Ontario Superior Court of Justice

COURT FILES NO. CV-15-523947 (main); 17-582357 (companion) & CV-19-622398 (Tremco)

- TSCC No. 2299 v. Distillery SE Development Corp, et al; (the "15 main action"),
- **Distillery SE Development Corp. et al and Architects-Alliance, et al (the "17 companion action")**
- Tremco et al, CV-19-622398.

- H. Borlack & C. Sipa, for WSP Canada Inc., defendant in the 17 companion action, moving party,
- E. Hiutin & M. Whelton for Distillery SE Development Corp, et al., plaintiffs in the 17 companion action, responding parties.

Endorsement of Associate Justice Josefo dated October 4, 2022
(Motion heard October 3, 2022)

The Within Motion:

This pleadings motion brought by WSP Canada Inc. ("WSP"), heard on October 3, 2022, arises out of the above-identified 17 companion action of these three above-listed actions which I case-manage. WSP seeks to:

- strike out the Replies delivered by the plaintiffs in the 17 companion action, alternatively described as the "17 action",
- compel the plaintiffs to deliver a fresh as amended Statement of Claim (occasionally, "Claim"), and,
- obtain leave for the defendants to deliver amended Statements of Defence (occasionally, "Defence") within 30 days of receipt of the plaintiff's fresh as amended Claim.

My August 30, 2022 Endorsement reviewed the initial case-conference discussion about this pleadings motion, as well as confirmed a timetable for delivery of materials pursuant to it. My two prior Endorsements (June 15/'22; June 7/'22) addressed the litigation timetable in these matters generally, pursuant to Case-Conference ("CC") discussions on those days.

Overview of the Case:

To contextually situate this motion, I provide a high-level overview of this condominium construction litigation. Pursuant to an August 9, 2019 Order, the 15 main action and the 17 companion action are being tried together or one after the other, as the trial Judge deems best.

The plaintiffs in the 17 companion action are, *inter alia*, the Declarants and related parties who conceived the condominium project ultimately built at 70 Distillery Lane, in Toronto ("project").

These plaintiffs in the 17 companion action are defendants in the 15 main action brought by the condominium corporation, TSCC No. 2299 ("Condo Corporation"). The Condo Corporation alleges many things went awry when the project was being built, including systemic failures. The Condo Corporation seeks damages for alleged breaches of contract, negligence, breach of fiduciary and statutory duty, and for breaches of warranties and representations.

In the 17 action, these plaintiffs point the finger of blame at virtually all of the construction trades involved in the project. To excerpt from paragraph five of the Fresh as Amended Statement of Claim (Claim originally issued on September 8, 2017; Amended Claim issued March 28, 2019):

> "The Plaintiffs allege that the Defendants to the 17 Action were: the building and construction consultants, professionals, contractors, trades, engineers, architects and planners who did the work for the condominium complex in relation to its design, monitoring, construction and/or repairs. They were also the suppliers of material and labour used for the construction of the condominium complex. All of these defendants are hereinafter referred to as the 'condominium complex defendants' ".

The plaintiffs in the 17 action thus claim contribution and indemnity, given the alleged breaches of the trades whom it engaged to construct the project.

This Motion in Context of the Evolution Over Time of the herein Pleadings:

The 17 action Claim is brief, consisting of 12 paragraphs. It raises various causes of action, and claims damages for breach of contract, breach of warranty, negligence, and for restitution. In paragraph six, it pleads that the plaintiffs entered into contracts with each of the above-defined condominium complex defendants. In paragraph seven, it pleads that those defendants provided warranties for their services or labour. In paragraph eight, a duty of care is alleged to be owed by those defendants. In paragraph ten, restitution is claimed. The *Negligence Act* is pleaded in paragraph 11.

