lower than when this traction was actually completed.
>
> 14. The delay in completing the construction of the Project, which was caused by EllisDon, will result in increased debt servicing payments for Southwest in the amount of $5,184,000.00 over the ten year period for financing of the Project. This amount is in excess of the projected $9.2 million loss claimed in paragraph 12 above.
>
> [Underlining in original]

[5] On November 1, 2019, SWC brought a motion for leave to make further amendments to the Notice of Action and Statement of Claim. The proposed amendments sought to:

(a) Add particulars of the claims against EllisDon;

(b) Delete the allegations set out in paragraphs 13 and 14 of the Statement of Claim which had been added by amendment in February 2019; and

(c) Add as additional plaintiffs SW Partners, SWP and SWP Maple Operating Partnership ("SWP Maple").

[6] The allegations by the new plaintiffs were:

> 30. In January 2015, SWP Maple entered into a lease with Summer Wind Partners II Limited, the owner of 1583 Hollis Street where the Project was being constructed.
>
> 31. The purpose of this lease was for SWP Maple, as the tenant, to operate the Project once constructed, including securing and administering mortgage financing jointly with Summer Wind and Southwest Properties and procuring leases for both residential and commercial tenants for the premises being constructed at that location.
>
> 32. SWP Maple repeats all of the foregoing and states that EllisDon's breach of contract and/or negligence in relation to the construction of the Project generally caused delay in the completion of the Project such that SWP Maple

> suffered loss and damages, including but not limited to lost rental payments caused by the delay in securing both residential and commercial leases for the Project.
>
> 33. SWP Maple and Summer Wind and Southwest Properties further state that EllisDon's breach of contract and/or negligence caused delay in the completion of the Project such that SWP Maple and Summer Wind and Southwest Properties were prevented from finalizing the financing for the Project at a time when the interest rates for such financing were lower than when the financing for the Project was actually completed.
>
> 34. The delay in completing the construction of the Project, which was caused by EllisDon, will result in increased debt servicing payments for SWP Maple and Summer Wind and Southwest Properties in the amount of $5,184,000.00 over the ten year period for financing of the Project. This amount is in excess of the projected $9.2 million loss claimed in paragraph 26 above.
>
> 35. SWP Maple and Summer Wind and Southwest Properties repeat and rely on the foregoing and claim against EllisDon for the following:
>
> (a) special damages, including but not limited to, increased debt servicing payments and lost rental amounts caused by the delay in the completion of the Project, the particulars of which will be provided prior to trial;
>
> (b) mitigation costs incurred by SWP Maple in relation to securing leases for the Project once faced with the delay in completion of the Project;
>
> (c) loss of profits;
>
> (d) pre-judgment interest;
>
> (e) costs of this action; and
>
> (f) such further and other relief as this Honourable Court deems just.
>
> [Underlining in original]

[7] The motion to amend was opposed by EllisDon. The motion judge, Justice Peter Rosinski of the Supreme Court of Nova Scotia, allowed the amendments for the reasons set out in his written decision dated April 28, 2020 (2020 NSSC 99).

[8] The decision to permit the amendments was appealed by EllisDon and for the reasons which follow, I would grant leave but dismiss the appeal.

Decision of the Motion Judge

[9] The motion judge set out his understanding of the effect of the proposed amendments:

> [14] In summary, the proposed amendments effect the following additions to the litigation:
>
> 1. SWC making a *new claim* of negligent misrepresentation;
>
> 2. WP2, SWP Maple, and SWP as *new claimants*, joining in existing claims of negligent provision of services, making a *new claim* of negligent misrepresentation, and *substituting them for SWC regarding the claimed damages for increased debt financing costs* in relation to both the existing and the new claims.
>
> [Italics in original]

[10] The proposed amendments do not allege a claim of negligent misrepresentation against EllisDon and no party suggested this before the motion judge or on appeal. This interpretive error by the motion judge caused him to engage in an analysis of the elements of this cause of action and consider the calculation of the applicable limitation period. Those steps were unnecessary; however, this does not impact my conclusion the motion judge did not commit reversible error in allowing the amendment.

