ORIGINAL

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20080610
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

Ruling on Objection

June 10, 2008

Counsel for the Plaintiff	David L. Miachika Brian M. Samuels Christopher Schuld
Counsel for the Defendant Sandbar Construction Ltd.	Steven F. Lee
Counsel for the Defendant Pino-Lite Glass Ltd.	William G. Neen David K. Plunkett

Counsel for the Defendant Dominion Stucco (1988) Ltd.	David M. Twining
Counsel for the Defendant Universal Sheet Metal Ltd.	David J. Bilkey
Counsel for the Defendant Top Line Industries Inc.	Harold K. Rusk
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT**: This is a ruling with respect to objections taken to questions asked by plaintiff's counsel in examination in chief at the qualifications stage with respect to the evidence of Pierre Gallant. The defence seeks to bind the plaintiff to the statement of qualifications provided pursuant to the rule.

[2] The history is that the plaintiff originally provided the defendants with an expert report of Mr. Gallant dated March 13th, 2007, which had as an attachment a one page statement of qualifications. The defendants at some point requested a more detailed statement of qualifications. A report dated March 28th, 2008 was provided, commenting on reports prepared as part of the defence case. The plaintiff then advised by letter dated April 15th, 2008, that counsel would not be providing a more detailed statement of qualification as, in counsel's view, the statement that was provided was sufficient.

[3] Plaintiff's counsel did provide a more detailed statement of qualifications with respect to its other expert, Mr. Wilson, in response to a request by the defendants. The plaintiff advised, pursuant to a request by the defendants, by e-mail dated June 4th, 2008, of the areas proposed for the qualification of Mr. Gallant. The plaintiff seeks to qualify Mr. Gallant to give expert evidence in a number of areas in relation to the issue of building envelopes.

[4] The areas of contention for the purposes of the present objections are four

(a) construction practices in British Columbia in the early to mid 1990s. With respect to this matter, the plaintiff, in the course of submissions,

has withdrawn this as an area of qualification and no longer seeks to qualify Mr. Gallant in this regard;

(b) the standard of care of a contractor and subcontractor with respect to building envelope construction in British Columbia in the early to mid-1990s;

(c) the effect of maintenance on buildings; and

(d) the expected lifespan of building envelope components.

[5] The defendants submit that the statement of qualifications does not provide any basis for expertise in those four areas, and that nothing in the reports would put the defendants on notice in this regard. The defendants seek a ruling that the plaintiff not be permitted to ask questions about qualifications that are not referred to in the statement of qualifications. The defendants concede that there is discretion in the rules pursuant to Rule 40A(7) of the ***Rules of Court***, B.C. Reg. 221/90, but submit that there is a prejudice here in that the foundation for consideration of an opinion is whether the opinion is supported by the expertise, and the only way to assess that in advance is by reference to the statement of qualifications provided.

[6] The plaintiff submits that the rules require only a summary of the experience, training and education of the witness with reference to the opinion, and it is the plaintiff's position that the summary that it provided was sufficient. The plaintiff submits that it is unrealistic to require proposed experts to enumerate every course they have ever taken, every building they have ever worked on, and every step they

have ever undertaken as a professional in order to develop the expertise in which they are proposed to be qualified.

[7] That may be the case. However, this appears to me to be a "straw man" that overstates the defendants' position.

[8] Rule 40A(5) provides that a written statement of an expert opinion is to include or be accompanied by a supplementary statement setting out the qualifications, the facts and assumptions on which the opinion is based, and the name of the person responsible for the content of the statement. It appears from submissions that there is little case law defining the scope of the qualifications of the expert to be supplied pursuant to this rule.