In his August 27, 2019 email to Mr. Hiutin, copied to all other counsel defending the 17 action, Mr. Borlack advised of WSP's then intention as follows:

> "My client wishes for us to bring a Rule 21 motion to have your Amended Statement of Claim dismissed for failing to disclose a cause of action as against my client. There is nothing in your pleading to suggest how my client owes a duty of care to your client and if it did how it breached that duty. Could you let me know if you intend to oppose the motion or seek leave to amend your claim. If it is the latter perhaps we could avoid the expense of a motion and you could amend the claim at this time. If you intend to oppose the motion I will be relying on this email in my submissions to oppose a request to amend your pleadings and in our cost submissions."

In his response later on August 27, 2019, Mr. Hiutin wrote:

> "I think what you're really looking for are particulars regarding the claim against your client. As I think I advised in a previous email, in my view, the condo should be providing a Scott Schedule regarding the claims. That should provide a clearer picture regarding the alleged deficiencies.

> After that's provided, I think providing particulars regarding the claim against your client is reasonable. I think all of this has to be dealt with at the case management conference that Blaine Fedson is trying to schedule with the case management Master now in charge of these proceedings."

Following the above, also on August 27, 2019, Mr. Borlack responds to the proposal of particulars as follows:

> "That is fine with me. Just to let you know, my client is somewhat puzzled that it is involved in this matter given its role. But I can wait to receive particulars as against my client."

In his email dated May 19, 2020, Mr. Hiutin then delivers the particulars as against WSP:

> "I'm writing you this email because you were one of the parties that requested particulars of my clients' claims regarding this action. The requested particulars are set out below.
>
> WSP (formerly Halsall) was the Building Enclosure System, Balcony Guard and Building Science consultant for the building. In this regard, WSP performed the functions below including but not limited to:
> -it worked with the architect to develop the generic Curtainwall details for the project;
> -it reviewed the architect's thermal and air barrier details;
> -it reviewed the structural design and details in respect to the continuous wrap around concrete balconies;
> -it wrote the Curtainwall and Storefront Glazing Specifications;
> -it reviewed and marked up the sub-trades performance and detailed design submittals for the Enclosure Systems and the Balcony Guards pre-contract and post contract including detailed design meetings with technical representatives of the sub-trade and reviewed all shop drawings and submittals related to the Enclosure Systems and Balcony Guards;
> -it reviewed the work of and liaised with the manufacturer's local engineer-of-record;
> -it visited the proposed sub-trade's manufacturing facilities in China to assess the proposed sub-trade's qualifications and manufacturing capacity and quality pre-contract, post-contract it visited the manufacturer's plant to witness the performance testing and re-testing of the Curtainwall;
> -it visited the manufacturer's plant to review the fabrication of the components of the systems while in production;
> -it reviewed the installation of the Building Enclosure Systems and Balcony Guards on a regular basis;
> -it performed testing of elements of the assemblies to ascertain their compliance with the specification for the project;
> -it issued regular reports including identifying deficient elements of the work and followed up thereafter until the deficiencies were witnessed as being complete;
> -it advised the Owner's specialist Curtainwall sub-trade after the Owner retained a local specialist sub-trade to help complete the deficiency work of the manufacturer; and
> -it advised the Owner's own forces as they worked to complete the technical audit deficiencies.
>
> To date, the Condo has complained about the following items that fall within WSP's mandate, which include but are not limited to:
> -Alleged issues with sliding doors, vents and hardware;
> -Alleged issues of the enclosure system assembly connection to slab and leaking;
> -Alleged issues with the use of Nickel Sulfide in the curtainwall glass;

> -Alleged issues with the installation of the balcony guards, including the installation of the bolting assembly to the concrete deck;
> -Allegations that there are missing elements of the assembly, and incorrect elements used in the assembly; and
> -Allegations pertaining to the installation of the traffic topping system and cracking on balcony slab.
>
> As WSP was responsible for the detailed review of the enclosure systems, balcony guard system, which included review of all shop drawings and calculations, as well as review of the system installation, WSP was responsible to ensure that there were no deficiencies related to the systems, and to the extent that there were deficiencies, it was WSP's responsibility to have discovered these alleged deficiencies prior to completion so that they could be remedied.
>
> The condo's Scott Schedule items related to WSP are: 4, 5, 6, 7, 11, 12, 14, and 16."

