SUPREME COURT OF NOVA SCOTIA

Citation: Sweeney-Cunningham v. IBG Canada Ltd., 2013 NSSC 415

Date: 20131218
Docket: Hfx. No. 185800
Registry: Halifax

Between:

Mary Sweeney-Cunningham and **Patricia Sweeney**

Plaintiffs

-and-

IBG Canada Limited, a body corporate

Defendant

Decision

Judge: The Honourable Cindy A. Bourgeois

Heard: October 16, 2013 at Halifax, Nova Scotia

Written Decision: December 18, 2013

Counsel:

Counsel for the Plaintiffs - T.Arthur Barry, Q.C. and Shelley Wood
Counsel for the Defendant - Joseph Burke (not appearing)
Counsel for the proposed Defendant - Christopher Robinson, Q.C.

Bourgeois, J.

INTRODUCTION

[1] The Plaintiff, Patricia Sweeney and her siblings, now deceased, have been since the late 1990's involved in the design and construction of a grand residence in Yarmouth, Nova Scotia. It would appear that the process has been riddled with a number of difficulties, including litigation.

[2] The residence prominently features a central atrium with a large glass skylight. Shortly after installation was complete, serious concerns including water infiltration and loud popping noises emanating from the glass panels arose. A legal action was commenced in September of 2002 against IBG Canada Limited, the designer, supplier and installer of the skylight.

[3] The Plaintiffs now bring a motion to amend the pleadings to name a second Defendant, Atkins & Van Groll Inc. (hereinafter "AVG"). The proposed Defendant had been engaged by the Plaintiffs to design the structural framing system which served to support the atrium skylight. The Plaintiffs wish to assert that AVG performed its work

negligently, which resulted in some or all of the difficulties encountered with the skylight. AVG vigorously opposes the motion. The Defendant IBG Canada Limited ("IBG") did not participate in the motion.

CIVIL PROCEDURE RULES AND LEGISLATION

[4] There are several Civil Procedure Rules which are relevant to a motion to amend pleadings to add a party. Rule 35.05 provides:

> A party who starts a proceeding may join a further party by amending the originating document, or notice of claim against third party, as provided in Rule 83 – Amendment.

[5] Rule 35.08 further provides:

> (1) Judge may join a person as a party in a proceeding at any stage of the proceeding.
> (2) It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.
> (3) The presumption is rebutted if a judge is satisfied on each of the following:
> (a) joining a person as a party would cause serious prejudice to that person, or a party;
> (b) the prejudice cannot be compensated in costs;
> (c) the prejudice would not have been suffered had the party been joined originally, or would have been suffered in any case.

[6] From the arguments advanced, it would appear that Rule 35.08(5) is central to the determination required. It provides:

> Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

[7] As referenced in Rule 35.05, the Court must also consider Rule 83. Of particular

relevance to the present motion is Rule 83.04 which provides:

> 83.04(1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in circumstances described in Rule 83.04(2).
> (2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:
> (a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;
> (b) the expiry precludes the claim;
> (c) the person protected by the limitation period is entitled to enforce it.

[8] The above provisions clearly bring into consideration the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258. Section 2(e) provides a six year limitation period for an action in negligence. The Court may effectively extend a limitation period in appropriate circumstances. Section 3(2) provides:

> (2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
> (a) the time limitation prejudices the plaintiff or any person whom he represents; and
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

[9] There are a number of factors which the Court should consider when deciding whether to extend a limitation period. These are enumerated in section 3(4) as follows:

> (4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to
> (a) the length of and the reasons for the delay on the part of the plaintiff;
> (b) any information or notice given by the defendant to the plaintiff respecting the time limitation;

(c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;
(d) the conduct of the defendant after the cause of action arose, including the extend if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
(e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
(f) the extent to which the plaintiff acted promptly and reasonable once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
(g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

POSITION OF THE PARTIES

The Plaintiffs

[10] The Plaintiffs submit that the Court should grant the motion and permit the addition of AVG as a named Defendant. It is submitted that the test for amendment under the new Civil Procedure Rules is essentially the same as that established in those case authorities decided under the 1972 Rules.