[9] The purpose of Rule 40A is to ensure that neither side is taken by surprise by expert evidence; see ***Sterritt v. McLeod*** (2000), 74 B.C.L.R. (3d), 371, (C.A.). In ***A.(C.) v. Critchley*** (1996), 4 C.P.C. (4th) 269 (B.C.S.C.), Madam Justice Allan stated at para. 15, that "the very purpose of 40A(2) is to prevent ambush and surprise at trial, ensure fairness to the parties, and to promote the orderly progression of the trial". The CLE publication *Expert Evidence in British Columbia Civil Proceedings, 2nd ed.* (CLE BC, 2005), contains the following discussion with respect to this issue, at paragraph 8.8(b):

> The statement of qualifications required to be provided under 40A(5) should demonstrate that the expert is qualified to provide an opinion in the area proffered. During the qualification of an expert, the party tendering the expert should not be allowed to ask the expert about qualifications which are not contained in the statement. Opposing counsel may have decided not to call a rebuttal expert on the basis that the statement of qualifications delivered under 40A(5) does not

> show that the author has the expertise asserted. It would be unfair to allow the party tendering the expert to buttress qualifications by proffering evidence concerning those qualifications not in the statement.

[10] No authority is cited by the authors of the publication in support of this contention. However, I would observe that it is consistent with the purpose of the rule. In ***Croutch (Guardian ad litem of) v. B.C. Women's Hospital***, 2001 BCSC 995 [***Croutch***], Mr. Justice Lowry, sitting as a trial judge, had this to say on the subject in *obiter* at para. 15:

> Finally, there should be a complete statement of the expert's qualifications including any particular training or experience beyond what might be found in a curriculum vitae, that are germane to the opinion.

[11] It is clear that failure to provide a statement of the facts and assumptions on which the opinion is based can be a basis for the exclusion of the report; see ***ter Neuzen v. Korn***, [1996] B.C.J. No. 2246 (S.C.). Failure to provide a statement of qualifications has been considered, together with a number of deficiencies, resulting in the exclusion of an opinion; see ***Handley v. Punnett***, 2003 BCSC 294 and resulted in the order of a new trial where evidence had been admitted contrary to 40A(5), including the absence of a statement of qualifications; see ***F.(K.E.) v. Daoust*** (1995), 3 B.C.L.R. (3d) 128 (C.A.).

[12] In ***Emary v. MacDonald***, [1983] B.C.J. No. 2012 (S.C.) the proposed expert evidence concerned the relatively new diagnostic technique of thermographic testing. Finch J., sitting then as a trial judge, had these comments to make at paras. 14, 15 and 18:

> ...[X]-ray is a well-recognized method of diagnosing certain kinds of injury, whereas thermography is new and not widely accepted as a diagnostic technique. But newness alone does not make the evidence inadmissible...
>
> The evidence sought to be adduced may have some probative value. It may, if the jury accepts it, support or confirm the opinions of the witness. It may tend to make the opinion more acceptable or trustworthy to the jury. Whether the jury accepts the evidence as helpful, and what weight they may choose to attach to it, are matters entirely for them. But since, in my view, the evidence may assist them in their deliberations they should have whatever benefit that evidence may afford.
>
> ...
>
> I think in the end the objection as to lack of notice of the doctor's qualifications was withdrawn. In any event, I do not think that is an obstacle to the evidence being adduced.

[13] In ***Reid v. Balcaen***, 2003 BCSC 1450, Mr. Justice Barrow ruled on a number of objections to expert reports. He noted at the outset of his reasons that with respect to the circumstances before him, there did "not appear to be a significant difference of opinion among the medical specialists as to the nature of the plaintiff's injuries, and there did not appear to be any disagreement among the medical experts as to the diagnosis or degree of the plaintiff's injury" (para. 4). With respect to the objections based upon notice with respect to qualifications, he concluded as follows at paras. 11-13:

> The purpose of the rule among other things is to give the opposite side the information necessary to determine how to respond to the proposed evidence. In the case of Dr. Biro it is obvious that he is a physician. It is not apparent what the nature of his experience is, nor is it apparent, for example, whether he is a specialist. The information provided in relation to his qualifications is at least arguably insufficient to comply with the requirements of 40A(5). In the case of the reports of Dr. Falconer, more information as to his qualifications has been provided, but there was no information as to the nature of his practice, the length of his experience, or whether he has any particular expertise

