ORIGINAL

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20080611
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 Admissibility

June 11, 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**: Objection has been taken to the admissibility of portions of the expert reports of Mr. Gallant dated March 13th, 2007 and March 28th, 2008. The objections in general are that the objected portions of the report do not properly set out the facts and assumptions upon which the opinion is based, that the objected portions usurp the role of the court in that they express conclusions which are for the court with no analysis, that in certain cases with respect to the March 28th, 2008 report, it is not proper rebuttal, and that it restates the original opinion, and finally that certain portions constitute argument in the guise of opinion.

[2] The proper function and role of the expert has been the subject of a great deal of jurisprudence. Recently summarized by Mr. Justice Smith in ***Keefer Laundry Ltd. v. Pellerin Milnor Corp.***, 2007 BCSC 899, 72 B.C.L.R. (4th) 187. In that decision, Justice Smith cites at para. 9 the leading case of ***Quintette Coal Ltd. v. Bow Valley Resource Services*** (1988), 29 B.C.L.R. (2d) 127 (S.C.), which references the criteria for expert opinion, including the following:

> He may not make conclusive findings of fact on issues disputed between the parties, but he may state certain facts as the hypothesis upon which he reaches an opinion or refer to matters which are already put in evidence. In each case, he should make clear which hypothesis or evidence he relies upon. It will be for the court to decide eventually whether that hypothesis is made out or whether the appropriate facts are found from that evidence.

[3] With respect to the importance of the expert opinion setting out facts and assumptions, Justice Smith notes at paragraphs 24 and 25 in the same decision as follows:

> It is fundamental that an expert opinion sets out the facts and assumptions on which it is based. The weight that can be given to the opinion depends on the extent to which the party who tenders the opinion is able to prove the truth of those facts and assumptions, but that evidence may come from sources other than the expert. In many cases, however, the opinion will be based in whole or in part on the expert's own observations. Where that is the case, the accuracy and reliability of those observations may be tested on cross-examination in the same way as the evidence of any other witness. I agree that it is not always possible to know from Mr. Hendrix's report where he is relying upon his own direct observations and where he is assuming the accuracy of observations reported to him by others. Counsel must be in a position to challenge the factual foundations of the expert opinion. To that end, counsel should be able to prepare cross-examination of the expert knowing which facts the expert should be cross-examined on and which facts can be safely left to cross-examination of other witnesses.

[4] Another passage with respect to this issue that is frequently cited is from the decision of Newbury J., sitting as a trial judge in ***Yewdale v. ICBC*** (1995), B.C.L.R. (3d) 240 (S.C.). In that case she had this to say with respect to the issue at p. 242:

> The expert must not be permitted to displace the role of the trier of fact. Because of this, courts in the past resisted expert testimony going to the "ultimate issue". That clear rule has long since fallen by the wayside, but it still remains essential for the expert to state the facts he or she has assumed in the course of reaching the opinion, and if possible, to avoid making findings of fact on issues in dispute. Thus if the court does not find such facts or finds different facts, the weight of the expert's opinion can be assessed accordingly.

[5] One source of difficulty with expert reports, that is analogous to the criticism levelled by defence in the present case, is with respect to the use of examination for discovery transcripts. As Lowry J., as he then was, noted in ***Crouch v. B.C. Women's Hospital***, 2001 BCSC 995, the assessment of evidence is not their function. Mr. Justice Smith in ***Keefer Laundry*** discussed the situation where the expert is provided with transcripts, at p. 196-197:

> [I]n those cases the expert must clearly identify the facts and assumptions he or she has drawn from the discovery transcript. There should also be no suggestion that the expert has weighed the discovery testimony against other evidence and chosen the facts that will be assumed.
>
> As this report is presented I do not know what evidence from Mr. Wong's discovery the expert has relied on, how that evidence compares with the testimony Mr. Wong has given in this trial, or how the factual foundation of the opinion may be affected by the extent to which I eventually accept or reject Mr. Wong's evidence.
>
> The same comment applies to the statement by the witness that he obtained "background information" in discussions with counsel and with various employees of the defendant. There is nothing in the report to identify what that "background information" might be, what role it played in the formation of the opinion, or the extent to which it is or will be in evidence.

[6] These concerns all relate to the difference between the role of the expert and the role of the court, as Meredith J. stated at p. 325 in ***Hennessy v. Rothman*** (1998), 26 B.C.L.R. (2d) 322 (S.C.):

> So one main objection is that Dr. Rockerbie is invited to base his opinion upon his own findings of fact. Surely this is wrong. It is not his function to find facts.