[11] The Plaintiffs acknowledge that there is however, a new consideration added by virtue of the new Rules, namely whether or not a limitation period has expired. In their written submissions, the Plaintiffs set out the test as follows:

> 30. The Plaintiffs therefore submit that the test to be applied in this case is as set out in *Stacey, supra* and *Global Petroleum Corp., supra*. An amendment should be granted unless at least one of three circumstances is present: (i) a limitation period, or extended limitation period, has expired; (ii) the amendment would cause serious prejudice to the

> Defendant that cannot be compensated for in costs; or (iii) the amendment is sought in bad faith.

[12] It is submitted that none of the above three circumstances are present in this instance, and as such, the amendment should be granted. In particular, it is asserted that the extended limitation period applicable to a proposed action in negligence against AVG has not expired. The Plaintiffs raise and rely upon the "discoverability rule" in support of their proposition that as they only became aware of their potential cause of action against AVG in January of 2007, the extended limitation period has not yet expired.

[13] The Plaintiffs further assert that they have not moved sooner to seek the addition of AVG as a named Defendant as they were attempting to negotiate a resolution outside the court process, and further, that the Plaintiffs' claim has only recently "crystallized" with an identified cost of repairs being ascertainable.

The Proposed Defendant AVG

[14] AVG defines the issue before the Court as follows:

> The issue is whether the Plaintiffs are prohibited, by reason of the expiry of the relevant limitation period, from adding AVG as a party to the action and amending the pleadings under Civil Procedure Rules 35.08 and 83.04.

[15] It is submitted that a reading of Rules 35.08(5) and 83.04(2) make clear that a Court is prohibited from adding a party if a limitation period has expired. It is submitted that the Court retains no discretion in the present circumstances, as both the limitation period, and any possible extended limitation period has expired. In this regard, AVG also relies upon the "discoverability rule", but asserts that the evidence in this case clearly establishes that the Plaintiffs knew or ought to have known about their potential claim against AVG in May of 2000, or alternatively, no later than November of 2002. In either case, the limitation period and any possible extension has expired, and as such, the Court cannot grant the amendment sought.

THE ISSUES

[16] Given the positions advanced on the motion, there are two issues to be addressed by the Court – one procedural, and one factual.

[17] Firstly, do the Rules preclude the Court from adding a party, if in fact a limitation period or extended limitation period has expired? Secondly, has the limitation period or extended limitation period expired in relation to an action against AVG, based upon the evidence before the Court?

EVIDENCE ON THE MOTION

[18] There are two affidavits before the Court, that of Patricia Sweeney, sworn May 28,

2013 and filed July 17, 2013, and that of Jonathan Atkins, managing partner of AVG, sworn October 8, 2013 and filed October 9, 2013. There are several exhibits attached to each affidavit.

[19] There is little factual dispute regarding the role of various parties involved with the construction of the residence, or the unfolding of various events. The dispute centers around when the Plaintiff's knew, or ought to have known, that a cause of action existed against AVG. With that in mind, the following evidentiary review is of assistance.

[20] Jonathan Atkins was personally involved on behalf of AVG with the Sweeney residence, including being on site when construction commenced in 1998. In paragraph 4 of his affidavit, Mr. Atkins, an engineer, describes the role of AVG as follows:

> 4. AVG are consulting engineers who provided structural design for the project that is the subject of this action, including the structural framing system supporting the tubular steel truss, which in turn supports the atrium skylight.

[21] IBG Canada became involved in the project in early July of 1999 and were responsible for the design, supply and installation of the atrium skylight. IBG completed its work "around the end of 2000". Significant problems became apparent with the skylight shortly after the completion of IBG's work – Sweeney affidavit, paragraphs 8 and 9.

[22] In March of 2000, the Plaintiffs and AVG entered into an agreement to provide

"assistance to review some structural modifications to the existing structure" including revisions to steel beams at the perimeter of the atrium; revisions to the short span roof trusses in the corridor around the atrium; and potential cutting of the upper atrium structure and associated structural modification to the atrium – Atkins affidavit paragraph 8, Exhibit B.

[23] The Plaintiffs through both their legal counsel and construction manager were attempting to have IBG rectify the problems with the skylight. In May of 2000, IBG President, Paul Davison wrote to the Plaintiffs' construction manager regarding the skylight leaks and broken glass panels. He writes:

> The greatest concern to me, however, is the fact that there has been more broken glass. This is extremely unusual and as I expressed to you earlier, I am concerned about the trusses and their rigidity. The pictures Vern took during installation were reviewed by myself and my engineering staff and we find them suspect. All of IBG framing members are designed to meet a minimum deflection of L/175. I would suggest you check with your steel supplier and find out if steel can resist all of the load to provide this type of structure. If it does not, you will continue to have leaks and broken glass forever due to excessive movement and it is a situation that cannot be rectified without major structural steel work.