[11] EllisDon's opposition to the motion was summarized in its pre-hearing brief:

> 12. EllisDon does not advance its position in this motion lightly: an amendment will normally be permitted unless an applicant for leave is shown to be acting in bad faith, or it is shown that by allowing an amendment another party would suffer some serious prejudice that could not be compensated by costs…
>
> A party's attempt to amend its pleading to advance claims which are barred by reason of the expiration of a limitation period is specifically addressed by the Civil Procedure Rules. The circumstances in which this motion is resisted are extraordinary and warrant the Court's intervention to prevent the circumvention of clear limitation periods and the presentation of claims which lack any pleaded basis in fact, are on their face unsustainable, and are intended to intimidate a party in a proceeding in which the conduct of Southwest in its dealings with EllisDon, and its failure to perform the Contract in good faith and honestly (*sic*), have been central issues since the commencement of action in 2015. EllisDon submits that the moving parties' motion should fail for two reasons:
>
> (i) the claims sought to be added to the statement of claim of Southwest through its proposed amendment are brought out of time; and
>
> (ii) the claims sought to be advanced in the amended statement of claim lack any pleaded factual basis which would warrant the amendment sought.

[12] In response to the arguments of EllisDon, the motion judge was required to consider whether the proposed amended Statement of Claim set out a cause of action by the new plaintiffs against EllisDon and whether it was barred by an expired limitation period. With respect to the sufficiency of the pleadings, the motion judge found:

> [86] In summary, while the proposed pleadings are not elegant, they are sufficiently sustainable on their face to forestall the court denying leave to amend.

[13] With respect to the limitation issue, the motion judge, as required, considered *Civil Procedure Rule* 35 and the *Limitation of Actions Act*, S.N.S. 2014, c. 35 ("the *Act*"). *Rule* 35.08 provides:

> **35.08 Judge joining party**
>
> (1) A judge may join a person as a party in a proceeding at any stage of the proceeding.
>
> …
>
> (5) Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

[14] The import of this *Rule* is the new plaintiffs should not be added if their claims against EllisDon are precluded by an enforceable limitation period. This engages an examination of the *Act*, the relevant provisions of which are:

> **General rules**
>
> 8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and

> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.
>
> (3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is
>
> (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
>
> (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.
>
> …
>
> **Claims added to proceedings**
>
> 22 Notwithstanding the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim
>
> (a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
>
> …
>
> (c) adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings.

[15] The motion judge was required to make a number of findings. The first was whether the limitation period with respect to the claims advanced by the new plaintiffs had expired and, if so, when. Under s. 8(1)(a) of the *Act*, the limitation period is two years from the date on which a claim is discovered. A claim is discovered when the claimant first knew or ought reasonably to have known the circumstances set out in subsection 2.

[16] The motion judge identified two different limitation periods. The first related to the existing claims in the litigation as well as the alleged new claim for misrepresentation, which he said was raised by the amendment. He concluded these were discoverable on June 1, 2015, which would start the two year limitation period. The motion judge then found the claim for increased financing costs was not discoverable until the relevant interest rate was known, which he found to be

June 1, 2017. As a result, the limitation period for this claim started on that date and expired on June 1, 2019.

[17] The motion judge found the new claim for misrepresentation by SWC was allowed by s. 22(a) of the *Act* because it was brought by an existing party.

[18] Since he concluded the limitation period for all claims by the new plaintiffs had expired, the motion judge went on to consider s. 22(c) of the *Act*. He said the claims by the new plaintiffs were "related to the conduct transaction or events described in the original pleadings" as that phrase is used in s. 22. With respect to the knowledge of EllisDon and whether it would be prejudiced in defending the claims, the motion judge concluded:

> [55] In relation to presumed prejudice due to excessive delay, that is not a persuasive argument in this case where the basic facts involve a contractual relationship between the parties, and the acts or omissions that caused the alleged damages were generally knowable by all parties on or before June 1, 2015, based on their intimate involvement in managing the construction flowing from the construction management services contract.

[19] With these findings, the motion judge applied the provisions of s. 22(c):

> [122] Regarding the proposed adoption by the "new parties" of the "new" negligent misrepresentation claim and the existing negligent provision of services claim, I am satisfied for the purposes of the application of s. 22(c) *LAA* that each claim "is related to the conduct, transaction or events described in the original pleadings." Although the "new" claimants are being added to SWC, I am satisfied that EllisDon had received, before June 1, 2020 (the end of the relevant limitation period regarding the claimed increased debt servicing payments plus 1 year "time provided by law for the service process" per CPR 4.04), sufficient knowledge of that claim such that it will not be prejudiced in defending against that claim on the merits; and that the addition of the claim is "necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings."

[20] In light of this conclusion, the motion judge determined that *Rule* 35.08(5) was not a bar to the addition of the new plaintiffs since EllisDon did not enjoy the protection of an enforceable limitation period.

