

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20080509
Docket: L032037
Registry: Vancouver

Between:

The Board of School Trustees of School District No. 63 (Saanich)
Plaintiff

And:

Advanced Architecture Inc. formerly known as Holovsky Mansfield Architects Ltd., Sandbar Construction Limited, Dominion Stucco (1988) Ltd., Pino-Lite Glass Ltd., Top Line Industries Inc., Sandy's Drywall Ltd., Universal Sheet Metal Ltd., Robert D. Tuff & Associates Ltd., Rolco Rollshutters B.C. Inc., Aluminex Extrusions Limited and John Doe 2
Defendants

And:

Advanced Architecture Inc. formerly known as Holovsky Mansfield Architects Ltd., Dominion Stucco (1988) Ltd., Pino-Lite Glass Ltd., Top Line Industries Inc., Sandy's Drywall Ltd., Robert D. Tuff & Associates Ltd., Rolco Rollshutters B.C. Inc., The Corporation of the District of Central Saanich and Her Majesty the Queen in Right of the Province of British Columbia
Third Parties

Before: The Honourable Madam Justice Ross

Oral Reasons for Ruling

May 9, 2008

Counsel for Plaintiff

D. Miachika
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C. Lee

Counsel for Defendant Dominion Stucco (1988) Ltd.

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Counsel for Defendant Pino-Lite Glass Ltd.

W. Neen
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Counsel for Defendant Universal Sheet Metal
Ltd.

D. Bilkey

Counsel for Defendant Top Line Industries
Ltd.

H. Rusk

Place of Trial/Hearing:

Vancouver, B.C.

[1] **THE COURT:** This is ruling number 3 with respect to the expert report of Michael Wilson. This ruling deals with the implementation of the earlier rulings concerning qualification and certain objections taken to the admissibility of the report.

[2] The position of the defence is that, as a consequence of those earlier rulings, substantial portions of the report must be excised. The position of the plaintiff is that all or virtually all of the report is admissible, consistent with those earlier rulings.

[3] In the first ruling I held that Mr. Wilson was not qualified to express opinions with respect to architectural design and field review practices in British Columbia in the early to mid 1990s and with respect to construction practices in British Columbia in the early to mid 1990s.

[4] The defendants' submission with respect to the current ruling is that the portions of the report that are objected to contain expressly or by implication a temporal component that contravenes the exclusion of qualification. As an overview, I make the following observations: First, I agree with Mr. Samuels' submission for the plaintiff that there is a difference between questions of the standard of care – what should have been done – and questions of what was commonly done, the typical practices of the trade contractors and professionals at the relevant time.

[5] Second, the plaintiff does not seek to qualify Mr. Wilson to give evidence with respect to the standard of care of architects, and I found him not qualified to give evidence with respect to architectural design and field review practices in British Columbia at the relevant times. Therefore, with respect to the issue of the architect,

Mr. Wilson has, in the result, not been qualified to give opinions of either variety, that is, with respect to the standard of care or with respect to common practice.

[6] Next, I agree with the submission of plaintiff's counsel that Mr. Wilson has been qualified to give evidence with respect to the standard of care of contractors and subcontractors, what counsel aptly describe as what should have been done or the duty of the respective trades. He has not been qualified to give opinions with respect to what was commonly done, the typical practices of trade contractors at the relevant time and place.

[7] Next, since the plaintiff sought to qualify Mr. Wilson to give evidence about both the standard of care of contractors and subcontractors, what should have been done, and construction and field review practices in the province at the relevant time, the common practice, one would assume that both kinds of opinions would appear in the report.

[8] I agree with the submission of Mr. Twining for the defence that normally the use of the term "would" is associated with a temporal connotation or a connotation of habitual practice as opposed to the use of the term "should" which is suggestive of the term "duty." This is consistent with the usage in which "would" is used to express habitual action while "should" is used to express duty or obligation.

[9] The foregoing should make the task of the ruling on the objection relatively straightforward. However, there are several complicating factors. First, the report is not structured along the lines of the distinct topics for which the plaintiff sought to have Mr. Wilson qualified.

[10] Second, it is not clear from the report in many places whether the opinion is being expressed with respect to the standard of care which is admissible except in the case of the architect, or the inadmissible opinion with respect to common practice, or to some amalgam of the two.