[24] The above letter was copied to the Plaintiffs and was in the possession of their legal counsel – Atkins affidavit paragraphs 9 and 10, Exhibit C.

[25] On September 11, 2002, the Plaintiffs filed an Originating Notice (Action) and Statement of Claim against IBG. At the same time, the Plaintiffs instructed their legal counsel to "obtain expert advice as to the cause of the water infiltration and noise issues". Mr. Stobie engaged the Jacques Whitford engineering firm in that regard. In

correspondence of September 20, 2002 to Jacques Whitford, Mr. Stobie encloses various documents and technical material for review, and writes:

> I confirm my telephone message that the project manager Delmar Construction has as-built drawings of the structural frame supporting the atrium stamped by Paul Richardson of Brandys McBride Richardson. The frame was installed by Cherubini. I confirm out discussions that we both think it is unlikely having regard to the identities of the individuals that the structural frame is the problem . . . See Sweeney affidavit paragraph 11 – Exhibit B.

[26] There is no indication in the evidence before the Court whether Jacques Whitford in fact completed a review, or provided an opinion as to the cause of the water infiltration and noise issues.

[27] By way of correspondence dated November 25, 2002, IBG's legal counsel provided to Mr. Stobie a copy of a report prepared by Joseph T.K. Ha Engineering Inc. (Sweeney affidavit paragraph 17(a) – Exhibit E). Ha Engineering was involved with designing the skylight structure for IBG. In the report, the following "Background Information" is provided:

> In the design of a skylight structure, the framing system provided by the manufacturer is only a building envelope. The skylight requires some form of primary framing supports provided by the prime structural engineering consultant. Hence, the skylight structure is neither responsible for providing any lateral support for the primary structure nor tying the primary framing system together. For this particular project, the primary framing system was trusses. According to the structural drawings Dwg. S8, prepared by Atkins + Van Goll Inc. of Thornhill, Ontario, two hip trusses formed the main supports for the canopy. Additional horizontal trusses, type B and C, were used to tie the two hip trusses together for stability. At the bottom of the skylight, the hip trusses were supported by a tension ring comprised of HSS 254 x 152 cantilevered. In our design of the skylight rafters, we utilized the hip truss, truss B, truss C, and HSS members below as support locations. Each rafter of the skylight was supported at each panel point on the trusses.

> On October 29, 1999, the vertical and horizontal loadings for each typical rafter were provided by this office. On the drawing, we specifically asked the truss designer (Atkins + Van Groll Inc.) to verify his primary structure due to the torsion effect and eccentric loading created by the skylight structure. It was made clear that this office was only responsible for reviewing the skylight structure.

[28] The Ha report further states that a computer analysis of the structural components disclosed:

> Based on the computer analysis output, it appears the top chord of both trusses B & C are not rigid enough to sustain the compression force and the torsional effects. In the hip truss, from where the truss C frames into the top & bottom chord to the HSS support below, it seems the bottom chord changes into compression. The bottom chord member is not strong enough to take the compressive force and is not laterally stable.

[29] The Ha report concludes by opining that it is not the skylight structure itself which is causing the ongoing leaking and noise issues, but rather the underlying structure itself. Mr. Ha writes:

> We do not believe the skylight structure could cause the persistent leaking problems and the cracking noises. We do, however, believe the existing primary structure needs to be completely re-checked. In our opinion, the cracking noise and leaking problem are caused by the weak primary framing system. We would strongly recommend the primary structural engineering consultant (Atkins + Van Groll Inc.) to re-verify their design.

[30] On January 20, 2003, IBG filed a Defence and Counterclaim to the Plaintiffs' claim, which contains the following statements:

> 4. The Sweeneys were responsible for ensuring that the primary structure of the Project would provide adequate support for the Skylight.
> 7. IBG states that any leaks and/or loud snapping noises in the atrium, which are not admitted but denied, are the result of structural inadequacies in the primary structure of the Project.

> 10. IGB states that the primary structure of the Project was inadequately designed to properly support the Skylight and that the inadequacies in design are solely the result of the negligence of the Sweeneys and their agents.
> 13. Any leaks and loud snapping noises in the atrium were the result of inadequacies in the design of the primary structure and therefore the investigative and remedial work performed by IBG was outside the scope of the warranty provided by the Contract. IBG has not been reimbursed by the Sweeneys for its investigative and remedial work.

