SUPREME COURT OF NOVA SCOTIA
Citation: *Altschuler v. Bayswater Construction Limited,* 2019 NSSC 197

Date: 20190710
Docket: Hfx No. 435230
Registry: Halifax

Between:

Scott A. Altschuler, Tracey A. Altschuler

Plaintiffs

v.

Bayswater Construction Limited

Defendant

Decision

Judge: The Honourable Justice John P. Bodurtha

Heard: December 20, 2018, in Halifax, Nova Scotia

Decided: July 10, 2019

Counsel: Matthew Gibbon, for the Plaintiffs
Melissa MacAdam, for the Defendant

Bodurtha, J.:

Background

[1] This matter involves a contractual dispute between the parties over the construction of a new-build home on land owned by the plaintiffs located at 211 Riley's Lake Road, Bayswater, NS. The project began in 2011 and the relationship between the parties broke down in the summer of 2014. The plaintiffs have brought a motion to amend the statement of claim in this proceeding.

Facts

[2] The plaintiffs filed their action on January 12, 2015. In the statement of claim, the plaintiffs alleged that in April 2011, they retained the defendant, Bayswater Construction Limited, to construct a home at 211 Rileys Lake Road. The estimated time of completion was six months to one year. The plaintiffs stated that under the verbal agreement, all sub-trades were to be supervised by the defendant. They said they were living in the United States during construction and relied on the defendant and its principal, Ronald Leblanc, to act as general contractor for work the defendant could not complete on its own, such as electrical and plumbing.

[3] According to the plaintiffs, it became clear as construction progressed that the defendant would not complete the project on time. When asked to explain the delays, Mr. Leblanc allegedly blamed weather conditions, vacations, funerals, and health issues. The plaintiffs said the defendant left the job in September 2014 with construction only 75% complete. They pleaded at para. 17 that, "[i]n addition to not completing construction of the house, many of the items that had been completed were deficient and not in accordance with the contract". They went on to identify 21 specific deficiencies. The plaintiffs claimed $297,000 in damages from the defendant.

[4] On February 9, 2015, the defendant filed a notice of defence and counterclaim. The defendant pleaded that negotiations with the plaintiffs began in March 2012 and construction started in the fall of 2012. According to the defendant, Bayswater provided the plaintiffs with its standard draft agreement, setting out in draft form the basic terms of the contract to be entered into, the scope of work, and a total estimated price for the completed work of $437,975. The defendant said there was no estimate of time for completion in the draft agreement, nor was any estimate ever given by Bayswater. The defendant stated that the draft agreement was never signed, and Bayswater commenced construction on the understanding that it would supply labour at the rate of $32 per person hour plus HST, that all material would be supplied by the plaintiffs, and that all sub-trades would be hired and paid for by the plaintiffs. According to the defendant, it was retained to construct the shell of the home and to coordinate and be available to enable sub-trades as retained by the plaintiffs onto the property to complete the work.

[5] The defendant pleaded that as work progressed, there were numerous delays caused by changes and additions requested by the plaintiffs. The defendant stated that by the summer of 2014, the relationship between the parties broke down due to the plaintiffs' indecisiveness, their numerous changes to the project, and their

failure to pay invoices in a timely manner. According to the defendant, the relationship deteriorated to the point where the plaintiffs started making arrangements with sub-traders without any consultation with the defendant. The defendant pleaded that in late summer 2014, the plaintiffs directed Bayswater to hand over the keys to the property to another sub-trade, at which time the defendant ceased working on the property. The defendant denied the allegations of defective and incomplete work and stated that any such work resulted from the defendant's removal from the job before the work was completed or arose from work and materials supplied by sub-trades hired by the plaintiffs. The defendant also filed a counterclaim for $13,391.68 allegedly still owed to it for work and materials supplied to the plaintiffs.

[6] The plaintiffs filed a notice of defence to counterclaim on March 11, 2015, in which they denied owing the defendant any amount for work and materials.

[7] The parties agree that in March 2016, the plaintiffs provided the defendant with a Supplementary Affidavit Disclosing Documents, which included a list of additional deficiencies in the defendant's work. The defendant provided those allegations to its expert who assessed them as part of his review of the property in July 2016. Other amendments, different in scope than those provided in March 2016, were proposed in October 2017. The defendant acknowledges receiving notice of those amendments in time to have its expert address them in his report. A date assignment conference was held in March 2018 and trial dates were set for February 2019. In May 2018, the defendant filed its expert report.

[8] In August 2018, the parties agreed to move the matter to Small Claims Court as a cost-saving measure. On September 9, 2018, counsel for the plaintiffs prepared an election to move the matter to Small Claims Court, but it was rejected on the basis that the statement of claim still referred to the original amount sought by the plaintiffs ($297,000 plus general damages). As a result, the matter remains within the Supreme Court's jurisdiction until amendment of the pleadings.

[9] In October 2018, counsel for the plaintiffs sought an amendment by consent to lower the value of the claim to $25,000 and to remove the general damages claim. Counsel for the defendant advised that it preferred to have the entirety of the amendments dealt with in Supreme Court prior to having the matter moved to Small Claims. Also, in October, the plaintiffs returned to Nova Scotia and met with an expert to review any deficiencies with the construction. The expert's report was prepared and sent to the defendant. The plaintiffs now seek a final amendment to add several new deficiencies that they say were found when they

were finally able to return to Nova Scotia and retain their expert. The defendant says these amendments are out of time, and/or would cause significant prejudice that is not compensable through costs now that the matter will be transferred to the Small Claims Court.