Clearly, the particulars were very detailed. In my view, these expanded well upon the less detailed Claim. On March 31, 2022, nearly two years after delivery of the particulars, Mr. Borlack delivered his Statement of Defence. It is thus obvious that Mr. Borlack was able to plead, as he then took no step, nor did he raise any further issue, regarding the Claim.

As was the Amended Claim, WSP's Defence could also be fairly described as brief, or concise. It is 13 paragraphs. In my view, it is a fairly standard or "boilerplate" denial of liability, not specifically responsive to the details set out in the particulars. Yet, as a denial of liability, also in my view, it nevertheless gets the job done. No party, including the plaintiffs nor any of the other defendants, challenged WSP's Defence.

Given delivery of the Statements of Defence from the various trade defendants, the plaintiff, from about May through June 2022, delivered Replies. These Replies are more comprehensive than is the Claim. New facts, with much more detail, are pleaded in the Replies as compared to the Claim, including in the specific Reply involving WSP.

During this period, the parties had case-conferences with me to address various items, including finally getting discoveries underway. Through no fault of the plethora of counsel involved in the 17 companion action as well as in the main action, all with competing demands on their time, working out a discovery timetable proved to be challenging. In that regard, in my June 15, 2022 Endorsement, I quoted Mr. Borlack when I wrote:

> "Turning to the concern regarding the timetable, I agree with Mr. Borlack who, in essence, suggested that we just get started and, if snags or problems arise, we try to resolve them. After all, paraphrasing Voltaire, "let not *perfect* be the enemy of *good*". This will be a "good", not perfect, schedule. It can be tweaked, within reason, if and as needs be."

Ultimately it was agreed that discoveries were to commence on or about the last week of November 2022. Understandably, the Condo Corporation was very eager to see these cases move forward. That plaintiff in the 15 main action is concerned about anything which will upset the scheduling agreement. Happily, by mid June 2022, all appeared finally on track to allow discoveries to begin as scheduled.

Counsel also commendably agreed to streamline the pleadings process, as I also recorded in my June 15th Endorsement, as follows:

> "Following from my June 7th Endorsement, the revised pleading language circulated by Mr. Lesage and not opposed is as follows:
>
> "Where a party is defendant to a crossclaim, provided such party has filed a defence, such party shall be deemed to deny all crossclaims against them on the following basis:
> 1. The crossclaim defendant denies all allegations set forth in the crossclaim against it;
> 2. The defendant pleads and relies upon its statement of defence, and/or the contents of the most recent Statement of Claim as against the party asserting the crossclaim;
> 3. The crossclaim defendant is deemed to plead and rely on the Negligence Act, and the Limitations Act, 2002 in defence to all crossclaims.
> 4. The crossclaim defendant submits that the crossclaim against it shall be dismissed with costs payable on a substantial indemnity basis.
>
> Nothing herein shall prohibit a crossclaim defendant from filing and serving a more detailed defence to crossclaim, nor from amending its defence to crossclaim at a subsequent point to plead more detail. This provision is intended only to avoid a multiplicity of largely redundant pleadings". I ask Mr. Brusven to incorporate this into the draft Order where the deadline for pleadings is set out, so to keep all such provisions in one spot, rather than floating about in various Endorsements."

Obviously, however, WSP's position evolved over the summer of 2022, leading to an initial case-conference on the topic of this motion on August 30th, and eventually, to this within motion.

Discussion and Conclusions:

The question I must decide is if the plaintiff's Reply involving WSP (no other defendant herein is a moving party, *albeit* some, not the majority, offer what I describe as "moral support" to Mr. Borlack) is proper pursuant to the *Rules of Civil Procedure* ("Rules").