[31] From the evidence, it appears that Mr. Atkins, in light of the concerns raised in the Ha report, reviewed the integrity of the base structural designs, and reported his findings to Mr. Stobie by way of letter dated May 14, 2003. Mr. Atkins opined his calculations were accurate. Further, by way of correspondence dated June 12, 2003 Mr. Atkins expressed frustration to Mr. Stobie with respect to the need to continue to "defend our design" – see Sweeney affidavit, paragraphs 17(b) and (c), Exhibits F and G respectively.

[32] In the fall of 2003, it appears that the engineer for IBG, Mr. Ha, continued to question Mr. Atkins' design. Mr. Atkins continued to assert that his design for the structural base was appropriate. In correspondence dated November 28, 2003, counsel for IBG wrote to Mr. Stobie in response to Mr. Atkins' position that his design was not responsible for the skylight problems. He writes:

> We provide the following response to your letter of November 13, 2003. Therein you enclose the comments of Jonathan Atkins regarding the support of the structural steel atrium frame. In particular, Mr. Atkins suggests that the frame is directly supported by a 10" deep steel continuous ring beam. Upon review of these comments, Mr. Ha points out that this statement is incorrect.
>
> Please refer to the photographs contained in Mr. Ha's November 18, 2002 report which I understand was provided to you on November 25, 2002. Pictures 5, 6, 7 and 8, taken on January 13, 2000 show the various supports referred to by Mr. Atkins in his letter to you of November 12, 2003. In particular, pictures 5 and 6, show the lower steel beam referred to

> in Mr. Atkins' letter and above that beam, the 10"steel beam which Mr. Atkins describes as a "continuous ring beam". It is evident from the picture that this is in fact not a continuous ring beam as it is not connected in the corners. Rather, the corners are left open to allow the hip truss which supports the upper level of the sky light to rise up from the lower steel beam where it rests. It is clear from these pictures that the upper steel beam is not a continuous ring beam but in effect four separate parapet walls that are not connected in the corners. Further, they are not connected to the hip truss. This lack of connection between the upper level of steel beams and the hip truss give rise to the lack of rigidity which Mr. Ha suggest is the cause of the problems with the skylight.

[33] By way of letter dated January 8, 2004 to Plaintiffs' counsel, Mr. Atkins continues to assert Mr. Ha's opinion is not valid – see Sweeney affidavit, paragraph 17(f), Exhibit J. He continues to write, expressing the same opinion into the spring of 2004. In a letter of April 30, 2004 Mr. Atkins provides to Mr. Stobie copies of his computer analysis, writing:

> As we are all aware this matter has now dragged on for a number of years. In spite of the fact that we are not aware of structural framing deficiencies that if existed would be causing continuous movement (and therefore continuous glass breakage). However, in an attempt to bring this matter to some closure for the Sweeney family, we have provided the results of the finite analysis showing not only the steel skylight framing but the steel supporting structure. The analysis shows extremely low deflection (less than 3mm) under full design load conditions well below any design guidelines. While we feel the presentation of this material is unnecessary we hope that this will bring the matter to an end for the Sweeney family.

[34] On July 28, 2004, counsel for IBG wrote to Mr. Stobie, enclosing Mr. Ha's review of the finite analysis previously supplied by Mr. Atkins. His opinion remained that is was the integrity of the supporting structure which was problematic, not the skylight itself – see Sweeney affidavit, paragraph 17(h), Exhibit L.

[35] In June of 2005, the Plaintiffs engaged Dora Construction Limited as Project

manager. Mr. Ron Cahoon acted as manager and reviewed many of the difficulties encountered with the project, including the skylight issue. He is not a professional engineer. By way of letter to Plaintiffs' counsel, then Mr. Barry, dated January 10, 2006, Mr. Cahoon recommended an "independent review" of the repair recommendations relating to the skylight – see Sweeney affidavit paragraphs 19 and 20.

[36] In April of 2006, the Plaintiffs engaged Brook Van Dalen & Associates Ltd. ("BVD") to perform an independent evaluation of the skylight. On the recommendation of BVD, the Plaintiffs further retained a structural engineering firm to undertake an assessment of the structural framing components of the skylight.