[10] The defendant specifically objects to paragraphs 17 v, w, x, y, z, aa, bb, cc, dd, and ii of the plaintiffs' proposed amended statement of claim, which refer to the following alleged defects:

> v) Not burying the exterior power conduit to the property as agreed;
> w) Not ensuring that the proper material was used on the outside of the well location;
> x) Insufficient exterior grading;
> y) Pouring the foundation over disturbed earth, causing it to settle;
> z) One floor truss has the wrong materials for the end bearing;
> aa) Insufficient spacing or location of joints in some support beams;
> bb) Incorrectly located wall between kitchen and living room;
> cc) Roof fascia not properly secured;
> dd) Not properly caulking on outside of structure;
>
> …
>
> ii) upstairs room had tray ceiling installed, but not called for in plans and had to be changed;

[11] The plaintiffs seek to amend their statement of claim to include the amendments previously discussed with Bayswater Construction in October 2017 and to include as part of the amendments six new deficiencies that were found by their expert in October 2018. The plaintiffs say the amendments are not new claims and, as such, are not out of time. In the alternative, they say the amendments can still be added pursuant to s. 22 of the *Limitation of Actions Act*, S.N.S. 2014, c. 35, or under *Civil Procedure Rule* 83.11(3).

[12] The matter was heard on December 20, 2018 with further written submissions requested by January 11 and 18, respectively, and with any further response to be filed by January 23, 2019.

Issue

[13] Whether the plaintiffs' proposed amendments represent new "claims" or "causes of action" that are statute-barred, or merely add further particulars to their current causes of action set out in their statement of claim.

The law of amendments generally

[14] Justice Rosinski in *Oldford v. Canadian Broadcasting Corp*., 2011 NSSC 49, summarized the relevant law in relation to adding amendments:

> [4] Counsel agree on the proper legal test that the Court should use. The test is found in *Stacey v. Consolidated Fund Corp. or Canada Ltd.* (1986), 76 N.S.R. (2d) 182 (C.A.) per Clarke, C.J.N.S.:
>
> > ...**the amendment should have been granted unless** it was shown to the Judge that the Applicant was acting in **bad faith** or that by allowing the amendment, the other party would suffer **serious prejudice** that could not be compensated by costs." [emphasis added]
>
> . . .
>
> [8] The only reported cases which have considered this issue under the new Rules are *Canada Life Assurance v. Saywood et al* (2010), 288 N.S.R. (2d) 273 (NSSC) and *M5 Marketing Communications v. Ross* 2011 NSCC 32, both decisions of McDougall, J.
>
> [9] As Justice McDougall concluded, I also do not believe the new Rules intended to alter, and I accept that they therefore have not altered, the appropriate legal test regarding when leave will be granted to amend court documents.

[15] In *Canada Life Assurance Co. v. Saywood*, 2010 NSSC 87, McDougall J. summarized the law as follows:

> [7] Apparently there are no written decisions regarding the new **Rule** 83.02. There are, however, a number of cases pertaining to the predecessor **Rule** 15 (1972 **Rules**). In the case of **Global Petroleum Corp** v. **Point Tupper Terminals Co.** (1998), 170 N.S.R. (2d) 367, Bateman, J.A., at para. 15, stated:
>
> > [15] The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs. (**Baumhour et al. v. Williams et al.** (1977), 22 N.S.R. (2d) 564; 31 A.P.R. 564 (C.A.))
>
> [8] This same statement of the law was cited by the Honourable Justice Arthur J. LeBlanc in the case of **Shea** v. **Whalen** (2008), 250 N.S.R. (2d) 65 at para. 6.

> [9] In the case of **Garth** v. **Halifax (Regional Municipality)** (2006), 245 N.S.R. (2d) 108 Cromwell, J.A. (as he was then) stated the following at para 30:
>
> > [30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs:
>
> [10] While these cases were all decided prior to the implementation of the new rule they continue to offer guidance despite these recent changes.

[16] In *Thornton v. RBC General Insurance Company*, 2014 NSSC 215, at para. 33, Justice Wood (as he then was), described prejudice that cannot be compensated in costs:

> 33 … 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.

[17] In *1588444 Ontario Ltd. (c.o.b. Alfredo's) v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, [2017] O.J. No. 241, the Ontario Court of Appeal said the following about non-compensable prejudice at para. 25:

> - There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: *Iroquois*, at paras. 20-21, and *Mazzuca* v. *Silvercreek Pharmacy Ltd*. (2001), 56 O.R. (3d) 768 (C.A.), at para. 65.
> - The non-compensable prejudice may be actual prejudice, i.e. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841 (C.A.), at paras. 5-7, and *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106 (Gen. Div.), at para. 9.
> - Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: *Hanlan v. Sernesky* (1996), 95 O.A.C. 297 (C.A.), at para. 2, and *Andersen Consulting*, at paras. 36-37.
> - At some point the delay in seeking an amendment will be so lengthy and the justification so inadequate, that prejudice to the responding party will be presumed: *Family Delicatessen Ltd. v. London (City)*, 2006 CanLII 5135 (Ont. C.A.), at para. 6.

- The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 27 O.R. (3d) 576 (C.A.), at paras. 3-4, and *Plante v. Industrial Alliance Life Insurance Co.* (2003), 66 O.R. (3d) 74 (Master), at para. 21.

[18] In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.*, 2001 NSSC 178, the defendant asserted prejudice of a similar nature to that claimed by the defendant in this case. Justice Wright concluded that the defendant had failed to demonstrate prejudice that could not be compensated in costs:

> 32 The demonstration of prejudice alone, however, does not satisfy the legal test to be applied on this application. The burden is on Mitsui to further demonstrate that the prejudice caused cannot be compensated in costs. Undoubtedly these amendments, if permitted, will necessitate further discovery and the re-instruction of experts which inevitably will result in more cost and some measure of delay. There has not as yet been any discovery of experts, however, and although there is always a risk of fading memories, any lay witnesses who do need to be re-examined will at least have the benefit of the transcripts of their earlier discovery evidence in a situation where the factual underpinning of the case has not changed.

