CITATION: Iroquois Falls Power Corp. v. Jacobs Canada Inc., 2009 ONCA 517
DATE: 20090625
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COURT OF APPEAL FOR ONTARIO

2009 ONCA 517 (CanLII)

Laskin, Moldaver and MacPherson JJ.A.

BETWEEN

Iroquois Falls Power Corp.

Plaintiff (Appellant)

and

Jacobs Canada Inc., McDermott Incorporated, Chubb Insurance Company of Canada, and American Home Assurance Company

Defendants (Respondents)

AND BETWEEN

Jacobs Canada Inc. and McDermott Incorporated

Plaintiffs by Counterclaim (Respondents)

and

Iroquois Falls Power Corp. and Computershare Trust Company of Canada, in its capacity as Trustee of Northland Power Income Fund and Iroquois Falls Power Management Inc.

Defendants by Counterclaim (Appellant, Iroquois Falls Power Corp.)

Warren H.O. Mueller, Q.C. and Robby Bernstein, for the appellant

Lawlor Rochester, for the respondents Chubb Insurance Company of Canada and American Home Assurance Company

Robert Reuter, for the respondents Jacobs Canada Inc. and McDermott Incorporated

Heard: June 2, 2009

On appeal from the order of Justice John R. R. Jennings of the Superior Court of Justice dated October 30, 2008.

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Laskin J.A.:

A. INTRODUCTION

[1] Iroquois Falls Power Corp. appeals the dismissal of its motion to amend its statement of claim.

[2] Jacobs Canada Inc. designed and built an electrical cogeneration plant[1] for Iroquois Falls.[2] Cracks were discovered in two components of the plant. Iroquois Falls sued the defendants for damages for faulty design. That claim was dismissed by summary judgment.

[3] Iroquois Falls then sought to amend its statement of claim to claim damages for breach of contractual warranty. Although the defendants acknowledged that for the purpose of the motion, the limitation period had not expired, the motion judge refused to permit the amendment. He based his refusal on two grounds: first, the amendment would

[1] A plant that generates electricity and steam heat jointly.
[2] The plant was built by a predecessor of Jacobs for a predecessor of Iroquois Falls. For convenience, I will use the names of the parties to the action.

cause non-compensable prejudice to the defendant; and second, the amendment would require Iroquois Falls to withdraw an admission in its original statement of claim.

[4] Iroquois Falls submits that the motion judge erred on both grounds. It contends that the prejudice relied on by the motion judge existed when the action was started, and therefore would not result from the amendment; and it contends that the original statement of claim did not contain any admission precluding the amendment. For the reasons that follow, I agree with both contentions. I would allow the appeal and permit the proposed amendment.

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B. BACKGROUND FACTS

1) The contract

[5] Jacobs designed the cogeneration plant for Iroquois Falls in the early to mid-1990's, under an engineering, procurement and construction contract. In 1997, Jacobs turned the plant over to Iroquois Falls. The plant contained two heat recovery steam generators, which were used to convert waste heat in the gas turbine exhaust into steam. Iroquois Falls' claim relates to cracking in the casing of the two generators.

2) The cracking

[6] Iroquois Falls first noticed cracks in the casing in April 2000. More cracks developed over the next few months.

[7] At the root of the lawsuit is a dispute over the cause of the cracks. Iroquois Falls maintains that the cracks were caused by high nitrate oxide levels in the two steam generators, which precipitated stress corrosion cracking in their steel casing. Jacobs maintains that the cracks were caused by Iroquois Falls' own maintenance practices, which included an unusual chemical wash.

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3) The litigation

[8] Iroquois Falls began this lawsuit in June 2005. In its original statement of claim, it sued for negligent design. The defendants, Jacobs and McDermott Incorporated, brought a motion for summary judgment to dismiss that claim on the ground that the claim arose "from the provision of a service that is within the practice of professional engineering", and accordingly was barred by the 12-month limitation period in s. 46(1) of the *Professional Engineers Act*, R.S.O. 1990, c. P.28.

[9] In response to the summary judgment motion, Iroquois Falls moved on June 7, 2006, to amend its claim to plead breach of the warranty contained in section 2.3.1 of the contract. This proposed amendment is the subject of the present appeal.

4) The summary judgment motion and the appeal

[10] The parties agreed that the summary judgment motion would be heard on the footing that the proposed amendment to the statement of claim had been made. If necessary, the motion to amend would be heard later. Campbell J. granted summary judgment dismissing the action against the defendants. Iroquois Falls appealed.

[11] This court reversed in part the summary judgment granted by Campbell J. Juriansz J.A., writing for the panel, held that Iroquois Falls' original claim for negligent design was a claim in respect of engineering services and so was barred by the 12-month limitation period in s. 46(1) of the *Professional Engineers Act*. However, he took a different view from Campbell J. of the proposed amendment. Two of his holdings are relevant to the present appeal.

