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COMMENCING A NEW ACTION AFTER AN APPLICATION TO ADD A DEFENDANT TO EXISTING LITIGATION IS DENIED

BACKGROUND

A common problem that arises in 'leaky condo' litigation is the addition of defendants whose identity has been discovered after the commencement of the action. Generally, the practice had been to bring an application to add defendants pursuant to Rule 15(5) of the *Rules of Court*. This discretionary Rule allows a court to add defendants where it is of the opinion it would be "just and convenient" to do so.

In making this determination, the court is required to balance a number of factors. Often the expiry of a limitation date is a complicating factor in such applications. If the plaintiff is successful in applying to add a defendant after the expiry of a limitation period, the defendant can no longer use the limitation period as a defence to the action.

In an attempt to avoid such issues, plaintiffs devised an interesting approach. Following an unsuccessful Rule 15(5) application, plaintiffs have commenced new actions solely against the defendants sought to be added. A number of previous rulings have held that a 'second kick at the can' was an abuse of process by attempting to re-litigate an issue already decided by the court, while other, more recent cases had specifically approved the procedure.

The recent B.C. Court of Appeal decision in *Owners, Strata Plan LMS 343 v. Haseman Canada Corporation*, 2007 BCCA 301, has clarified this dispute, holding that the commencement of a new action, after an unsuccessful application to join a new defendant, is not inappropriate.

THE RULING

The difficulty the plaintiff applicant experienced in *OSP LMS 343* was due to the fact that it knew the identity of the three defendants it proposed to add, well before the expiry of the limitation period. In fact, it had placed two of those defendants, an architect and a general contractor, on formal notice just prior to filing of the action. Nonetheless, the Writ filed by the plaintiff omitted to name these defendants, naming only the City of Coquitlam and "John Doe".

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An application to add these defendants was not made until July 2005, some five years after the first formal notice was issued (and, arguably, well after the limitation period had expired). Shortly after the application to add the three defendants was made, and during the course of oral argument, counsel for the plaintiff filed a new action against the three defendants. The application to add the new defendants pursuant to Rule 15(5) was denied. The defendants then filed their own application to have the new action dismissed, arguing that the new action was an abuse of process.

The Court of Appeal recognized that there was a dispute in the case law about whether such a procedure was acceptable. However, in a blow to potential defendants, it concluded that there was nothing objectionable about a plaintiff commencing a second action following an unsuccessful application for joinder of a party. The Court of Appeal unanimously held that filing a new action was neither an abuse of process nor an attempt to re-litigate the same issues.

PRACTICAL IMPLICATIONS FOR INSURERS

The Court of Appeal's decision means that insurers may have to fund two separate rounds of applications before the courts when faced with this scenario. Plaintiffs' counsel will likely continue to bring Rule 15(5) applications, but simply take the added precaution of filing writs contemporaneously with such applications in an attempt to continue with actions against new defendants if their application to add is unsuccessful. In such cases it will be necessary to oppose the Rule 15(5) application, and then apply to have the new action dismissed because of the expired limitation period.

Insurers are well advised to be cognizant of the potential for this "two-step" procedure and the associated costs when determining whether to oppose joinder applications in British Columbia.

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