[19] These are the principles that are applied on an ordinary motion to amend. The analysis becomes more complicated, however, where the amendment is sought after the expiry of a limitation period.

Adding a cause of action after expiry of the limitation period

[20] In *Letang v. Cooper*, [1964] 2 All E.R. 929 (Eng. C.A.) at 934, Lord Diplock offered what is now considered the classic definition of "cause of action":

> A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

[21] In 2009, new *Civil Procedure Rules* came into force. The relevant rule regarding amendments by a judge is Rule 83.11, which states:

> 83.11
>
> (1) A judge may give permission to amend a court document at any time.
>
> (2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.

> (3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
>
> (a) the material facts supporting the cause are pleaded;
>
> (b) the amendment merely identifies, or better describes, the cause.

[22] Rule 83.11(3) applies where the amendment would not deprive the defendant of a limitations defence because all the material facts have already been pleaded and the amendment "merely identifies, or better describes, the cause."

[23] The courts have developed other ways to allow amendments including the common law "functional approach" to amendments. Under this approach, the relevant question is not whether the amendments raise a new cause of action, but whether the defendant will suffer prejudice if the amendments are allowed. In *Pike v. Pemberton Securities Inc.*, [1997] A.J. No. 857, 1997 CarswellAlta 769 (Alta. Q.B.), the Court explained the analytical and functional approaches to amendments:

> ***Adding a Cause of Action After Expiry of the Limitation Period***
>
> 32 Adding a cause of action is somewhat problematic. The beginning point is the English Court of Appeal case of *Weldon v. Neal* (1887), 19 Q.B.D. 394, 56 L.J.Q.B. 621 (Eng. C.A.) where Lord Esher said:
>
> > We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the *Statute of Limitations*, it would be allowing the plaintiff to take advantage of his former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.
>
> 33 This has been described as the "analytical approach," although the "peculiar circumstances" exception is the origin of what has been called the "special circumstances" approach espoused by the Supreme Court of Canada in *Basarsky v. Quinlan*, [1972] S.C.R. 380 (S.C.C.). Professor Garry Watson has rejected both of these approaches. In his article, "The Amendment of Proceedings after Expiry of Limitation Periods," (1975), 53 Can. Bar Rev. 237 Professor Watson questions *Weldon v. Neal* on the basis that it makes two unsustainable assumptions: It assumes that all claims and amendments can be

> abstractly classified into distinct categories of causes of action, and it assumes that inquiring as to whether a new cause of action has been added is the only pertinent inquiry. Professor Watson supports a functional approach where the question is, instead, whether the defendant will be prejudiced by the proposed amendment: "When this approach is adopted the pertinent question is not whether the amendment raises a new cause of action. The significant issue is, did the defendant receive such notice of the plaintiff's case against him that he will suffer no actual prejudice in having to meet the amended claim?" (*Ibid.* at 242.)[1]
>
> [*Emphasis added*]

[24] In his article, Professor Watson proposed that courts adopt a new rule dealing with post-limitation amendments. With respect to amendments changing the plaintiff's claim, he wrote at pp. 282-283:

> The United States Federal Rule of Civil Procedure 15(c) provides that an amendment will be permitted, notwithstanding the expiry of a limitation period, whenever the new claim,
>
> > arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings ….
>
> In policy terms this seems a sound approach to the problem. After the passage of the rule, the defendant must realize that once an action is commenced the plaintiff is entitled to amend to include any claim arising out of the underlying conduct, transaction or occurrence, and so on, and that he should treat all claims arising out of these as still potentially contingent, not dead. In so doing, it is to be noted that the rule represents an advance over the "common law" functional approach developed above. It does away, at least initially, with the need for an inquiry as to whether the defendant received actual notice of the new claim sought to be added, since, by the rule itself, all defendants are notified in advance that, if necessary, all aspects of the underlying occurrence may be fully litigated notwithstanding the passage of the limitation period. This gives the plaintiff scope for amendment which will permit him to fully develop all aspects of the action he has timely commenced. The limits of the rule are that the plaintiff may not add claims which are unrelated to his original claim, that is those which do not arise out of the same conduct, transaction or occurrence. This limitation represents an eminently reasonable balancing of the interests involved.

[25] Professor Watson set out his proposed rule at p. 284:

> *Rule XXX Amendments to Proceedings After the Expiration of the Limitation Period*

[1]The first iteration of the "functional approach" permitted amendments only where the defendant had received actual notice of the claim. It later evolved to allow amendments where the defendant would suffer no significant prejudice, even if there was no actual notice prior to expiry of the limitation period.

> *(a) Amendments Changing the Claims Asserted.*
>
> The court may allow an amendment changing the claims asserted in an action, notwithstanding that since the commencement of the action a relevant limitation period has expired, whenever the claim sought to be added by amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading or writ.
>
> The application of the rule calls for little comment beyond what has already been written. In practice it should prove to be relatively easy to apply. By deliberately avoiding any reference to "cause of action" the proposed rule obviates the need to struggle with what is in this context the difficult, imprecise and highly conceptual inquiry as to whether or not a new cause of action is stated by the amendment. Instead, the relevant question is the more manageable one of whether the new matter asserted by the amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading or writ. Interpreted with constant attention to its benevolent purpose the rule can deal justly with any request by plaintiffs to amend their claims after the running of the limitation period. Although the rule states that the amendments there described "may be granted", the intention is that, *prima facie*, all such amendments shall be granted. The court should only exercise its discretion, within the rule to refuse leave to amend, where the amendment will prejudice the defendant in some way that is unconnected with the expiry of the limitation period, or will defeat the actual interests of the defendant sought to be protected by the limitation period.
>
> [*Emphasis added*]

[26] Some jurisdictions, including Nova Scotia, have introduced legislative provisions that are clearly based on Professor Watson's proposed rule. Others, like Ontario, apply the functional approach at common law. Consider s. 22 of Nova Scotia's *Limitation of Actions Act*:

> CLAIMS BROUGHT AFTER EXPIRY OF LIMITATION PERIOD
>
> **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;
>
> (b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, 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; or
>
> (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.
>
> *[Emphasis added]*

[27] As Justice Chipman explained in *Dyack v. Lincoln*, 2017 NSSC 187, jurisprudence from other provinces suggests that the phrase "related to the conduct, transaction or events described in the original pleadings" has a very broad meaning and is "not a particularly high threshold": paras. 48-55.