[37] On January 30, 2007, BVD provided its report, which also included the report of the structural engineering assessment. That report opined that Mr. Atkins' design "inappropriately relied on the fixed skylight frame for additional support, and that he had made an error in calculations he prepared in the effort to convince IBG that it was responsible for the problem" – see Sweeney affidavit, paragraph 28.

[38] It would appear that by letter dated July 3, 2007, the Plaintiffs' legal counsel put Mr. Atkins on notice of a potential claim against him and provide a copy of the BVD report. This letter was responded to by Monette May & Associates on August 13, 2007, specialty liability adjusters retained by AVG's insurers. In that letter, the adjuster raises potential limitation concerns in relation to a claim against AVG, writing:

> . . .Moreover, and as you are undoubtedly aware, concerns regarding support truss rigidity were first raised by IBG back in May, 2000 (ie. Over seven years ago). Notwithstanding

> the implication of this fact from a limitations perspective, our Insured maintains that their design was sufficiently rigid unless, or until, the lateral bracing which connected the skylight's fixed connections is removed.

[39] It would further appear that the Plaintiffs were concerned with "the potential aesthetic consequences" of the repairs recommended by BVD. As such, they retained CBCL Limited to provide a second opinion, and by way of report dated June 26, 2008, an alternate repair was suggested. That report confirmed the findings of BVD however, that additional structural framing would be required to properly support the skylight – support not included in Mr. Atkins' design. See Sweeney affidavit, paragraph 38.

[40] In December of 2009, Plaintiffs' counsel was notified that Mr. Robinson had been retained by AVG. Although the parties discussed participating in mediation, such ultimately did not take place.

[41] The Plaintiffs have undertaken repairs to the skylight, and the problems have resolved. In the spring of 2011, the Plaintiffs put forward a settlement proposal to both IBG and AVG. It was rejected. The Plaintiffs brought the motion to add AVG as a party by Notice of Motion filed July 17, 2013.

DETERMINATION

Do the Rules preclude the Court from adding a party, if in fact a limitation period or extended limitation period has expired?

[42] In my view Rule 35.08(5), read in conjunction with Rule 83.04(2) adds a new and important consideration to a motion seeking the addition of a new party. The Court must consider whether a relevant limitation period, or extended limitation period has expired. If expired, then the Court has no discretion to add a party. Although not deciding a matter directly involving Rule 35.08(5), a similar sentiment has been expressed by MacDougall, J. in **M5 Marketing Communications Inc. v. Ross**, 2011 NSSC 32.

[43] Additionally, Rosinski, J. has recently in **Secunda Marine Services Ltd. v. Caterpillar Inc.**, 2012 NSSC 53 considered Rule 35.08(5), and concluded that the expiry of a limitation period leaves the Court with "no discretion" to add a party. The following passage is particularly instructive:

> [51] I believe that these specific Rules have not yet been interpreted in the jurisprudence in the context of a limitation period defence - for an example not involving a limitation period defence, see *M5 Marketing Communications Inc. v. Ross* 2011 NSSC 32. I bear in mind the guidance of our Court of Appeal in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)* 2009 NSCA 44, per MacDonald, CJNS, in situations involving statutory interpretation, which principles apply to our *Civil Procedure Rules* by virtue of their status as equivalent to statutes.
>
> [52] I note that in the *Nova Scotia Civil Procedure Rules* (2nd Ed.) (looseleaf text updated to November 2011) Lexis Nexis Canada Inc. 2008 (Markham, Ontario), the title page includes the following:
>
> > Designated as the official annotated version of the Rules by the Nova Scotia Department of Justice.
> > Editor D.A. Rollie Thompson
> > Professor of Law, Dalhousie University

> [53] Professor Thompson was intimately involved in the creation of these new Rules. In Professor Thompson's overview of the new Rules, included therein we find:
>
> > A surprising change has been made in the Nova Scotia law of joinder, in Rule 35.08(5) and the accompanying amendment Rules 83.04(2) and 83.11: a party may not be joined in an existing proceeding if the relevant limitation period has expired. Traditionally, Nova Scotia has had a liberal approach to joinder and even the intervention of a limitation period did not usually bar joinder of a new party, as the proceeding "speaks" from its date of commencement: *Garth v. Halifax Regional Municipality*, [2006] N.S.J. No. 300, 2006 NSCA 89; and *Clarke v. Sherman*, [1997] N.S.J. No. 196 (S.C.).
>
> [54] While not binding on courts, these opinions/observations may be added to the mix in an effort to get a sense of what the drafters of the Rules may have intended when they completely rewrote the Rules.

