

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Master Tokarek
Pronounced in Chambers
January 18, 1995

BETWEEN:

**STRATA CORPORATION OF STRATA PLAN NO. VR1378
and THE OWNERS OF STRATA PLAN NO. VR1378 et al.**

PLAINTIFFS

AND:

**MARA PROPERTIES LTD., formerly known as
POLYGON PROPERTIES LIMITED and
THE CORPORATION OF THE DISTRICT OF WEST VANCOUVER**

DEFENDANTS

R. Pawliuk
F.G. Potts

Appearing for the Plaintiffs
Appearing for the Defendants

1 The defendant, District of West Vancouver, applies for the relief set forth in the Notice of Motion filed January 10, 1995. I need not recite all of those claims for relief. Counsel have gone through the facts in a succinct but careful way, and as well, have referred me to the relevant authorities. I think it fair to say that with respect to the matters requested in the

Notice of Motion, the issue turns -- as Mr. Potts described -- on whether or not there is privilege with respect to certain documents. If the privilege has been waived, I think he is correct and he is entitled to the relief sought. If it has not been waived, then he is not entitled to his relief, other than perhaps the issue of the cross-examination on affidavits.

2 The submission advanced by the defendant is straightforward, and amounts to the claim that where the parties' state of legal knowledge is put in issue, privilege is gone or absent with respect to the documents relating to that.

3 The affidavit material clearly indicates that the plaintiff has had ongoing conversations with solicitors, obtaining legal advice with respect to one aspect or another of the defects and deficiencies in this particular building since 1986. There have been successive solicitors. I need not name them. It is those documents that are being sought.

4 One or more of the plaintiffs have deposed to the fact -- and I am paraphrasing -- that they essentially knew nothing about their right of action against West Vancouver or the limitation period. However, in the course of events, a letter of August, 1986, has been referred to, which refers to legal advice to the effect that there may be damages involved and that there may be a claim against West Vancouver. Again, I am paraphrasing, as I

cannot at this moment put my finger precisely on the affidavit or the portion of the affidavit that contains that reference.

5 The plaintiff says, amongst other things, that whatever knowledge or lack of knowledge the plaintiff had in 1986, and whatever advice they received in that regard, if any, is either irrelevant or certainly ought not to be produced on this application because there is an abundance of material by way of experts' reports and other material to indicate that in 1986, there was no knowledge whatsoever of the particular roof-rot problem which is now the subject of this action. Rather, at that time, advice was sought and presumably given with respect to a myriad of defects and deficiencies of a more minor nature, which were subsequently remedied to the satisfaction of the plaintiffs and for which the plaintiffs are not bringing an action. I am told that there is no law suit in that regard being asserted now.

6 However, in the more narrow sense, the issue is the state of legal knowledge of the plaintiffs with respect to an action against West Vancouver and any limitation period known to the plaintiffs.

7 It is sufficient in that regard that documents may be relevant, not that they must be relevant. It is likely that there are some documents that may be relevant, although in the absence of looking at those documents or reviewing them, it is of course

impossible to definitively determine that issue. I think the knowledge of the plaintiffs of their legal position is put in issue, if nothing else, by paragraphs 1 and 2 of the reply filed April 26, 1994.

8 In essence, the plaintiffs are replying to the defense that they are out of time by essentially saying time does not begin to run until we were aware of the problem. That did not happen until 1989/1990, and consequently, the time period runs from then. That kind of pleading is analogous to the cases referred to and applied by Mr. Justice Maczko in the *Wirtanen* decision. In that case and in the cases that he referred to -- the full extracts of which have also been provided to me -- documents in similar circumstances were ordered to be produced.

9 I am cognisant of the position of the courts that solicitor/client privilege must be guarded jealously, and only waived and documents disclosed in the clearest of cases. In that regard -- I think it appropriate that I grant the order sought, but only with respect to certain portions of the documents claimed, some of which cannot be known or ascertained until Ms. Pawliuk has an opportunity to refer to the documents, for example, from the files of Douglas Symes.

10 There has been discussion as to whether it would be appropriate for the court to examine these documents, or whether

counsel can find a way to deal with that between themselves. At this stage, I am going to grant the order sought by the District of West Vancouver in the Halliday Form, which is the alternate order contained in the Notice of Motion of January 10th. That is the documents of Clark, Wilson and Douglas Symes relevant to the plaintiffs' state of knowledge as to its actual or potential legal rights as against the defendant and relevant to the state of knowledge in respect of limitation periods be produced as requested.

11 Now, before I continue, I assume that the law firms have been served with this notice?

12 **COUNSEL:** Yes. The law firms both have notice. You'll recall Clark, Wilson provided me with an affidavit saying their file was destroyed.

13 **THE COURT:** Yes. So in that regard, the order will read, to the extent the same may exist, or to the extent that they --

14 **COUNSEL:** I know that Douglas Symes has a file. I confirmed that with them.

15 **THE COURT:** All right. Now, I am at your convenience as to how you want to proceed in that regard. I would think -- and

I am open to your submissions later -- that the orderly way to deal with this would be for Ms. Pawliuk to have those documents delivered to her to examine in detail, for her to compile them with respect to the other documents that we have discussed and that are in issue and that when she has a comprehensive picture of what, if anything, those documents reveal relative to the two issues we have discussed, namely the state of knowledge and the limitation period she will be able, perhaps, to do something with those documents.

16 It seems to me the choices are that she could delete from those documents, things that are irrelevant and give the balance to you, the typical Halliday type of order. However, if that is inappropriate or impractical for whatever reason, then it is open to you to come back and have the documents reviewed.