New causes of action vs. particulars of original causes of action

[28] The plaintiffs argue that the proposed amendments are not new causes of action but are merely part of the pleading that the work done by the defendant was deficient. In the alternative, they say the proposed amendments are new claims that should be allowed under s. 22 of the *Limitation of Actions Act*.

[29] The defendant's position in its pre-hearing brief was that the amendments should be denied because they are out of time, and/or because they would cause significant prejudice that is not compensable in costs now that the matter will be transferred to the Small Claims Court. That said, the defendant argued in its post-hearing brief that the amendments do not amount to "claims" that could be added under s. 22 of the Act, nor do they fall within the exception set out in Rule 83.11(3). This position is incompatible with its earlier position that the amendments are out of time. If the amendments are not new claims or causes of action, there is no limitation defence available to the defendant. In that case, the question of whether to allow the amendments must be decided under the test set out in *Oldford*.

[30] To assist in my analysis, it is helpful to outline the material facts necessary to support causes of action in negligence and breach of contract, and to examine the plaintiffs' original statement of claim to determine whether those causes of action are properly pleaded.

[31] The elements of negligence are set out in *Halsburys Laws of Canada* (online) – Negligence and Other Torts (2016 Reissue) at HTO-47:

> A cause of action for negligence arises if the following elements are present:
>
> 1. The claimant must suffer some damage.
> 2. The damage suffered must be caused by the conduct of the defendant.
> 3. The defendant's conduct must be negligent, that is, in breach of the standard of care set by the law.
> 4. There must be a duty recognized by the law to avoid this damage.
> 5. The conduct of the defendant must be a proximate or legal cause of the loss or, stated in another way, the damage should not be too remote a result of the defendant's conduct.
> 6. The conduct of the plaintiff should not be such as to bar or reduce recovery, that is, the plaintiff must not be guilty of contributory negligence and must not voluntarily assume the risk.

[32] The elements of a breach of contract claim were discussed in *Gravelle (c.o.b. CodePro Manufacturing) v. A1 Security Manufacturing Corp.*, 2014 ONSC 5472, [2014] O.J. No. 4585:

> 13 The defendants submit that the statement of claim does not contain sufficient facts to support the claim of breach of contract against A1. I do not agree.
>
> 14 The gist of the plaintiff's claim is that the parties entered into a contract to develop and exploit a key cutting machine. It will be for the court to determine at trial whether a contract existed between the parties and if so, what its terms were. If a contract existed, the court will then determine whether it was breached.
>
> 15 A contract need not be reduced to writing in order to be binding. A contract is grounded in an offer and acceptance, which may be evidenced by performance. The plaintiff describes this process in his statement of claim. He describes his performance of the contract by purchasing production tools and fabricating key machines in anticipation that they will be marketed. He describes the termination of the contractual relationship, initiated by an email from A1, and sets out the basis for his claim for damages.
>
> 16 It is not improper to plead in the alternative that the contractual arrangements were formed by some or all of the negotiations. The statement of claim references the exchange of certain documents between the plaintiff and A1 that he says form the terms of the contract. Presumably, these documents are in the possession of A1. Thus, the claim is particularized. It is therefore not baldly pleaded. *Prima facie*, the plaintiff has pleaded a cause of action for breach of contract: offer, acceptance, and breach, which he alleges resulted in damages.
>
> [*Emphasis added*]

[33] The Federal Court described the requisite elements as follows in *Coast Dryland Services Ltd v Canada (Ministry of Fisheries and Oceans)*, 2007 FC 16, [2007] F.C.J. No. 40:

> 26 In terms of breach of contract, the essential elements of the cause of action are the existence of a contract and its wrongful breach.
>
> 27 However, a contract can only exist when parties have entered into an agreement for some form of consideration, with an offer by one party and an acceptance by the other party. In order to establish the existence of a contract, the proponent is required to plead the terms of agreement, the consideration exchanged, and the intention to create contractual relations.

[34] Turning to the pleadings, the plaintiffs allege that they entered into an agreement with the defendant for the construction of a new home on the plaintiffs' property. As the plaintiffs' contractor, they say the defendant owed them a duty of care. The plaintiffs state at para. 17 that the defendant failed to complete construction, and that "many of the items that had been completed were deficient". While the pleading could have been clearer, "deficient" would suggest that the defendant breached the standard of care for a contractor constructing a house in Nova Scotia. Paragraph 17 then sets out a non-exhaustive list of the ways in which the defendant's work fell below the standard expected from a reasonable contractor. The plaintiffs claim, among other things, $87,000 to complete repairs of the deficiencies. In other words, the plaintiffs allege that they suffered damages as a result of the defendant's breach of the standard of care. In my view, these pleaded facts suffice to establish a claim in negligence related to construction of the home.

[35] As to the contractual claim, the plaintiffs allege that there was a construction contract in place between the parties under which the defendant would construct the home. They say the estimated time of completion was six months to one year, and the total estimated construction price was $437,000. The plaintiffs allege construction was never completed, and many of the items that had been completed were deficient and "not in accordance with the contract". They then set out the specific deficiencies and claim, among other things, for the cost of repair or remediation of the deficiencies. Again, in my view, these pleaded facts suffice to support a cause of action in breach of contract.