To answer that question, I begin by referencing Rule 1.04, the seminal Rule which requires that the Rules be "liberally construed to secure the just, **most expeditious**, and **least expensive** determination of every civil proceeding on its merits [*emphasis added*]." In a matter under judicial case management, with multiple parties, moving the case(s) forward expeditiously, preventing stalling, side trips, and the matter bogging down, becomes an important joint task of counsel and the managing jurist.

In applying this Rule to this matter, I keep in mind that the main action commenced in 2015, and the companion action began in 2017. As referenced above, it took effort from all parties to agree to a discovery schedule. While Mr. Borlack was sanguine in his submissions that adjustments could be made if necessary, based on what has actually transpired to date, I am not as confident. While it could be done, as anything eventually can be done if there is a will (or sufficient coercion) and ability to do so, it is trite that busy counsel have busy schedules. In this matter, counsel indeed have full calendars, as I have observed. Re-opening the timetable will lead to further delay in getting this case to discoveries, and ultimately, to a pre-trial and then trial.

Depending on when I render these reasons, if I grant the relief sought, plaintiffs will have a month to amend its Claim. Then, optimistically assuming no challenges to the amended Claim

from any of the defendants, another at least twenty days will elapse (Mr. Borlack was content with twenty days but other defendants may well seek a little more time) for new Defences to be delivered. On that basis, once everyone pulls out their day-timers, discoveries will realistically be pushed at least to the winter-spring of 2023 if not later, instead of commencing in November 2022 as was agreed.

That likely resulting delay would be the opposite of "expeditious", in my view.

If I compel all counsel to return to the drawing board, the plaintiffs must scrap all their individual Replies (although this motion only involves WSP, there must be a consistent approach to the pleadings in this complicated case). They will instead have to draft a much-elongated Claim to encompass all which is in the individual Replies, which individually focus on each defendant, into one huge Claim. Then, the defendants must put in amended Defences in response. All this will come at a cost, and in my view, at likely no small cost to the parties. It will also consume hours of legal time to go through this process.

Adopting this process is, in addition to not being at all expeditious, the opposite of "least expensive".

More importantly, what, if I compel the approach sought by WSP, will be gained? The defendants and plaintiffs have framed and identified the issues through not only the Claim, but through the particulars, and through the individual Replies. The parties thus know what case must be met or proven. As a key goal of pleadings is to frame the case, so that all parties know the case that they must meet or prove, the pleadings herein have already done exactly that.

Mr. Borlack submits that the pleadings brad will be too bulky; with the plethora of Replies, it will be hard for the trial Judge to flip through the various pleading documents, and it will be equally hard for me to do so should, for example, I have to address a refusals or some other motion. Yet having one large claim, addressing all the defendants in one bulky document, does not strike me as any easier to manage. The present approach, arguably perhaps somewhat unorthodox, yet for this complex construction litigation involving multiple parties, with a Scott Schedule as a useful tool, seems to me to be not a bad way to differentiate between the many defendant trades and the allegations specific to each of them. Moreover, given electronic document management, the pleadings on Caselines can be hyperlinked for easier access.

When Mr. Borlack raised a concern about not being able to respond to the new details and factual allegations in the Reply directed at WSP, plaintiffs offered him, and all the defendants, the opportunity for a "rejoinder pleading", at times called "sur reply". Rule 25.01(5) provides that a Reply is typically where pleadings end. Yet it does allow a subsequent pleading either on consent or with leave of the court.

To be clear, Rule 25.01(5) provides that if the parties consent to such a rejoinder pleading, the court would not even need to address the matter. If the plaintiffs had opposed a defendant delivering a Rejoinder pleading, the test in *Green v. Green*, 2013 ONSC 5164 would apply. In this case, I do not find that the Reply involving WSP truly introduces a "new and important matter". Rather, the Reply simply expands upon and offers more specifics or details about the

allegedly faulty construction and areas of responsibility under WSP's purview. Especially considering the detailed particulars long ago delivered, none of what is pleaded in the Reply truly should have taken WSP by surprise. Rather, again referring to the *Green* decision, such fairly could have been anticipated by WSP.