[44] In her oral submission, counsel for the Plaintiffs submit that even if the Court finds that a limitation period and extended limitation has passed, the Court still retains a general discretion to amend the pleadings. With respect, I disagree. The new Rules specifically direct the Court to consider limitation issues on motions to add a party. The wording in Rules 35.08(5) and 83.04(2) are clear and in my view constitute a mandatory direction to the Court. Pursuant to Rule 2.03(3), the Court's general discretion cannot be used to override such a provision.

Has the limitation period or extended limitation period expired in relation to an action against AVG, based upon the evidence before the Court?

[45] At this juncture, a closer look at the "discoverability rule" may be of assistance. Our Court of Appeal has had occasion to consider the nature of the rule in the context of an appeal of a summary judgment motion, in Nova Scotia Home for Coloured

Children v. Milbury, 2007 NSCA 52. In my view, the principles are equally applicable to the motion before me. Writing for the Court, Roscoe, J.A. generally describes the rule as follows:

> [22] In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 146, LeDain, J., for the Court, described the discoverability rule as follows (at pp. 151- 152):
>
> . . . A cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. ...

[46] The Court writes further at paragraph 26:

> [26] The comments on discoverability in the context of a summary judgment application in *Jack v. Canada*, [2004] O.J. No. 3294 (S.C.J.) are instructive:
>
> 81 Counsel have referred to legal authorities regarding the discoverability rule. Discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it or to sue. *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.) at paras. 36 and 44.
>
> 82 A cause of action arises for the purposes of a limitation period when the material facts on which the action is based have been discovered or ought reasonably to have been discovered, by the exercise of reasonable diligence. *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147 at p. 224; *Peixeiro v. Haberman* (1995), 25 O.R. (3d) 1 at p. 4 (Ont. C.A.).
>
> 83 The rule of reasonable discoverability is to ensure that the plaintiffs have sufficient awareness of the facts to be able to bring an action. The suggestion that a plaintiff requires a "thorough understanding" of such facts even after the action is brought, sets the bar too high. Similarly, to say that a plaintiff has to know the precise cause of her injuries before the limitation period started to run would also place the bar too high. *K.L.B. v. British Columbia* [2003] 2 S.C.R. 403 (S.C.C.) at para. 55-57; *McSween v. Louis* (2000), 187 D.L.R. (4th) 446 at p. 459 (Ont. C.A).
>
> 84 The exact extent of one's loss need not be known before a cause of action can be said to have accrued. Once a plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent nor the type of damage need be known. *Peixeiro v. Haberman*, supra, at p. 557.

...

> 87 The facts upon which any plaintiff relies to fall within the discoverability rule must have an objective basis. Objective facts supporting negligence that were discovered at a later point in time beyond a limitation period are an absolute pre-requisite to the extension of the limitation period. The extension of a limitation period is not driven by "wishes", "maybes", or "emotions" generated by a benevolent or well-intentioned source. *Lalani v. Woolford*, [1999] O.J. No. 3440 (Ont. Div. Ct.) at paras. 12, 16, 19; *Morellato v. Wood* (1999), 175 D.L.R. (4th) 753 (Ont. S.C.J.); affirmed at (1999) 187 D.L.R. (4th) 760 (Ont. C.A.).

[47] In her affidavit, the Plaintiff asserts at paragraph 30:

> The first time that my sister Mary and I had any indication that Mr. Atkins and not solely IBG might have responsibility for the problems in the atrium was upon receipt of the January 30, 2007 report.

[48] The Plaintiffs argue that the action was “discoverable” as of January 2007, and as such the limitation period for bringing a claim against AVG has yet to expire. AVG submits that a proper application of the “discoverability rule” to the evidence in the present instance should give rise to a conclusion that when the Notice of Motion to amend was filed in July of 2013, both the limitation period and any possible extension thereof, had expired.

[49] The issue before me is, when based upon the evidence presented, did the Plaintiffs know, or could have known by virtue of the exercise of reasonable diligence the material facts giving rise to a claim against AVG? In my view, this question must be considered objectively, as opposed to considering the subjective views of the Plaintiffs.