[36] The question, then, is whether the proposed amendments represent new "claims" or "causes of action" that are statute-barred, or merely add further particulars to the negligent construction and breach of contract claims already set out in the statement of claim.

Amendments do not amount to new claims or causes of action

[37] In *White v. Vancouver General Hospital*, (1963), 45 W.W.R. 34, 1963 CarswellBC 146 (B.C.S.C.), a plaintiff sued the defendant hospital and members of its staff for negligent medical treatment. In particular, the plaintiff complained about the injection of a dye substance into his body. The plaintiff later sought to amend the statement of claim to allege the administration of "medical substances". He also wanted to add to the particulars of negligence an allegation that adrenalin was administered under circumstances that were unsafe. It was acknowledged by the parties that the administration of the dye substances and the adrenaline took place on the same day. The defendants opposed the amendments on the ground that they would permit the plaintiff to lead evidence of the administration of adrenalin and other medical substances apart from dyes, and would amount to a new cause of action that was already statute-barred. The Court summarized the plaintiff's position as follows:

> 7 The plaintiff submits that the amendment permitting him to allege administration of substances other than dyes does not constitute the setting up of a new cause of action, but is merely a new particular of the negligent treatment alleged in the endorsement on his writ where he pleads:
>
> > The plaintiff's claim is for damages for injury to the plaintiff caused by the negligence of the defendants, Duncan Govan and D. R. S. Milne, as medical men, at all material times the servants or agents of the defendant, Vancouver General Hospital, and by the negligence of other servants and agents of the defendant, Vancouver General Hospital ....

[38] Allowing the amendments, Justice MacLean stated:

> 14 In the present case, I do not think that it can be said that the plaintiff in his proposed amendments seeks "a new departure, a new cause of action." The amendments merely add further particulars of the negligent treatment alleged in the endorsement. Further, I find that the proposed amendment falls within the scope of amendments premitted [*sic*] by O. 28, R. 1.

[39] On an appeal from a Master's decision allowing certain amendments, the Court in *Brews & Cues Billiard Club Ltd. v. Bee-Bell Health Bakery Inc.* (1997), 204 A.R. 79, 1997 CarswellAlta 596 (Alta. Q.B.), ruled that adding particulars to a negligence claim does not create a new cause of action:

> 2 The defendant's present contention might have been arguable when the *Judicature Act* first introduced facts-only pleading. Maybe plaintiffs intending to sue a defendant for negligence should then just have pleaded the negligent conduct, such as failing to keep a proper lookout (or leaving a door open). Maybe negligence might have been a legal conclusion and not a fact. <u>But</u>

> for well over a century, it has been customary to plead negligence as a fact, and then to recite particulars of it, though no express Rule calls for those particulars. See 1 Bullen & Leake's Precedents of Pleadings 477 ff. (4th ed. 1882). It is too late to condemn that practice.
>
> 3 The original Statement of Claim says that the defendant worked on the premises above the plaintiff's, and by the defendant's negligence caused a flood which caused the plaintiff's damages. That is enough to show a cause of action, even ignoring para. 8 (which at first gave probably erroneous particulars). If para. 8 did not exist, that gap would only let the defendant move for particulars, as the Master points out. The defendant could not argue that the Statement of Claim disclosed no cause of action. So adding new or different particulars does not add a cause of action where none existed. Nor is it a different cause of action. Before and after the amendment, the only cause of action was negligence. See the facts in *Budget Rent A Car of Edmonton Ltd. v. University of Toronto* (1991), 116 A.R. 33 (Alta. Master), and the facts of the other court decisions cited in it. Cf. *Mitchell v. Campbell*, [1937] 2 W.W.R. 497, [1937] 3 D.L.R. 542 (Man. C.A.).
>
> 4 Therefore, leave to amend the particulars in the Statement of Claim was properly given, even though the limitation period seems to have expired before the Notice of Motion seeking the amendment was filed. The amended Statement of Claim will stand, and the appeal from the Master's order is dismissed, with costs.
>
> [*Emphasis added*]

[40] Courts in Ontario have also held that there is no new cause of action where an amendment merely provides particulars of an allegation already pleaded. For example, in *1100997 Ontario Ltd. v. Elgin*, 2016 ONCA 848, [2016] O.J. No. 5851, at para. 20, the Ontario Court of Appeal adopted the following passage from Morden & Perell, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis Canada Inc., 2014) at p. 142:

> A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.
>
> [*Emphasis added*]

Analysis

[41] In my view, there is sufficient authority to find that the amendments sought by the plaintiffs are not new causes of actions or "claims" for the purposes of the *Limitation of Actions Act*, but merely particularize the negligence and breach of

contract claims already pleaded. That said, the outcome of this motion does not depend on whether the amendments add new causes of action or claims. If I am wrong and the amendments are new claims, they are clearly related to the conduct, transaction or events described in the original pleadings and may be added pursuant to s. 22 of the *Act*. Whether the amendments should be permitted will depend on whether they will result in prejudice that cannot be compensated in costs.

[42] In *Stolk v. 382779 Alberta Inc.*, 2005 ABQB 440, the Court considered whether prejudice factors into the analysis required under sections like s. 22(a) of the *Limitation of Actions Act*, writing:

> 39 In *Stout Estate v. Golinowski Estate*, 2002 ABCA 49, Wittmann J.A. (as he then was) discussed prejudice in the context of section 6 of the *Limitations Act*. He noted (at para. 97) that the functional approach, which presumes that amendments will be allowed unless the party resisting amendment can show it will suffer actual prejudice, is the proper approach under section 6 of the *Limitations Act*.[2]

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[2]Section 6 of the Alberta Act states:

> 6 (1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
>
> **(2) When the added claim**
> **(a) is made by a defendant in the proceeding against a claimant in the proceeding, or**
> **(b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,**
> **the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.**
>
> (3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,
> (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
> (b) the defendant must have received, 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 maintaining a defence to it on the merits, and
> (c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.
>
> (4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,
> (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and
> (b) the defendant must have received, 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 maintaining a defence to it on the merits.