[11] Third, I have concluded that Mr. Wilson appears to be using "should" and "would" interchangeably. For example, when describing what a reasonably competent and prudent architect does, sometimes he uses "should" and sometimes "would" -- see, for example, references at pages 13 and 14 -- sometimes he uses "should" and "would" in the same sentence when apparently the term "should" is what he intends. In many cases the rest of the context of the opinion does not provide clarification with respect to whether the opinion is as to the standard of care or as to the common practice or as to some mixture of both.

[12] The defendants have submitted that with respect to the issue of standard of care the opinion is either implicitly about the standard of care at the time, and in the defendants' submission inadmissible, or about the current standard of care in which case it is irrelevant.

[13] Mr. Wilson was qualified to give evidence about the standard of care of contractors and subcontractors. The question of whether the standard of care he articulates was the appropriate standard of care at the time and whether there has been any change in the standard of care are all matters to be explored in the evidence through cross-examination and in argument, but I conclude not a basis upon which to exclude the opinion. That leaves the question of what to do with the

balance of the portions to which objection is taken. I have concluded that, as I will review in detail going through the objective portions, certain portions of the report – primarily those dealing with the architect – must be deleted.

[14] I have concluded that the sections dealing with contractors and subcontractors must be rewritten so that it is clear what opinion is being expressed and to exclude opinions for which Mr. Wilson has not been qualified. Rewriting is an option in such cases, see *Surrey Credit Union v. Willson* (1990), 45 B.C.L.R. (2d) 310, and to do otherwise would potentially deprive the plaintiff of access to opinion that is admissible and for which the expert has been qualified.

[15] With those observations I then turn to the specific sections in the report and have concluded that with respect to page 6 the opinion is admissible. With respect to page 9 it is admissible except for the reference to the architect. With respect to page 13, the reference to the architect beginning "a reasonably competent and prudent architect" and concluding "good designer construction practice" is to be deleted, and then the following portion beginning "also a reasonably competent and prudent general contractor" is to be rewritten.

[16] The defendants have objected to a series of opinions characterized by the next paragraph which makes reference to the design as-built condition as being contrary to good design and construction practice. Mr. Wilson has been qualified to give opinion evidence with respect to the design and construction of building envelopes and with respect to the *British Columbia Building Code*, and accordingly, in my view, this opinion throughout is admissible.

[17] With respect to page 14, the same comment, the deletion of the reference to the architect, and over on to page 15, rewriting the opinion with respect to the general contractors so as to excise inadmissible opinion and express the opinion that has found to be admissible, and down at the bottom section with reference to drawing A4.1 to A4.5 the same. The same at page 16, 17, 18. On page 18 there is a section under "Inadequate Skylights Sloped Glazing Details" where the opinion states:

No consideration was given to how drainage at the edge of the assembly was to be diverted or collected so the wall would not be stained and unnecessarily subjected to rain water overflow.

[18] The defendants contend that this amounts to the expert finding facts with respect to the architect's mental process while the plaintiff's counsel contends that it is a way of referring to the inadequacy of the plans. I find that it is not possible to tell from the way the opinion has been drafted what is intended and will direct that this portion be rewritten.

[19] Page 19, the same. Page 20, the same. Page 21, the same, and then in the section that begins under section 076 to 0 metal flashing and trim, in addition to the changes that have been outlined earlier, the sentence that begins:

The as-built construction contains examples of metal flashing construction that do not comply with the requirements of RCABC.

And then it says "or good construction practice at the time." "Good construction practice at the time" should be deleted.

[20] Page 23 the same. Page 24 the same, also page 25, and page 34 delete the sentence under "Opinion" dealing with the architect, and on page 36 delete the reference to the architect and rewrite the reference to the contractors. On page 37 the same as before, and as well on page 38. On page 41 the same. And 42, now it is on page 42 that with respect to the discussion of the general contractor that now the language of "should" is being used, but as I say, given the way the terms have been used apparently interchangeably through the earlier part of the report, I was just not sure whether that was intending to reflect an opinion with respect to duty or an opinion with respect to practice or both.

[21] Page 43, the same. Page 45, the same. Page 46, the same. And the same for page 48. And the same for page 49, and in addition on page 49 the reference in the sentence beginning "a reasonably competent and prudent general contractor and stucco trade contractor responsible for the construction of exterior stucco walls would have known," that sentence is simply to be deleted. And page 50, the same changes we have talked about with respect to the other sections.

Cecil Ross /
Ross J.