Date: 19970109
Docket: C960926
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Thackray
Pronounced in Chambers
January 9, 1997

BETWEEN:

THE OWNERS, STRATA PLAN NO. LMS 0108

PLAINTIFF

AND:

ZHONG XING INVESTMENT (CANADA) LTD., STUART OLSON CONSTRUCTION INC., PAUL MERRICK ARCHITECTS LIMITED, JAKIN ENGINEERING & CONSTRUCTION LTD., QUAY DEVELOPMENTS LTD., ALLIANCE ROOFING SYSTEMS LTD., HUMPHREY ALUMINUM (1977) LTD., PATTULLO GLASS & ALUMINUM LTD., SEYMOUR BUILDING SYSTEMS LTD. and SEYMOUR BUILDING SYSTEMS (1979) LTD.

DEFENDANTS

Counsel for the Plaintiff: I.G. Schildt

Counsel for the Defendants
Seymour Building Systems Ltd.: F.G. Potts

[1] **THE COURT:** There are before me motions by Seymour Building Systems Ltd. The first is for an order pursuant to Rule 18A that the claim as against it be dismissed. The second is that pursuant to Rule 2, Rule 19, and the subsections, the plaintiff's claim against it be struck out, in that the

relevant pleadings are deficient and disclose no reasonable cause of action and/or are an abuse of process.

[2] The plaintiff has asked that this matter be adjourned and has submitted that pursuant to precedent set forth in the ***Hunt*** cases, that the 18A and indeed the applications under Rule 2 and Rule 19 are premature. The plaintiff asks that the matter be adjourned "pending a full discovery relating to the issue of successorship". The successorship is to the named Seymour Building Systems Ltd., by what Mr. Potts described as "another company". The plaintiff wold like to know the financial arrangements and contractual nature of the succession.

[3] The pleadings against the particular defendant says little more than that it is the "successor to the liabilities of SBS and/or Seymour Building Systems (1979) Ltd." - that is from paragraph 30 of the statement of claim. The allegation of negligence is contained in paragraph 29 as against Seymour Building (1979) and articulated in a slightly different form in paragraph 23 of the statement of claim, where it alleges that Seymour (1979), "as SBS", was the sub-contractor and responsible for carrying out its duty in a workman-like-manner. Paragraph 11 of the statement of claim says that "Seymour Building is the successor to the liabilities of SBS and/or Seymour Building (1979)".

[4] Two things are clear. One is that the plaintiff is suspicious that possibly some of these maneuvers may be to in some way leave the plaintiff out in the cold, but even short of that specific, they are suspicious that somewhere within the transaction there is an assumption of liabilities by the successor company. They want to examine for discovery and have examination of documents in this regard. The notice of motion of the plaintiff, in paragraph (b), sets out five specifics with regard to the classes of documents that they want produced.

[5] Mr. Nichelena's supplemental affidavit signed January 9, 1997, has responded to each of those five sub-paragraphs. In effect, he has said there are no documents and there are no agreements and there is no assumption of liability, and that the company in question had nothing to do with the work or the undertaking.

[6] The plaintiff has referred to the 1990 reasons in ***Hunt*** as support for its position that it would be premature at this time to dismiss the claim. Having been involved for two or three years in that case after that decision, I must say that it was a much more extensive and sophisticated and complicated case than the one before me.

Mr. Justice Hinkson spoke about apparent corporate manoeuvering over the years, and said that a chambers judge should hesitate

about dismissing a claim, in circumstances which he then outlines, and they were to do with the ***Quebec Act***, that is the ***Business Concern Records Act*** of refusing to furnish an answer to interrogatories, of refusing to produce an officer for discovery and for filing a faulty affidavit. Then having regard to all of those circumstances, he ruled that it was inappropriate for the trial judge to accede to the motion.

[7] I can understand that the plaintiff makes reference to that case because it feels there has been some corporate manoeuvering. Of course the word "manoeuvering" suggests something slightly less than totally above board. I have no reason before me to conclude that the corporate changes, and I will not categorize them as maneuvers, were anything other than in the ordinary course and for good business reasons. I doubt that the plaintiff has any evidence otherwise.

[8] Consequently these changes were made, and in this case, contrary to ***Hunt***, it is a very simple matter. The plaintiff has pleaded that the successor is the successor to the liabilities. I have before me an 18A on the pleadings as they are, and they are deficient, and do not make out a cause of action. Furthermore, the evidence that I have before me has convinced me that there is only a very slight chance of the plaintiff being able to make out a case against Seymour Building Systems Ltd. The judge hearing an 18A does not have

to be absolutely satisfied that a full trial hearing would produce a different result.

[9] However, I am satisfied that it is highly unlikely that further pursuit of this defendant would result in other than increased legal costs to all of the parties and the same result as I have now found, that is that no claim has been properly plead and none has been made out on the facts, and the 18A application is allowed.

(submissions re: costs)

[10] **THE COURT:** (Tape starts)... it has a long way to go and Mr. Potts is still going to be involved with the other client, and consequently, I am of the opinion that the costs should be to Mr. Potts client for this motion. All costs incurred for today's motion will be to that defendant.

Mr. Justice Thackray