40 In *Herman v. Alberta (Public Trustee)*, Justice Marceau described the effect of this decision as follows (at para. 46):

> Although Wittmann J.A. mentions prejudice as a part of the functional approach, I do not believe this decision suggests that prejudice is a concrete consideration under every subsection of section 6. Wittmann J.A. does not differentiate between sections 6(2) and 6(3) and does not address the different language in those two subsections. There is no indication in section 6(2) that a party can invoke prejudice as a ground to resist an amendment. By way of contrast, in section 6(3)(b), a defendant can clearly resist an amendment by showing actual prejudice. The express language of these two provisions reveals that prejudice is a consideration under section 6(3), but not under section 6(2).

41 In *Malborough Ford Sales Ltd. v. Ford Motor Company of Canada*, 2003 ABQB 298, Justice Hughes described section 6(2) as follows (at para. 33):

> ... The only requirement of s. 6(2) of the *Limitations Act*, that the added claim "be related to the conduct, transaction or events described in the original pleading in the proceeding", has been satisfied by Ford, and, therefore, Ford is allowed to amend its Statement of Defence by adding the proposed Counterclaim. In so ruling, I note the relationship requirement of s. 6(2) serves purposes previously served by the common law; in Limitations (Report No. 55) at 83, the Alberta Law Reform Institute commented:
>
> > 12. The relationship requirement is designed to serve at least three purposes. First, it gives the courts ample latitude to adjudicate claims in a single proceeding whenever this is [desirable] under objectives of procedural policy. Second, it assists the claimant to exercise some control over the eventual size of the civil proceeding which he commenced. The conduct, transaction or events which the claimant describes in his original pleading will operate as a screen determining which added claims may remain subject to a limitations defence notwithstanding the exception provisions. *Third, it prevents any possible prejudice to a defendant because of surprise by the addition of a claim after the expiration of the limitation period applicable to the added claim. Because the defendant (unless the original claimant) must have been made a party to the action under a timely claim, he will know of the conduct, transaction or events described in the original pleading in the action, and he will be able to gather and preserve evidence as to any possible claims against him based on the described conduct, transaction or events*. (Emphasis added)

…

[*Emphasis added*]

> 42 Based on the foregoing, it does not appear that prejudice to the Defendants is a necessary part of the analysis under section 6(2) of the *Limitations Act*.

[43] Like its Alberta counterpart, s. 22 of the *Limitation of Actions Act* refers to prejudice only where the amendment adds or substitutes a party, or changes the capacity in which a party sues:

> 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;
>
> (b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, 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; or
>
> (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.
>
> [*Emphasis added*]

[44] A defendant is unlikely to defeat a motion to amend pursuant to s. 22(a) of the *Limitation of Actions Act* based on prejudice that cannot be compensated in costs, because the relationship requirement is intended to ensure that the defendant is not surprised or prejudiced by the amendment. In other words, while there may be prejudice to the defendant, it will not amount to actual or otherwise non-compensable prejudice. As Professor Watson noted at p. 282 of his article:

> After the passage of the rule, the defendant must realize that once an action is commenced the plaintiff is entitled to amend to include any claim arising out of the underlying conduct, transaction or occurrence, and so on, and that he should treat all claims arising out of these as still potentially contingent, not dead.

[45] In its pre-hearing brief dated December 12, 2018, the defendant submits that it will suffer "significant prejudice", including:

- The defendant's expert will need to reattend at the site and amend his report;
- The defendant may need to discover the electrician and/or a representative of Nova Scotia Power;
- The defendant may need to discover and add the landscaper as a third party;
- The defendant will need to re-discover the plaintiffs in relation to what plans the plaintiffs are relying on and what discussions were had in relation to the allegedly incorrectly-placed wall;
- The defendant may need to call additional witnesses in relation to the tray ceiling.

[46] Although there are vague references in the brief to potential difficulty locating witnesses, there is no evidence that the defendant will suffer actual prejudice. If this matter were remaining in the Supreme Court, the forms of prejudice asserted by the defendant would be compensable in costs. The issue is complicated, however, by the parties' decision to move the matter to Small Claims Court, which has limited jurisdiction with respect to costs awards. Section 15 of the *Small Claims Court Forms and Procedures Regulations*, NS Reg 17/93, provides:

> 15 (1) The adjudicator may award the following costs to the successful party:
>
> (a) filing fee;
>
> (b) transfer fee;
>
> (c) fees incurred in serving the claim or defence/counterclaim;
>
> (d) witness fees;
>
> (e) costs incurred prior to a transfer to the Small Claims Court pursuant to Section 10[3];

[3] s. 10 simply provides:

> 10 (1) A party to a proceeding commenced in the Supreme Court in which the trial has not begun or judgment has not been entered who elects to have the proceeding adjudicated in the Small Claims Court pursuant to subsection 19(2) or (3) of the Act, may do so by paying a transfer fee of $99.70 and serving a Notice in Form 4 on the prothonotary, the plaintiff and any other party to the proceeding.
>
> (2) The prothonotary, upon receiving a Notice referred to in subsection (1), shall, if the matter is within the jurisdiction of the Small Claims Court, transfer the file to the clerk of the Small Claims Court who shall affix an identifying number to the file and provide the parties with Form 5, Notice of Adjudication in the Small Claims Court of Nova Scotia, notifying the parties of the date, time and place of the hearing.