> such as an expertise in electric diagnostic medicine, which is a recognized subspecialty of neurology and which is relevant to some of the opinions contained in his report. I will assume, for purposes of what follows, that the information provided in these reports is insufficient to meet the requirements of the rule.
>
> In the case of all three of the reports, however, I find them admissible exercising the discretion reposed in me under 40A(7).
>
> There are several reasons for this conclusion. First, there is no suggestion that the defendants have been particularly prejudiced by the lack of information provided. No specific prejudice has been articulated during argument, and none was alluded to in the notice of objection delivered to the plaintiff by the defendants when they received the reports in question. Indeed, the issue of shortcomings in the statement of qualifications of the reports authors was not even specifically mentioned in the notice of objection. Secondly, as pointed out above, the reports do not deal with an area of evidence that is particularly controversial in the context of this case. The expert for both parties, it appears, do not disagree as to the diagnosis. Further, the diagnosis itself is not a matter of particular controversy, nor is it a particularly novel area of medicine. Thirdly, and finally, some information as to the qualifications of the authors of the reports were provided and, in the context of this case, the shortcomings in that information are of less significance than might otherwise be the case.

[14] By contrast, in the present case, the defendants have asserted prejudice, although the plaintiff has submitted that since this trial will now inevitably go over to the fall, there remains time for the defendants to reconsider any decisions made with respect to rebuttal reports. The reports here are central to the matters that are at the heart of the contentious issues in the case.

[15] It is useful to have regard to certain fundamental principles to give context to this issue.

[16] First, one of the fundamental requirements for the admission of expert opinion is that the expert be properly qualified ***R. v. Mohan***, [1994] 2 S.C.R. 9. Second, an

expert must confine his opinion to his area of expertise; see ***R. v. Taylor***, 2001 BCSC 1025, in which Mr. Justice Henderson stated at paragraph 3:

> It is axiomatic, however that any expert must confine his opinions to his area of expertise. That principle has been well established for some considerable time and never doubted.

[17] In my view, given the purpose of Rule 40A, it follows that the statement of qualifications required by the rule is a statement of the education, training and experience of the expert that relates to the area of expertise for which the expert is sought to be qualified. This does not mean, as Mr. Samuels would suggest, that the statement must chronicle every course that the witness has ever taken, full details of every job he has ever done or every project undertaken. It does mean that the document is not meant to be generic, but something drafted with the object of the exercise in mind. As Mr. Justice Lowry stated in ***Croutch***, it is to identify any particular training or experience that are germane to the opinion. Counsel will, in the normal course, make decisions based upon the notice provided.

[18] In my view, absent circumstances justifying an exercise of the discretion under Rule 40A(7), a party should be confined to the statement of qualifications provided, and not permitted to go beyond it. To do otherwise sabotages trial fairness and efficiency. I do, however, agree with the statement of plaintiff's counsel that fleshing out the summary provided in the statement is appropriate, and is consistent with the rule. I note, however, that the dividing line between the two can be obscure and a matter of debate, and in my view, it is the counsel of prudence to err on the side of disclosure.

[19] Turning then to the specifics of the objections, reference was made to participation in the Building Envelope Committee, Building Envelope Task Force and the Canadian Construction Documents Committee. These matters were not included in the statement of qualifications. They are relevant to the opinion, and should have been specifically referred to. However, objection was not taken when the evidence was given, and accordingly these matters will be admissible. The second area is evidence with respect to the professional designation of Building Envelope Professional. Again, no reference was made in the statement of qualifications to this matter. It is a discrete matter, relevant to the opinion. In my view it should have been disclosed, and is not admissible, absent an exercise of discretion under rule 40A(7).