[50] Although technically complex in terms of the potential causes for the skylight difficulties, the claim itself in terms of identifying those potentially responsible for the problems is straightforward. Only two parties were involved in the design of the atrium – AVG which was responsible for the supporting structure design, and IBG, which designed the skylight itself. There could be no better example of classic "finger pointing" when problems arose with the skylight shortly after its installation in 2000. IBG asserted the structural design was "suspect". AVG, through Mr. Atkins pointed to the skylight design and installation as being the source of the problems. For several years, the battle of the engineers continued, each with their own vested interest in establishing that fault laid at the feet of the other.

[51] The Plaintiffs chose to continue to rely upon the representations of Mr. Atkins and chose to accept, notwithstanding the strongly expressed view of IBG's engineer to the contrary, that AVG bore no responsibility for the skylight problems. As shown by the January 2007 BVD report, which for the first time contained an independent engineering analysis, the Plaintiffs' earlier reliance on Mr. Atkins' opinion was shown to be misguided.

[52] I cannot accept Ms. Sweeney's assertion that receipt of the BVD report in January of 2007 was the first time the Plaintiffs had "any indication" that AVG might have responsibility for the skylight problems. Such an assertion is contrary to the evidence which clearly establishes that the structural design work undertaken by AVG was being

called into question significantly earlier, and was brought to the attention of the Plaintiffs. In May of 2000, the President of IBG raised concerns with respect to truss stability. This is followed by Mr. Ha's engineering report in November of 2002, which provides much more concrete assertions that specific structural issues, those which were the responsibility of AVG, were involved. In my view, the Defendants IBG could not have raised the "red flag" higher than in its Defence and Counterclaim that it would be asserting that liability did not rest with them, but rather in the structural design of the supporting structures.

[53] It may be that receipt of the BVD report in January of 2007 was the first time an independent opinion had pointed to AVG bearing responsibility, however, the Plaintiffs had been well aware prior to that of the "finger pointing" in AVG's direction. Although IBG raised that issue in May of 2000, it was not until November of 2002, upon receipt of the Ha report, that the Plaintiffs had detailed information giving rise to concerns with AVG's structural design work. To their ultimate detriment, as opposed to seeking an independent opinion, the Plaintiffs continued to rely upon and accept what amounted to Mr. Atkins' denial of liability.

[54] In my view, by the exercise of reasonable diligence, the Plaintiffs could have, and as the BVD report in January of 2007 suggests, would have been able to ascertain AVG's potential liability if they had simply sought an independent engineering assessment earlier. In light of the November 2002 Ha report, along with the Defence and

Counterclaim, it was imprudent to not make further inquiries as to ascertain which of the engineers involved in the design work may be responsible for the flaws.

[55] The limitation period for the claim against AVG should not be considered to start in May of 2000. The concerns raised at that time were not sufficiently clear to put the Plaintiffs on notice that there were material facts pointing to liability on the part of AVG. However, the same cannot be said upon receipt of the Ha report in November of 2002, nor upon receipt of IBG's pleadings. Read in conjunction, the Plaintiffs were clearly put on notice that a potential claim existed against AVG. In my view, the action was clearly "discoverable" by January of 2003, and as such the limitation period for bringing action against AVG has expired, along with any possible extension.

[56] Although the Plaintiffs did not directly advance such an argument, the evidence presented outlining the involvement of AVG's legal counsel in recent years, may give rise to a suggestion that AVG had somehow waived reliance on the limitation defence . Apparently AVG accepted an invitation to inspect the skylight prior to final repairs being undertaken, and had indicated a willingness to participate in mediation. It would require clear evidence that a potential defendant was waiving reliance on a limitations defence. Such does not exist in this case.

[57] It is not at all clear to the Court why, following receipt of the BVD report in January of 2007, that the Plaintiffs waited until July of 2013 to bring a motion to add

AVG as a Defendant. I cannot accept the explanations offered by the Plaintiffs that attempts to mediate, or the fact that the cost of atrium repairs had not "crystallized" made such an amendment premature until now. Clearly, settlement efforts do not stay the limitation clock, nor does it only begin to tick once damages are concretely ascertained. Such considerations may be more important should a Court be tasked with determining whether a party should be granted the benefit of s. 3(2) of the *Limitation of Actions Act, supra*. That is not the case here, as clearly both the limitation period, and any possible extension expired prior to the motion being brought.

CONCLUSION

[58] For the reasons noted above, the motion to amend the pleadings to add AVG as a named Defendant is dismissed. If the parties are unable to agree with respect to costs, written submissions are to be provided to the Court within 30 days from the release of this decision.

J.