Issues

[21] The appellant in its factum describes the issues on appeal as follows:

> 11. The issues for determination in this appeal are:
>
> (i) whether the Learned Chambers Judge erred in finding that the new claims advanced in the Respondents' proposed amended Statement of Claim were not barred by operation of the *Limitation of Actions Act*;
>
> (ii) whether the Learned Chambers Judge erred in finding that the Respondents' proposed amended Statement of Claim disclosed a cause of action and sufficient factual basis to support the new claims advanced therein; and
>
> (iii) whether the Learned Chambers Judge erred in failing to apply the law stated in the Decision to bar the new claims advanced in the Respondents' proposed amended Statement of Claim.

[22] EllisDon did not argue that the amendment to add further particulars of the existing SWC claims should have been refused. As well, neither party suggested the amendment added a claim of negligent misrepresentation and so there is no need to consider the application of s. 22(a) of the *Act*.

[23] After considering the oral and written submissions of both parties, I would restate the issues on appeal as follows:

1. Did the proposed Amended Statement of Claim disclose a cause of action by the new plaintiffs against EllisDon?
2. Did the motion judge misapply the provisions of s. 22(c) of the *Limitation of Actions Act* in relation to the claims by the new plaintiffs?

Standard of Review

[24] The standard of review on an appeal from a motion to amend pleadings by adding a party after expiry of a limitation period was set out by this Court in *Barry v. Halifax (Regional Municipality)*, 2018 NSCA 79:

> [33] As noted by Fichaud, J.A. in *Innocente v. Canada (Attorney General)*, 2012 NSCA 36 at 22, non-discretionary rulings, including those that are interlocutory, are subject to the normal standard of review: correctness for extractable issues of law, and palpable and overriding error for issues of either fact or mixed fact and law with no extractable legal error.

[25] Legal questions such as the sufficiency of pleadings or interpretation of the *Act* will be reviewed on a standard of correctness. Factual determinations or decisions involving mixed fact and law will only be set aside if the motion judge

committed a palpable and overriding error. These would include findings such as when a party became aware of a claim or whether they had suffered prejudice.

Analysis

Sufficiency of Pleadings

[26] A judge should not permit an amendment to add a claim which discloses no cause of action or where the action is obviously unsustainable. This is the same standard applied on a motion for summary judgment on pleadings under *Rule* 13.03.

[27] In this case, the motion judge described the proposed pleading as "not elegant" and the respondent readily concedes that point. The fact that a proposed pleading sets out allegations which are poorly described or lacking in particulars is not fatal to the amendment motion. The issue is whether the pleading is obviously unsustainable.

[28] The allegations set out in the Statement of Claim as proposed include the following:

> i. EllisDon entered into a construction management contract with SWC for the Project;
>
> ii. EllisDon was aware the Project was to be a mixed residential and commercial development and would be owned and operated by one or more companies related to SWC;
>
> iii. EllisDon did not exercise reasonable care and skill in managing the construction of the Project resulting in delay;
>
> iv. As a result of the delay, SWP Maple, which leased the property from the owner, suffered damages including lost rental income; and
>
> v. Delays in the Project prevented SWP Maple, SW Partners and SWP from finalizing financing arrangements at a time when interest rates were lower, resulting in increased financing expenses.

[29] In my view, the proposed pleadings set out sufficient facts to establish a potential duty of care, breach of that duty and resulting losses to the new plaintiffs. If EllisDon believes it requires additional information concerning these allegations

in order to defend the action, it may obtain this through a demand for particulars or discovery examinations.

[30] The proposed pleading is adequate for the purposes of the amendment motion, and the motion judge was correct in concluding that sufficient facts had been pled. I would not allow this ground of appeal.

Section 22(c) of the *Limitation of Actions Act*

[31] The motion judge and the parties agreed that the amendment motion was brought after the expiry of the limitation period in relation to the claims alleged by the new plaintiffs. As a result, an analysis under s. 22(c) of the *Act* is required. This section requires the motion judge to be satisfied of the following before claims by new parties could be added:

i. The new claims relate to the conduct, transaction or events described in the original pleadings;

ii. The defendant received sufficient information within the limitation period plus the time permitted for service of process so as not to be prejudiced in defending the new claims; and

iii. It is necessary or desirable to ensure the effective determination or enforcement of the claims in the original proceeding that the new claims be added.

[32] EllisDon did not argue that the first or third requirements were not established. Its focus was on the second criterion. The difficulty with its position on appeal is that it presented no credible argument before the motion judge or this Court indicating it was prejudiced in defending the new claims. In fact, the motion judge found there was no prejudice:

> [49] As to whether adding the proposed "new claimants" SWC (in relation to the newly claimed negligent misrepresentation) and WP2, SWP Maple, and SWP (in relation to the newly-claimed negligent misrepresentation and existing claim of negligent provision of services, and the claim for increased debt interest financing) would cause prejudice that could not be compensated for in costs, I find there is no such prejudice here.