17 **COUNSEL:** Your Honour, I don't think that I'll have any difficulty going through it. One of my concerns -- I understand that I can delete portions so I can give portions of the file, and I will comply with Halliday -- but, my concern is because the nature of the facts takes so long to describe, if rather than coming back, we could just save costs and time by simply submitting to you what is in issue?

18 **THE COURT:** Well, I leave that to you. I have difficulty foreseeing how that could happen without somebody wanting to make some submissions on it. If you can arrange that so

you can put the documents forward with a two-liner: here is what we are looking for, do you say yes or no; fine. If you can work that out, all the better, but if you want to have the opportunity to make submissions, you should have that opportunity.

19 **COUNSEL:** Okay, because Halliday perceives that we go back on another application. I have been in a situation where we've just had one brief little question which has required us to go back before another judge, and so what I would like to do is have left open to us through the order, that we can simply -- if we've got a couple of little questions -- we can submit it to the Registry, bring it to your attention and have it disposed of quickly and cheaply.

20 **THE COURT:** Well, I do not mind looking at it. Depending upon when that happens, I would think that a month or two from now, my memory would be somewhat faded in any event, but if that is what you want to happen, that sounds efficient. Mr. Potts?

21 **COUNSEL:** Perhaps the order could be done this way. My friend has already listed the documents in her possession at present in her affidavit. I would ask that the order go that she obtain the documents from Douglas Symes of Clark, Wilson to the extent they are a document, she prepare a list of all of those documents in the same format, provides such documents as she is disposed to provide and the parties have liberty to bring any

disputed documents back before the court.

22 **THE COURT:** Such documents or portions of the
documents?

23 **COUNSEL:** Yes.

24 **THE COURT:** Yes.

25 **COUNSEL:** And hopefully we can work it out. If we
can't, then we could come and argue it. What I'm concerned about
though is I don't want my friend culling the list. I want a
complete list of all the documents received, and she can maintain
privilege on such whatever she thinks fit.

26 **THE COURT:** And she will maintain privilege over the
ones that she claims privilege over, and they should be identified
sufficiently well to entitle him to determine whether he -- as I
was saying, the documents that you have, Ms. Pawliuk, when you
obtain them should be described, of course, in a sufficient fashion
to allow Mr. Potts to make a determination whether he should
proceed or not. Now, there are delicate issues in that regard as
to how detailed a description he may be called upon to make, but we
will leave it to your best judgment. If there is a problem in that
regard, we can handle that as well at a subsequent time.

27 Now, were the interrogatories an alternative to the
production of the documents?

28 **COUNSEL:** No, not at all. My submission on that was
very brief. If privilege has been waived, we're entitled to those
answers. They're set out as an exhibit to Mr. Miller's affidavit.

29 **THE COURT:** I have looked at them. I have read them.
I think you are correct in that regard as well, although certainly
they need not be answered until this document issue is resolved.

(SUBMISSIONS)

30 **THE COURT:** I understand it is a corporate plaintiff,
but there are some practical difficulties. Without making a
determination on it, I am asking Mr. Potts as to why, practically,
the response to the interrogatories could not await the conclusion
of the cross-examination on the affidavits or discoveries and/or
production of the documents. In other words, it seems to me those
interrogatories may truly not need to be answered.

31 **COUNSEL:** I would be content with an order that they
be answered subsequent to cross-examination on the affidavits in
the event that information hasn't been provided, or something to
that effect if that's what my friend's concern is, but I don't want

to be taken as agreeing that, oh well, this is a very difficult case and we can't answer interrogatories generally.

32 **THE COURT:** No. I am not suggesting that, but I think in terms of practice, from my reading of those interrogatories, you ought to be able to obtain those answers in a number of ways, either the documents or the cross-examination on affidavits or admissions or discoveries.

33 **COUNSEL:** If I can be candid, we've sought the orders and it appears you're disposed to grant them, but if we get the answers to the interrogatories -- and let's say, yes, we were told to sue West Vancouver, or something to that effect --

34 **THE COURT:** The rest is academic.

35 **COUNSEL:** -- we may not have to do the cross-examination on the affidavits. We may be in on our 18A, which is why I was seeking them.

36 **COUNSEL:** Well, he'll know exactly what was told, because what I hear this court saying is that the portion that deals with advice in respect to suing the City has to be released, and so, he'll know word-for-word what was said.

37 **THE COURT:** Well, that is what I thought, but I am

going to order that the interrogatories be responded to at Ms. Pawliuk's choice, either prior to the production of all of these documents or after the cross-examination on the affidavits, as she chooses. I believe that will make things more efficient, convenient and less costly for the parties.

38 As indicated, if the interrogatories are answered in connection with the production of documents, then cross-examination on affidavits may be unnecessary. Conversely, if Ms. Pawliuk has great difficulty answering the interrogatories or cannot, then that may be cleared up by going through the other steps and then the interrogatories can be answered.

39 That leads to the issue of the cross-examination on the affidavit material. Although this is not one of the strongest cases of conflicting material, nevertheless I am satisfied that the test in the *Patterson* case is met, and that there are conflicts within the affidavit material as to whether or not some or all of the owners or the plaintiff knew or did not know about the limitation period and the action against West Vancouver.

40 The application as to cross-examination is abandoned as against Ms. Pawliuk, so the order will go only with respect to the other people named in the Notice of Motion. Costs will be in the cause.

41 **COUNSEL:** In respect to the issues of limitation and
-- I didn't catch what you said.

42 **THE COURT:** Yes. The cross-examination on the
affidavits as well is restricted to the issues of the knowledge or
state or mind concerning the limitation period, and the action or
potential action or cause of action against West Vancouver. Costs
will be in the cause.

43 Thank you for your presentations.

44 **COUNSEL:** Thank you.

(DISCUSSION)

(PROCEEDINGS ADJOURNED)

Master Tokarek