

COURT FILE NUMBER 1701 14133  
COURT COURT OF KING'S BENCH OF ALBERTA  
JUDICIAL CENTRE Calgary  
PLAINTIFF Dilip Nandi and Jayashri Nandi



DEFENDANT Wolf Custom Homes Ltd., ABC Corp. and DEF Corp.

DOCUMENT

**CHAMBERS  
ENDORSEMENT**

- Order Granted
- Information Required
- Order Rejected
- Unable to Complete – see Comments/Reasons for further information

**Comments/Reasons:**

I heard this matter as a special chambers application on October 3, 2023. It is an application for leave to file four third party claims in a dispute pertaining to the construction of a home which suffered water ingress issues.

The home construction took place between 2012 and 2014. The statement of defence of the defendant Wolf Custom Homes Ltd. ("Wolf") (which entity wishes to file the additional third party claims) was filed on April 30, 2018. Accordingly, the initial deadline for filing and serving third party notices was October 30, 2018. Some third party notices were filed and served, but the application to file the ones sought here was filed on August 16, 2021.

Before moving to the legal test and the application of the test to the facts before the Court, I make some preliminary comments.

First, the defendant Wolf that wishes to file the third party claims argues that the nature of the claim has changed since the original statement of defence was filed and that the

claim is a much larger claim and it deals with water ingress in more ways than was initially apparent at the outset of the claim. While there are some emails between plaintiff's counsel and defendant's counsel discussing potentially new aspects of the claim and additional amounts claimed, the original statement of claim has never been amended. The claim remains pleaded as it always has been. The initial claim largely refers to water ingress around decks and doors, but it does have some more general language as well. In terms of pleadings, the plaintiff's claim has not changed. In my view I must be cautious as to whether I can decide this application based upon what might be added to the pleading in the future. The pleadings as they now exist would seem to govern.

Counsel for the applicant Wolf also spoke as to how some of the cases recognize that sometimes litigation proceeds at a more leisurely pace, but I have concerns as to whether a leisurely pace that is acceptable to the plaintiff and defendant can be foisted upon proposed new parties which have had no opportunity to have a voice on whether a "more leisurely pace" was agreeable to them. We dismiss actions where no advances occur in more than three years, yet here the Court is asked to add parties to defend allegations when their work was done between nine and eleven years ago and that have never had a say in the pace of the litigation.

The defendant Wolf was the general contractor. It is hard to imagine that any party involved in a construction project would have more knowledge as to who worked on the project and its various scopes of work than the general contractor. It is Wolf's knowledge that matters to the application, as opposed to the knowledge of its insurer or counsel. Normally I would not make reference to insurer involvement, but in this case the applicant made it clear during argument that an insurer was involved. Regardless, in my view it is Wolf's knowledge that matters.

With that background, I consider the applications.

The standard test for an extension of time to file a third party notice as set out in **Canadian Natural Resources Limited v. Arcelormittal Tubular Products Roman S.A. (Mittal Steel Roman S.A.)**, 2012 ABQB 679 at paragraph 497 is:

[497] Rule 3.45 requires a third party claim to be filed and served within six months of the filing of the statement of defence. This time may be extended after the consideration of the following three factors: (1) the length of delay; (2) the reason for the delay; and (3) the prejudice to the third party: **Alliance Pipeline** at para 10 citing **Flight v Dillon**, 2001 ABQB 211, 284 AR 117 [**Flight**]; **Dean**; and **Builders Holdings Ltd. v. Gasland Properties, Ltd**, 2001 ABQB 823 (CanLII), 2001 ABCA 823, 306 AR 163.

In addition, the Court must find at least some evidence to support the claim. That aspect has come to be known as whether there is "an air of reality" to the claim. In the end, that aspect does not affect my decision here. Some of the arguments quite properly related to how expert reports were tendered. I do not make specific findings on that here, but I would observe that the answer likely depends on the purpose for which the report is tendered.

The delay here was approximately 34 months from when the third party notices were otherwise due. While not prohibitive in itself, that amount of delay approaches the fringes

of what has traditionally been permitted in applications for leave to file late third party notices.