[7] Here Mr. Gallant sets out the assumed facts upon which his report is based, in his March 13th, 2007 report, as follows:

> In preparation of this report I have assumed the following facts.
>
> 1. The observations contained in the July 2003 Building Envelope Condition Assessment Stelly's Secondary School, School District 63 report, prepared by RDH Building Engineering Limited ("RDH") are a true representation of the as found conditions at the Project.
>
> 2. The photographs taken by RDH before and during the remediation are a true representation of the as-found conditions at the Project.

3. The assumed facts and observations as set out in the March 12th, 2007 Building Enclosure Performance Problems Report prepared by RDH.

[8] One difficulty must be noted with this at the outset. RDH took thousands of photographs in connection with its work on various aspects of the project. Some are in evidence, many more are not, and may never be.

[9] With this background, I turn to the objected passages, starting with the first objection, which is found at page 4 of the report, which is the statement:

> The Building Envelope Condition Assessment Report conveys the as-found condition of the project complete with failure mechanisms of the building envelope and associated damages.

[10] The defendants assert that this sentence makes findings of fact on matters that are in contention, contains no explanation, states no facts and assumptions. Moreover with respect to the reference to the failure mechanisms, this can only be a reference to an opinion in the document which was admitted into evidence solely for the observations and what was recommended to the plaintiff, and not for opinions. The document was not submitted pursuant to Rule 40A of the ***Rules of Court***, B.C. Reg. 221/90 as an expert report, and the author was not called to testify. Hence, reliance upon opinion with respect to this matter is reliance upon something that will never be in evidence in this trial.

[11] The plaintiff's response is that this sentence is in fact not an opinion, but an assumption. I note that the sentence is not written as an assumption, and the assumption stated in the report at page 2 is that the observations in the condition

assessment report are true representations. There is nothing about an assumption of failure mechanisms.

[12] In my view, this sentence is objectionable for all of the reasons cited by the defence, and accordingly, the sentence will be deleted. The balance of that paragraph is acceptable opinion.

[13] The next objection is with respect to the sentence at page 4:

> The Design Report outlines the conceptual recommended repairs needed to address the building envelope failures identified in the Building Envelope Condition Assessment Report.

[14] The defendants submit that Mr. Gallant is drawing a conclusion that the repairs were needed, and that a central issue in the case is to what extent repairs were needed and whether the building envelope could continue to perform adequately with significantly less expenditure. The defendants submit that Mr. Gallant is drawing a conclusion central to the ultimate issue in the case without providing any explanation, and is simply adopting and bolstering the report of RDH without providing any technical analysis. Further, the defendants submit he makes reference to building envelope "failures" without providing any explanation identifying the alleged failures or attempting to demonstrate how that alleged failure occurred.

[15] The next passage states:

> The recommendation suitably addressed design and construction deficiencies that led to the building envelope failures at the project.

[16] Again, this assumes that there was a building envelope failure, and again, no explanation is provided as to why repairs are suitable or on what facts the expert relies as the basis for that conclusion. The defendants submit that the report asks the court to accept the conclusion on faith without any technical analysis or explanation. The plaintiff submits that the first sentence is an assumption and that the balance is an opinion, the analysis or basis of which is to be found in the portion of the preceding paragraph that has not been struck.

[17] In my view, this paragraph falls perilously close to being a statement of a conclusion absent analysis. However, on the basis set out by the plaintiff that the first sentence is an assumption and not a method of introducing opinions from the Building Envelope Condition Assessment Report, I conclude that the paragraph is admissible.

[18] The next objection is with respect to the following paragraph which deals with field review reports. The defendants submit that this paragraph is essentially argument with no basis set out for how the conclusions were reached. In my view, Mr. Gallant here is using the RDH field review as an illustration to support his opinion expressed with respect to field reviews, and in my view, this is appropriate expert opinion.

[19] The next disputed passage is found at page 5 and objection is taken to the sentence:

> A reasonable and prudent architect would have noticed the obvious inadequate workmanship.

[20] With respect to this passage, the defendants submit that Mr. Gallant is assuming that there was inadequate workmanship performed during construction. In the circumstances, it is the defendants' submission that the use of the words "obvious inadequate workmanship" amounts to a speculative conclusion. In the defendants' submission, Mr. Gallant has not described what the alleged inadequacies were nor has he explained in what way they were obvious. He has provided no analysis with respect to the timing of the obvious inadequacies in relation to when the architect was or would be expected to be on site. Finally, he has provided no explanation of the factual basis for reaching his conclusion, and therefore, in the defendants' submission, his opinion is of no assistance to the court.