In any event, even if WSP would arguably not meet the test in the case-law had plaintiffs opposed the delivery of a Rejoinder pleading, that does not matter. It does not matter because, in an attempt to avoid this motion, the plaintiffs had consented to any of the defendants delivering a Rejoinder pleading.

Mr. Borlack raised concern that all the defendants will deliver a rejoinder to the Replies, noting that this would make the pleadings file even more unmanageable. Given the position of the other defendants, such presently does not seem to be the case. Not even most seemingly want to do so. Yet, if the other defendants, beyond one other (Italform, which indicated it would put in a Rejoinder pleading), wish to do so, again, that should be no less manageable than one large Claim addressing each of the many defendants. Again, technology and hyperlinking will delineate which pleading belongs to which party.

Moreover, a tight timeline for any Rejoinder pleadings can fairly be imposed, given counsel have had the Replies for several months at this stage. The advantage with this existing approach is that discoveries can thus proceed as scheduled.

If the Reply was contrary to Rules 25.06(5), with allegations inconsistent from a previous pleading, or with a new ground of claim not previously made against WSP, I would not hesitate to grant the relief sought. Similarly, if the Reply was contrary to Rule 25.08, again, I would grant the relief sought. Yet in my view, in the context of this case, and in all these circumstances, I find that the plaintiffs by delivering a Reply have appropriately adhered to the admonition in Rules 25.08(1) & (2). They have squarely put their additional factual details in the Reply, so the defendants (WSP in particular, but all in general) will not be taken by surprise.

Mr. Borlack urged that this process adopted by the plaintiffs, in his view quite unorthodox and irregular, is contrary to the Rules which govern pleadings. Respectfully, I must disagree. In my view, the Rules allow, within certain fixed parameters, sufficient flexibility to accommodate different types of cases, with differing degrees of complexity, and differing stakes, which come before the Court. For example, in *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, Justice Perell addressed the need in some cases for a more complete, or "Cadillac" style of discovery, whereas in other cases that process could be streamlined with the maximum number of hours mandated by the Rules appropriately applied.

Particularly when a matter is being judicially case-managed, the case-managing jurist is able, again within parameters, to tailor an approach that makes sense in the individual circumstances of the case. For example, while generally, Rejoinder pleadings are not automatically allowed, as discussed above, in the appropriate case, rare though it will be, such can be pursuant to Rule 25.01(5) either agreed to by the parties or permitted by the Court.

When I consider the Claim and the causes of action pled therein, I also find consistency when comparing the Reply to the earlier pleadings (including the particulars and the reference to the Scott Schedule). Again, the Reply is far more detailed than is the Claim. Yet it expands on the existing allegations rather than adding new causes of action. It pleads new and relevant facts again, to which WSP or any defendant can respond via a Rejoinder pleading. Thus, procedural fairness is maintained. There is no prejudice in this process to any of the parties involved.

At paragraphs seven and eight of the Reply, the contract with WSP is pled. Paragraph 11 pleads the issue of warranties. Paragraph 12 addresses the duty of care, or negligence, while paragraph 12 pleads the *Negligence Act*. As I discuss earlier in these reasons when reviewing the Claim, these same claims are therein asserted.

For all these reasons, I find the Reply by plaintiffs to the Statement of Defence of WSP is proper in all of the context and circumstances of this case. Thus, the relief sought by WSP is denied. Its motion is dismissed.

I order that any defendant party wishing to deliver a Rejoinder pleading shall do so by October 31, 2022.

Costs and an Order:

It is trite that costs follow the event. Despite thorough and well-made argument, WSP was the unsuccessful party on this motion. Absent anything unusual, or/and an offer to settle, WSP will have to pay costs to the plaintiffs. I trust that the parties involved can satisfactorily address costs without my additional intervention. Yet, if that optimism is misplaced, a short tele-case-conference with me can be scheduled. Costs Outlines can be uploaded to Caselines in advance.

The parties involved in this motion can hopefully agree on a form of Order. It should be sent to my ATC who releases this decision to counsel.

Associate Justice J. Josefo