> (f) reasonable travel expenses where the successful party resides or carries on business outside the county in which the hearing is held;
>
> (g) additional out of pocket expenses approved by the adjudicator.
>
> (2) No agent or barrister fees of any kind shall be awarded to either party.

[47] During the hearing, counsel for the plaintiffs indicated that under the *Small Claims Court Act*, all expert fees are awardable as costs. Accordingly, he said, if the amendments require further work by the defendant's expert, the court cannot state that that prejudice is not compensable in costs. This statement is not entirely accurate. While the Supreme Court of Nova Scotia has held that expert fees can be awarded in Small Claims Court as an "out of pocket expense", other cases have held that it should be a rare occurrence. In *Learning v. Glen Arbour Condominiums Inc.*, 2006 NSSC 5, Justice McDougall upheld an adjudicator's award of $9,221.99 in interest and costs, including $8,511.99 for expert fees. He wrote:

> [47] … If the legislature intended to limit the fees awarded to successful litigants to cover the costs of experts then it should have clearly stated so in the Statute or the Regulations similar to what was done to limit agent or counsel fees. Instead, it granted discretion to adjudicators under Regulation 15(1)(g) to award "additional out of pocket expenses" that he or she might approve.
>
> [48] I see no reason to fetter the discretion of the adjudicator who is in the best position to decide what costs should be allowed. …

[48] However, in *French v. Checkmate Home Inspections Inc.*, 2009 NSSC 114, Robertson J. held:

> [8] There are no provisions for expert fees in the Small Claims Court Regulations. Notwithstanding the cases cited *Glen Arbour Condominium v. Lisa Learning and Egan Wallett*, 2006 NSSC 5 and *Burgess v. Pickard*, 2008 NSSM 15, which demonstrate the discretion to award experts' fees lies with the court. I do not find that this is a case where such an award should be made. As a general principal [*sic*] the purpose of achieving speedy and inexpensive resolution to small claims, is defeated if experts' fees come into play in every award of costs. Had this been contemplated by the legislation the regulations would have addressed the matter. <u>In my view it would be a rare circumstance where such a discretion should be exercised.</u>
>
> [*Emphasis added*]

[49] Justice Robertson's decision in *French* was recently applied in *Scotia Structures Inc. (c.o.b. Archadeck of Nova Scotia) v. Singh*, 2018 NSSM 33, [2018]

N.S.J. No. 329. In addition, in *Weller v. Hailey's Auto Sales*, 2015 NSSC 120, Justice Rosinski noted:

> [33] I agree with the principle that adjudicators should be reluctant to award expert fees, unless they are, truly necessary to a claimant's or defendant's case, and reasonable in amount.

[50] Consequently, while the defendant may succeed at the hearing, and the Small Claims Court may award expert fees to the defendant under s. 15 of the Regulations, there is no way to predict whether either of these will occur. For this reason, the Small Claims Court's power to award expert fees is of little assistance in determining whether to allow the amendments.

[51] While it is sometimes the case that costs to a defendant arising from an amendment are left for the trial judge to determine at the end of the proceeding, there is no general rule to that effect (See: *L&B Electric Ltd. v. Oickle*, 2005 NSSC 225, at paras. 8-9, and *Secunda Marine Services Ltd. v. Caterpillar Inc.*, 2012 NSSC 53, at paras. 80-81). For example, in *Wall v. Horn Abbott*, [2000] N.S.J. No. 113, the plaintiff moved to amend his statement of claim to change the date of an alleged meeting between himself and one of the defendants. The action was commenced in November 1994. In the statement of claim, the plaintiff alleged that he met the defendant in the "Autumn of 1979". In July 1995, the plaintiff amended the pleadings to allege that the meeting took place on or about "December 14, 1979". The corporate defendants and the individual defendant filed defences in April 1997. In September 1997, the plaintiff amended the statement of claim again to assert the meeting occurred on December 4, 1980.

[52] Over the next several years, evidence obtained through various discoveries led the plaintiff to conclude that the defendant was not in Canada during the period on or about December 4, 1980, and that the meeting between them must have occurred in 1979. In March 2000, the plaintiff sought to amend the statement of claim once more to plead that the meeting took place in the "Fall of 1979". The defendants objected to the amendment, arguing that the plaintiff's application was brought in bad faith and that the amendment would cause "serious injustice". Justice MacAdam was not satisfied that the plaintiff was acting in bad faith, and noted:

> 36 To deny the plaintiff's proposed amendment would be to require him to testify, at the trial, under oath or affirmation, about evidence he now says is not correct and require him to tell the trier that this meeting occurred on one date when he himself believes it occurred on another. The obvious absurdity of such a position requires no further comment.

[53] On the issue of prejudice, he stated:

> 37 The defendants raise the issue of prejudice and delay. Notwithstanding the representations by counsel for the plaintiff to the contrary, it is clear the defendants are prejudiced by this amendment and evidence is not required for the court to recognize that in preparing their defence, the defendants have relied on the dates suggested by the plaintiff in reference to this alleged meeting. Even notwithstanding they may have canvassed witnesses concerning events in both 1979 and 1980, it is clear they conducted examinations on the basis the plaintiff was alleging a December 1980 date as being the time period in which he had met with Haney and discussed his idea of a board game. On the other hand, not to grant the amendment would clearly prejudice the plaintiff. As noted, he would be required to testify in court, not as to what he believes or says is one of the circumstances of the meeting, namely the date, but rather without reference to any date or in suggesting a date he no longer accepts as being the likely time in which he says this meeting occurred.
>
> …
>
> 39 The trier of fact is entitled to know the positions of each party and notwithstanding the circumstances of this application to amend, including the prior history of amendments and the multitude of applications which have occurred since the commencement of this proceeding, the prejudice to the plaintiff far exceeds that to the defendant in these circumstances. The defendant, is entitled, notwithstanding the extensive cross-examination conducted of the plaintiff on this application in respect to the basis for his now suggested date for the meeting, to have further discoveries or a resumption of the existing discovery of the plaintiff on the basis that the date for the meeting is now stated to be the "Fall of 1979", as well as the evidentiary position of the plaintiff that this meeting occurred on or about "November 29th , 1979". Costs associated in canvassing the plaintiff in respect to his present position as to the date of this meeting are, of course, for the account of the plaintiff.