[20] The next is the issue of the effect of maintenance on buildings. There is, in my reading of the statement of qualifications provided, nothing that makes reference to any training, expertise or education in relation to this issue. The evidence proposed in relation to this issue relates to particular experience obtained in consultation projects. The statement of qualifications provided does refer specifically to matters such as cost control and project scheduling. It would have been a simple matter to have included such a reference with respect to maintenance, particularly given the intention to qualify Mr. Gallant as an expert in this area. Accordingly, I conclude that this is not admissible, absent an exercise of discretion.

[21] The next is in relation to evidence discussing Mr. Gallant's experience in British Columbia projects involving problems with building envelopes, including

stucco clad buildings and schools. In my view, while it would have been the better course to include a specific reference to this in the qualifications, this area falls within the scope of fleshing out what has been provided in the statement, and is in my view admissible.

[22] The next area is evidence with respect to the roles of the contractor and subcontractor, good construction practice, and the expected lifespan of buildings. The evidence with respect to these issues was to the effect that these matters were part of the training of an architect, and part of the experience of an architect attending a job site while engaged in his professional duties. In my view, these matters flesh out what is in the statement of qualifications, and are admissible.

[23] The next issue relates to matters dealing with the quality of workmanship, and practices of contractors and trades in British Columbia in the early to mid-1990s. There is nothing specific in the statement of qualifications in relation to this issue. The evidence is that the witness acquired this expertise from his training and from reviewing drawings and buildings constructed during this period. In my view, while on the borderline, this is a fleshing out of what is contained in the statement of qualifications and is admissible. I note that at our current stage, we have yet to have cross-examination on the issue of qualifications or submissions with respect to this issue. Nothing in this ruling should be taken as an expression of any conclusion with respect to those issues.

[24] There are then, in the result, two areas in which the evidence proposed exceeds the disclosure in the statement of qualifications, or viewed the other way,

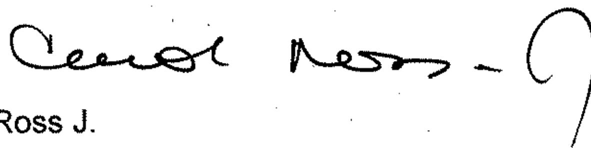
that the statement of qualifications is deficient in areas relevant to the expertise for which qualification is sought: Building Envelope Professional and the question of an expertise in maintenance. The final question then is whether there should be, in relation to these two issues, an exercise of discretion to admit the evidence. In that regard, the plaintiff admits that in this age of the Internet, the defence could find out what they want in any event. In my view, that is neither an excuse for deficient disclosure nor a basis upon which the court should exercise a discretion.

[25] The plaintiff submits that there was de facto notice of the opinions, and by extension of the expertise sought, so the defence will not be taken by surprise. I have reviewed the opinions and agree that there is such notice, but note that this argument is somewhat circular, in that the purpose of the statement of qualifications is to permit a reasoned assessment and response in advance with respect to the question, among others, of whether the expert is likely to be qualified to give the opinion. Knowing the opinion without the relevant qualifications will not assist in that regard.

[26] The matters at issue are, as I stated earlier, at the heart of the areas of contention. The plaintiff was put on notice that defence wanted a more detailed statement of qualifications, and took the position that what it had provided was adequate. Having taken that position, one could take the view that the plaintiff has accepted the risk that its view would not be sustained. With respect to the Building Envelope Professional designation, this is a discrete matter of training. In my view, if the plaintiff wanted to rely upon this in support of the expertise, they should have

disclosed it in the statement of qualifications, and with respect to this issue, I see no basis to exercise the discretion to admit the evidence.

[27] With respect to the issue of maintenance, it would have been a simple matter, as I stated earlier, to have included reference to this in the statement of qualifications, and it should have been done. However, ultimately this exercise comes down to a balancing of prejudice, and with respect to this issue, I have concluded that it is appropriate in all of the circumstances to exercise my discretion and to permit the plaintiff to lead this evidence.



Ross J.