The reason cited for the delay is that the claim has evolved. The difficulty, however, is that the claim has not been amended. I do not believe that I can decide a case based upon what the pleadings might be in the future. The claim is as it always has been. It speaks primarily of ingress through windows and doors, but it does make some general allegations about water ingress.

Paragraph 499 of ***Canadian Natural Resources Limited v. Arcelormittal Tubular Products Roman S.A. (Mittal Steel Roman S.A.)*** speaks to the consideration of delay and prejudice:

[499] When the delay is relatively short, more weight is given to the existence of prejudice resulting from the delay and less to the length of delay. As the length of the delay becomes longer, more weight is given to the reason for the delay and less to the existence of prejudice: ***Spartek Systems Inc v Brown***, 2009 ABQB 705 at para 14, 481 AR 213 [***Spartek***]; ***Flight; Dean; Alliance Pipeline*** at para 10. A delay of approximately 10-14 months is considered relatively short: ***Alliance Pipeline*** at para 11. When the delay is longer, the defendant seeking the extension must give evidence explaining the delay. Evidence explaining the delay was required in ***Lister v Calgary (City)*** (1997), 1997 CanLII 24562 (ABCA), 193 AR 218 (CA) where the delay was 4.5 years: para 20. Leave will be denied if the delay is long and no evidence is provided to explain it. In ***Hein v Barrett***, 2008 ABQB 548, leave was refused where an insufficient explanation was given for a seven-year delay. The pace of the litigation is another factor to be considered in weighing the three factors: ***Spartek*** at para 14.

With respect to prejudice, I find that there is significant prejudice in this case. While the proposed third party defendants do have general financial records in relation to the project, they do not appear to have records that go to the quality of construction and the daily occurrences during construction. While the principals of the respondent corporations seem to be generally available, a number of witnesses who actually did the work on the project are not available. Further, the construction took place between 2012 and 2014. Asking someone to recall what they did on a construction project over ten years ago, and the occurrences on the project, is not fair. While the application for leave to file the third party notices was filed in 2021, a trial on this matter, even with an expeditious approach, would not take place for more than ten years post construction. It is doubtful that the quality and fairness of a trial for the proposed new third party defendants would approach the levels of fairness that would have been available had they been named earlier, and to that extent there is prejudice.

Further, there is no reason that the general contractor Wolf would not have been familiar with construction related matters regarding water ingress from an early stage in the proceeding. Wolf became bankrupt, and that caused some delays in obtaining leave to proceed with the action, but ultimately Wolf's knowledge is key to what Wolf proposes to do in the litigation.

In my view, there is litigation prejudice and the proposed third party defendants ought not to be subjected to the leisurely time frame that the existing parties adopted. As a result, I

dismiss the application to file and serve the four Third Party notices for which leave is sought in Wolf's application filed August 16, 2021.

Even if I had not found prejudice, I find that limitations principles would have precluded issuance of the third party notices as well. The statement of defence was filed on April 30, 2018. At that point Wolf certainly knew that there were allegations of water ingress issues and Wolf knew which trades worked on the project and their roles.

The application for leave to issue the third party claims was filed on August 16, 2021. Two years from the statement of defence filing is April 30, 2020 for limitations periods purposes, and three years is April 30, 2021 for the purposes of s. 6 of the **Limitations Act**, RSA 2000, c L-12. Even with the requisite adjustment of 75 days under **Ministerial Order 27/2020**, the application is outside the permitted time period.

Counsel for the plaintiffs did not appear on the application.

The parties who responded through counsel are presumptively entitled to costs from Wolf, but if the parties cannot agree on quantum, or there are formal offers to consider, they may book an appointment to speak to costs within six months of release of these reasons.

Thank you very much to all counsel for their very helpful oral submissions and for their written arguments which were very well done.

**DATE OF DECISION: 2023-10-12**

Signed:  \_\_\_\_\_  
APPLICATIONS JUDGE J. R. FARRINGTON