[21] Plaintiff's counsel submits that the expert can look at photographs and conclude that what is depicted in the photographs constitutes inadequate workmanship. That in counsel's submission, is in effect what Mr. Gallant has done here. Moreover, counsel submits that the defendants are free to cross-examine and to put whatever photographs counsel wishes to the witness.

[22] I agree that an expert with appropriate qualifications, as I have found Mr. Gallant to have, can look at a photograph and can express the opinion that the condition depicted amounts to inadequate workmanship. However, here we do not know whether in fact that is the basis for the opinion that has been offered. The presumption that it is based on a review of photographs is in itself speculation.

[23] With respect to the question of the photographs, as I stated earlier in the reasons, there are thousands, only some of which are in evidence. Only some of

those photographs depict what could amount to damage. Some photographs are of the original portion of the school that was not remediated. The question of the existence, nature and scope of damage depicted is not free from controversy. The location of the site of photographs is also a matter of some significance in the litigation, and is also not free from controversy.

[24] The bottom line in my view is that here we do not know what was the factual basis for the conclusion set out in this opinion. What are these defects in workmanship? They have not been identified. Where are they located? We are not told.

[25] In my view, this situation is akin to the circumstances commented upon by the Supreme Court of Canada in ***R. v. J.-L.J.***, 2000 SCC 51, [2000] 2 S.C.R. 600. In that case, the accused was charged in a series of sexual assaults of children. At issue was the evidence of a psychiatrist who established that in all probability, a serious sexual deviant had inflicted the abuse, and that no such deviant personality traits were disclosed by the accused on the basis of various tests, including penile plethysmography. After a *voir dire* the trial judge had excluded the expert evidence, and the accused was convicted.

[26] The Court of Appeal allowed the accused appeal and ordered a new trial on the basis of the expert evidence was wrongly excluded. In the Supreme Court of Canada, the Court concluded that the Crown appeal was allowed and the conviction restored. One of the objections taken to the expert evidence that was in contention

was that the basis for the opinion was not before the court. Mr. Justice Binnie, speaking for the court, had this to say at para. 56-57:

> In ***Mohan***, Sopinka J. held that the expert evidence in question had to be more than merely helpful. He required that the expert opinion be *necessary* "in the sense that it provide information, 'which is likely to be outside the experience and knowledge of a judge or jury',... the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature" (p. 23). In ***Beland***, *supra*, McIntyre J., speaking about the inadmissibility of a polygraph test, cited, at p. 415, ***Davie v. Magistrates of Edinburgh***, [1953] S.C. 34, at p. 40, on the role of expert witnesses where Lord Cooper said:
>
> > Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.
> > [Emphasis added]
>
> The purpose of expert evidence is thus to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an act of informed judgment, not an act of faith.
>
> Dr. Beltrami clearly did not consider it his function to enable the trier of fact to appreciate the basis of the suggested inferences from his data in favour of the respondent. He offered a packaged opinion but was not prepared to share with the trial judge the data which he relied upon.
> [Emphasis in original]

[27] What is offered here is likewise a packaged opinion that calls for an act of faith. No basis is provided for the court to exercise the independent judgment that it is called upon to do. Accordingly, the sentence is struck.

[28] The next passage at issue is at page 7, and it is the sentence:

> The Project's building envelope failed prematurely because of inappropriate design and construction.

[29] The defendants submit that Mr. Gallant concludes the building envelope failed prematurely without providing a basis. The plaintiff responds that this is a general conclusion based on all the observations of damage. I think it is useful to contrast Mr. Wilson's report with the report of Mr. Gallant in this respect. Mr. Wilson's report does identify which photographs and which observations of damage are the basis for the opinion, and as set out in earlier rulings on admissibility, the report is confined to those observations.

[30] By contrast, what we have here is in my view a conclusion without analysis or reference to the facts and assumptions upon which it is based, in particular, as it relates to the question of inappropriate construction. What precisely is the premature failure, how was it manifested, what was the inappropriate construction, and how was it evidenced? Counsel has characterized this as an opinion based upon the totality of observations. Where the facts and assumptions have been identified and the analysis or reasoning presented, such a conclusion based upon the totality of what has gone before it would be appropriate. Here there is, in my view, no such foundation. The author has, in my view, usurped the function of the court with respect to findings of fact. Again, what is offered is a conclusion that the court is left without a basis to assess or analyze. In my view the passage is objectionable and will be struck.

[31] The next passage is on the same page, with respect to the passage that begins:

> As of July 2003, water ingress and resulting damage to the structure had already occurred. Left unattended the Project's deterioration would have continued and created a health and safety risk for the occupants.