[33] This was buttressed by the motion judge's subsequent refusal to award costs to either party (2020 NSSC 194). EllisDon argued it was entitled to costs for any

additional work resulting from the amendments. The judge found EllisDon had not suffered any prejudice which would justify compensation through a cost award.

[34] The motion judge's decision discussed two different limitation expiry dates. He found the limitation period started to run with respect to the existing claims on June 1, 2015; but in relation to the increased financing costs, it did not start until June 1, 2017, when the interest rates were known. This reflects the motion judge's misinterpretation of s. 8(2)(a) of the *Act* which says:

> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;

[35] The motion judge failed to differentiate between "damage" and "damages". What a party needs to be aware of for limitation purposes is that damage has occurred. It is not necessary that the precise calculation of loss be known. This distinction was identified by Cromwell, JA in *Union of Icelandic Fish Producers Ltd. v. Smith*, 2005 NSCA 145:

> [119] There is a distinction, long recognized, although sometimes overlooked, between damage and damages. As A.I. Ogus put it in his treatise *The Law of Damages* (London, Butterworths, 1973) at p. 2:
>
> > The terms "damage" and "damages" have suffered from loose usage. Some writers and judges have used them as if they were synonymous. But "damages" should connote the *sum of money payable by way of compensation ...* , while the use of "damage" is best confined to instances where it refers to the *injury inflicted* by the tort or breach of contract ... .
>
> [120] Following this description, damage, or detriment, as an element of the cause of action in negligent misrepresentation may be understood to mean an injury rather than a sum money to compensate for its infliction. Consistent with this view, the House of Lords approved the following description of what actual damage means in *Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd. (No. 2)*, [1997] H.L.J. No 52:
>
> > ... any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage. ...
>
> [Italics in original]

[36] The motion judge made a finding that the new plaintiffs had sufficient information with respect to their claims by June 1, 2015 for the limitation period to commence on that date. In my view, he was wrong to suggest a later start for the limitation in relation to the claim for increased financing costs because that damage was also discoverable by June 1, 2015.

[37] A limitation period commencing on June 1, 2015 would expire on June 1, 2017. For an amendment brought after that time, section 22(c) of the *Act* requires the judge to consider the knowledge EllisDon had within the two year limitation together with the additional one year permitted for service under *Rule* 4.04(1).

[38] The issue for determination becomes whether EllisDon had sufficient knowledge of the claims by no later than June 1, 2018 so as not to be prejudiced in its defence of the allegations in the proposed amendments. The motion judge found that EllisDon had this information on or before June 1, 2015:

> [54] An examination of the record reveals no compelling evidence of serious non-compensable actual prejudice to EllisDon if the amendments were permitted. No serious non-compensable prejudice of the kind referenced by Justice Bodurtha in *Bayswater* has been established here: namely, prejudice of an evidentiary nature, such as documents and witnesses that have been lost due to the passage of time; lost opportunity in the litigation that cannot be compensated as a consequence of the proposed amendments, etc.
>
> [55] In relation to presumed prejudice due to excessive delay, that is not a persuasive argument in this case where the basic facts involve a contractual relationship between the parties, and the acts or omissions that caused the alleged damages were generally knowable by all parties on or before June 1, 2015, based on their intimate involvement in managing the construction flowing from the construction management services contract.

[39] In addition, the original Statement of Claim issued in July 2015 clearly set out allegations of negligent construction management against EllisDon resulting in the types of losses claimed by the new plaintiffs. EllisDon was also aware of the involvement of SWP and SW Partners in the project because they were joined as parties in August 2015. While it is possible that EllisDon might not have been aware that SWP Maple would be leasing the project from SW Partners, it was on notice that its alleged mismanagement had resulted in loss of revenue and profits.

[40] Despite the addition of further particulars and the inclusion of related companies as plaintiffs, the essential allegations against EllisDon remain unchanged from the original Statement of Claim issued in June 2015. Although I do not agree with all of the analysis by the motion judge, he was correct to

conclude that the new plaintiffs could be joined under s. 22(c) of the *Act* and I would, therefore, not allow this ground of appeal.

Conclusion

[41] I would dismiss the appeal and set the costs at $3,500.00 inclusive of disbursements. The motion judge declined to award either party costs despite the success of SWC on the motion. I would make the costs of appeal payable in the cause at the conclusion of the proceedings in the Supreme Court of Nova Scotia.

Wood, C.J.N.S.

Concurred in:

Beveridge, J.A.

Scanlan, J.A.