[54] Justice MacAdam allowed the amendment, but made it subject to several conditions:

> 46 The application to amend is granted, subject, however, to the following conditions:
>
> 1. The defendants shall have costs of this application in the sum of $1,000.00, collectively, to be paid within thirty days from the date of this decision.
>
> 2. The plaintiff, at the discretion of the defendants, is subject to a further or a continuation of his discovery and, upon completion of the discovery, shall pay to the defendants collectively, the sum of $2,000.00 within thirty days of the date the defendants confirm the discovery of the plaintiff has been completed.
>
> 3. The defendants, at their discretion, may re-examine on discovery any non-party witnesses on any issues arising out of this amendment and upon

> confirmation to the plaintiff, or his counsel, that such repeat discoveries have been completed, the plaintiff shall pay to the defendants, collectively, the additional sum of $2,000.00 within thirty days of the date of receipt of such confirmation.

Justice MacAdam's decision was affirmed on appeal: 2000 NSCA 113.

[55] In *Shea v. Whalen*, 2008 NSSC 422, Justice LeBlanc adopted a similar approach. In that case, the defendants applied to amend their defence to plead that the plaintiff's injuries were caused or contributed to by the treatment she received from a medical professional. Justice LeBlanc allowed the amendment, but made its effect conditional on the payment of certain costs by the defendant:

> [47] The prejudice, although significant, is not fatal to the application. Though there will be delay it is not a delay that is monumental. Experienced and competent trial counsel can readily prepare for trial even with this amendment granted. I am prepared to allow the amendment. However, in order for the amendment to take effect, the applicants will be required to pay certain costs to the respondent, as and when incurred by the plaintiff in dealing with the claim of *novus actus interveniens* and the other amendments. I set those costs as follows:
>
> 1. $3,000.00 for the preparation time for the discovery of Dr. Hannigan and Dr. Bourque;
> 2. $4,000.00 for the costs of conducting the discovery of Dr. Hannigan and Dr. Bourque;
> 3. $1,500.00 for preparation time for discovery of the plaintiff's additional expert, if any;
> 4. $2000.00 for the cost of attending the discovery of the plaintiff's dental expert.
>
> [48] The defendant shall undertake to the court to pay the costs of the expert dental report prepared by the expert for the Plaintiff.
>
> [49] I award $1,000.00 to the Respondent for the costs of this application.

[56] As these cases demonstrate, the court may allow the amendments, conditional on the plaintiffs paying costs to the defendant to compensate for prejudice arising from the amendments. Granted, it is easier for a trial judge to calculate an amount based on steps actually taken by a defendant to respond to the amendments, rather than on submissions made by defence counsel in opposition to the motion to amend, but that option is not available here.

[57] While it is true that the defendant will need to incur additional costs to respond to the amended claims, defence counsel, in my view, has exaggerated

those costs. The defendant's expert will likely need to revisit the property and amend his report to address the new deficiencies raised in the amendments. As to further discovery of the plaintiffs, interrogatories would be an appropriate, and less expensive, means of obtaining details about the plans relied on by the plaintiffs as well as any discussions regarding placement of the wall. The defendant says it may need to discover additional witnesses, such as the electrician, the landscaper, and a Nova Scotia Power representative. It is not clear why discoveries would be necessary. If this proceeding had been commenced in Small Claims Court, the defendant would not be entitled to discovery of these individuals. Finally, the defendant raises the possibility of adding the landscaper as a third party. On this point, if the defendant wishes to add the landscaper, there does not appear to be any barrier to doing so.

Conclusion

[58] In my view, the amendments sought by the plaintiffs do not raise a new cause of action or claim. As a result, where there is no allegation of bad faith, the amendments should be allowed if they would not result in prejudice that cannot be compensated in costs. There is no evidence that the defendant will suffer actual prejudice, and the other forms of prejudice asserted by the defendant can be compensated in costs.

[59] Even if I am wrong, however, and the amendments do raise new causes of action or claims, the amendments are clearly related to the conduct, transaction or events described in the original pleadings, and may therefore be added under s. 22(a) of the *Limitation of Actions Act*. Since the relationship requirement in s. 22(a) is intended to ensure that the defendant will not be surprised by or suffer actual prejudice as a result of the amendments, any prejudice should be compensable in costs.

[60] The Small Claims Court's jurisdiction over costs is limited, and it is impossible to know whether an adjudicator would make an award of expert fees to the defendant if it is successful at the hearing. It follows that if the defendant is to be compensated for prejudice resulting from the amendments, those costs must be granted on this motion.

[61] While a trial judge is best placed to quantify prejudice suffered by the defendant as a result of an amendment, there is no general rule requiring it to be left to him or her to determine. There are several cases where the Supreme Court

has granted an amendment conditional on the payment of costs to the opposing party. I find this to be one of those cases. I set those costs as follows:

1. The plaintiffs shall undertake to the court to pay the costs of the expert report prepared by the expert for the defendant to address the new deficiencies alleged in the amendments to the plaintiffs' statement of claim; or

2. In the alternative, if the plaintiffs prefer to proceed without the contested amendments rather than pay the costs for the defendant's expert – a reasonable course of action in view of the numerous allegations already advanced in the pleadings and the $25,000 limit on damages in the Small Claims Court – they would be free to do so.

3. I award $1,000 to the defendant for the costs of this application, in any event of the cause.

Bodurtha, J.