[32] The defendant's have the same objections to this passage as have been discussed in these reasons. The plaintiff submits that this again is a conclusion based upon a review of the totality of the photographic evidence. In my view, again, this is a finding for the court to make. It is an appropriate role for the expert to analyze what is depicted in photographs and express his opinion. The court is then in a position to make an informed decision. But here, we do not know what is the basis for the opinion, if it is based on photographs, which is not itself stated, what damage, and where had it occurred. In my view, the first sentence, for those reasons, is objectionable.

[33] With respect to the second sentence:

> Left unattended, the deterioration would have continued and created a health and safety risk.

The plaintiff submits that this is simply common sense. To the extent to which it is common sense, it is not appropriate expert opinion. However, I am not so sure that this is an uncontentious matter of common sense, and that the question of whether deterioration would have continued and created a health and safety risk is something free from controversy. Counsel submits that what is meant is that rust and mould will continue to grow if left unattended. That submission presumes that what Mr. Gallant means by resulting damage is rust and mould and the report does not specify that, nor does it identify what the health and safety risk for occupants is.

Again, in my view, this opinion is not of assistance, and accordingly, the first two sentences of section 5.3 are to be struck.

[34] I turn then to the report of March 28th, 2008, and the first objected passage here is found at page 2, which is the statement:

> The face sealed stucco walls at Stelly's school generally did fail where exposed to rain.

[35] The same objections are made, namely that this constitutes an argument usurping the functions of the trier of fact and that no facts and assumptions are set out. In this case the question of whether there was a failure, a general failure, what is sometimes described as a systemic failure of the stucco walls, is a central issue in the litigation.

[36] Again contrasting Mr. Wilson's report, conclusions there are reached based upon observations that have been identified both with respect to particular photographs and with respect to their location on the building. Armed with this information, the court can, with the assistance of other testimony, reach an independent conclusion with respect to whether there was damage, where the damage occurred, if there was damage, and whether the damage amounted to a general failure. In addition, counsel were in a position to cross-examine with respect to the basis of the opinion.

[37] In my view, no such opportunity is present for either the court or counsel with respect to the statement at issue in this report. Indeed, while again counsel submits that the opinion is based on a review of the totality of the photographs, once again,

even that is speculation, since the report contains no such statement. Accordingly, that sentence is struck.

[38] The next passage that is objected to is on the same page, and it is the sentence that commences:

> Face-sealed stucco as discussed in the March 12th, 2007 RDH report did not meet the requirements of the British Columbia Building Code which is in itself only a minimum standard.

This is objected to on the basis that it merely repeats the RDH conclusion. In my view, the passage is expressing agreement with the RDH opinion, and adding the thought that the code is only a minimum standard, and in my view, this passage is not objectionable.

[39] The next passage that is objected to is the statement:

> In my opinion, face-sealed stucco as designed and constructed at Stelly's school is not an acceptable practice.

This is objected to as not being proper rebuttal and as merely restating the original opinion. I agree that this is not proper rebuttal and the sentence should be struck.

[40] The next passage at issue is on page 3 of this report and is the statement:

> Without debating the definition of widespread, the Halsall statement is contrary to RDH's findings and contrary to my findings on reviewing RDH's documentation.

In my view, the former statement with respect to RDH's findings constitutes argument, and the latter statement "contrary to my findings" suffers from the same

problems that have manifested themselves in the other passages that have been struck. What findings, based on what documentation?

[41] The court is not in a position to make an informed decision based on such a conclusory statement. Further, the statement reflects a misconception of the role of the expert. As stated earlier, it is the role of the court to make findings, it is the role of the expert to express opinions based upon stated facts and assumptions. Accordingly, this passage is struck.

[42] The next passage in contention is at page 4 and is the sentence:

> The more the reason not to rely on face-sealed systems and the more the reason such systems cannot be effective, even with zealous and excessive maintenance.

In my view, when read in context, this passage is not objectionable and is an appropriate expression of opinion.

[43] The next passage is on the same page, and is the sentence that reads:

> For the reasons stated above, based on my experience, Halsall's opinion is contrary to my own, and not shared by the majority of practising professional building envelope consultants in B.C.

[44] The first part of the sentence is in my view not objectionable. However, the portion of the sentence commencing "and not shared" is in my view objectionable, and must be struck. It is not in my view appropriate for the expert to state what the opinions of others would be with respect to the issue, and I do not agree that this is simply another way of stating the standard of care.

[45] Finally, the last passage that is in contention is the final sentence on that page, and the plaintiff conceded in argument that that sentence constituted argument and should be struck.

Ross J.