

*Construction
S290 defence*

Date: 20021202
Docket: S30411
Registry: Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Ruling
The Honourable Mr. Justice Lander
December 2, 2002

BETWEEN:

THE OWNERS, STRATA PLAN VIS 3690

PLAINTIFF

AND:

BERWICK INVESTMENTS LTD., GORDON DENFORD, CITY OF NANAIMO,
CHOW & FLEISCHAUER ARCHITECTS INC., SIDNEY T.S. CHOW, BERRY
ENGINEERING LTD., JAMES WILLIAM GALLOWAY P.ENG., NEW HOME
WARRANTY OF BRITISH COLUMBIA INC., JOHN DOE AND OTHERS,
DENFORD CONSTRUCTION MANAGEMENT LTD., C.N. RYZUK & ASSOCIATES
LTD., FRENETTE PLASTERING (1982) LTD., ARMOUR ROOFING & SHEET
METAL LTD., CHRIS RYZUK and ALMETCO BUILDING PRODUCTS LTD.

DEFENDANTS

Counsel for the Plaintiff:

B. Kirkhope

Counsel for the Defendant City
of Nanaimo:

D. McKay

[1] THE COURT: Mr. Kirkhope, I might just say that I find your arguments inventive, not ingenious but inventive, so I just - I am not being critical by the way. I have considered them and I have read this material. I asked the question when I first came in, "Where would I have discretion after consideration at 290 of the *Local Government Act*?" There is

no discretion permitted. Your line of argument is that somehow the plans were changed, or something was changed, therefore the approvals are ineffective. That is how I read your argument. That is the only way that there is any way around this 290.

[2] I hate to give the impression to counsel that I am being precipitous Mr. Kirkhope, I find no merit to your submissions.

[3] Mr. McKay has set forth that the height has been changed two to six inches; that does not affect the plans that are approved or the engineering that was approved. Therefore I have no alternative but to - and I might say, and I agree with you, Mr. Kirkhope, this is a very appropriate matter for 18A. The legislation is so direct and mandatory that I have no alternative but to grant the application sought by the City of Nanaimo. The order will go in the form of clauses 1 and 2 in the notice of motion.

[4] MR. KIRKHOPE: With respect to that, My Lord, I think what we - clauses 1 and 2 are actually - you're double-jeopardizing it. I mean, it's - you're saying the same thing twice.

[5] THE COURT: Oh, really?

[6] MR. KIRKHOPE: I would submit that it is more appropriate

to just make number 1, which is the wording of the Act, and it's an 18A, so it's a judgment, it's final, and section - dismissing - except for the part where you've already made that judgment, so I don't think it's necessarily appropriate to restate it.

[7] THE COURT: What about that, Mr. McKay?

[8] MR. MCKAY: I agree that perhaps not both - I'm wondering if number 2 might not be more appropriate, and I'm just reading it, My Lord.

[9] THE COURT: Yes.

[10] MR. MCKAY: I think that number 2 is more specific and it covers the overall general intent of the order.

[11] THE COURT: Okay, I will make it 2 and not 1.

[12] MR. KIRKHOPE: Well, the - what - I would prefer number 1, and I -

[13] THE COURT: Why?

[14] MR. KIRKHOPE: - I would prefer number 1 because if number 2 is put into place, which affects my statement of claim, it's going to affect my ability to -

[15] THE COURT: Alleges negligence.

[16] MR. KIRKHOPE: Right. But it's cancelling parts of the - of my statement of claim. It's deleting - and that's going to affect my discovery.

[17] THE COURT: And that is negligence for failure to inspect.

[18] MR. KIRKHOPE: It's negligence for a number of things.

[19] MR. MCKAY: No, actually, specifically - if we - we should go to that wording, My Lord, and I'll show the statement of claim.

[20] MR. KIRKHOPE: 42 at page 10 of the amended statement -

[21] MR. MCKAY: I've got a copy here for you.

[22] THE COURT: Yes, okay. 42, Mr. -

[23] MR. MCKAY: You see, 42(a), (b) and (c) specifically deal with the relief we are seeking, and then the other issues my friend is still able to proceed with, with respect to negligence and inspection and otherwise. (a), (b) and (c) specifically deal with s. 290.

[24] MR. KIRKHOPE: With respect, My Lord, they don't quite

because 42(a) refers to both the building code and the by-laws. The certificates signed by the engineers relate only to the code, not the by-laws. The reference to non-conforming in 42(b) references - or could reference, and perhaps poor drafting on my part, both as well, and the same with item (c). So if you - if my friend is relying on the s. 290, the appropriate order would be to say they're not liable for any of that, any damage caused as a result of their inspection, not to tinker with my statement of claim.

[25] THE COURT: What about that, Mr. McKay?

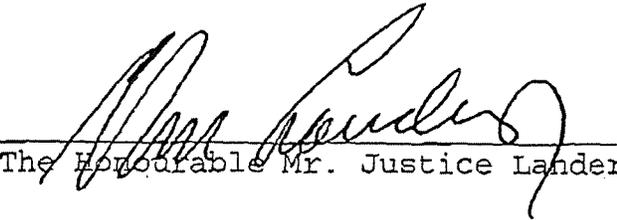
[26] MR. MCKAY: I don't think I can argue with that.

[27] THE COURT: Okay. The form of the order is, with reference to 290 then, it is dismissed. All right.

[28] Thank you very much, gentlemen.

[29] Costs in the cause? Costs in the cause, gentlemen.

[30] Thank you very much for a very splendid two-hour submission. Thank you.


The Honourable Mr. Justice Lander