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[12] First, Juriansz J.A. held that whether the proposed amendment seeking damages for breach of warranty "arise other than from the practice of professional engineering is, at the very least, a genuine issue for trial". Second, he held that "discoverability of the claim is a genuine issue for trial". Thus, if the relevant limitation period is six years, that cracks in the casing were first discovered in April 2000 and the motion to amend was not brought until June 2006 may not statutorily bar the amendment. It is a question for trial whether the cracking before June 2000 was significant enough to trigger the running of the limitation period.

5) The motion to amend before Jennings J.

[13] Based on the reasons of Juriansz J.A., Iroquois Falls brought a motion to amend its statement of claim. And, in the light of those reasons, the motion judge was obliged to accept that the proposed amendment was not barred by the 12-month limitation period in the *Professional Engineering Act*, or by the former six-year limitation period for breach of contractual warranty claims.

[14] The motion judge, nonetheless, dismissed Iroquois Falls' motion to amend its statement of claim.

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C. ANALYSIS

1) Did the motion judge err in holding that the defendants would be prejudiced by the proposed amendment?

[15] Rule 26.01 of the *Rules of Civil Procedure* governs amendments to pleadings. It uses mandatory language:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[16] Rule 26.01, therefore, dictates that the court must grant an amendment to a pleading unless the party opposing the amendment shows that:

- If the amendment was granted, the party opposing the amendment would suffer non-compensable prejudice, that is, prejudice that could not be compensated for in costs or by an adjournment; and
- The prejudice would result from the amendment.

[17] My quarrel with the motion judge's decision is that he addressed the first element, non-compensable prejudice, but not the second element, whether that prejudice would result from the amendment.

[18] The motion judge identified three items of non-compensable prejudice:

- Two material witnesses for the defendants had died;
- Iroquois Falls changed the turbines at the plant, which made it impossible to determine whether high nitrate oxide levels caused the cracks in the casing of the steam generators; and
- Many relevant documents had been destroyed.

[19] I accept that these three items of prejudice are the sorts of prejudice that may not be compensable by costs or an adjournment. And, in this case, I defer to the motion judge's findings that these items amounted to non-compensable prejudice.

[20] However, to defeat a motion to amend, the party resisting the amendment must show that the non-compensable prejudice it relies on "would result" from the amendment. It must establish a link between the non-compensable prejudice and the amendment. It must show that the prejudice arises from the amendment.

[21] This necessary link is missing in this case. That is because the non-compensable items of prejudice found by the motion judge already existed at or immediately after the time that the original statement of claim was issued. These items of prejudice, therefore, would not result from the amendment.

- Two material witnesses for the defendants had died, but one died in 1998 and the other in 2003;
- Iroquois Falls had changed the turbines, but it did so in the spring of 2003;

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- Relevant documents belonging to the defendants were destroyed, but their destruction occurred during Hurricane Katrina in August 2005.

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[22] The original statement of claim was issued in June 2005, well within a six-year limitation period. The first two items of prejudice existed well before Iroquois Falls started its action. The third item of prejudice – the destroyed documents – occurred a month before the defendants delivered their statement of defence and thus likely before they began assembling their documents for the lawsuit. These items of prejudice did not arise from the amendment. They existed whether or not Iroquois Falls sought to amend its statement of claim.

[23] The decision of this court in *Mazzuca v. Silvercreek Pharmacy Ltd*. (2001), 56 O.R. (3d) 768, is directly on point. The plaintiff, Ms. Mazzuca, operated a ladies' clothing and lingerie store. A fire occurred next door at the Silvercreek Pharmacy. The fire damaged the clothing and lingerie store. Ms. Mazzuca sued Silvercreek for damages to her inventory and for loss of income while her store was being repaired. During discoveries, Ms. Mazzuca determined that her company, La Gondola Ltd., owned the store and the business and that it, not she, was the proper plaintiff. She moved to amend her statement of claim to substitute her company as the named plaintiff.

[24] Silvercreek opposed the amendment on the ground that the accountants for Ms. Mazzuca's company had destroyed business records that might have assisted in Silvercreek's defence of the damages claim. These documents, however, were destroyed

three years before the action was started. The motion judge, Molloy J., granted the amendment and her decision was upheld by our court. On the question of prejudice caused by the destruction of the documents, Cronk J.A. wrote at para. 65:

> I agree with the motions judge's conclusion that, although the destruction of the source documents relied upon for preparation of the financial statements conceivably might give rise to some element of prejudice, this prejudice would have existed, in any event, if the action had named La Gondola Ltd. as plaintiff from the outset. I also agree with her observation that had the proper parties been named at the time of the commencement of the action, Silvercreek's position in respect of the missing records would be precisely the same as it is today. This cannot be viewed as prejudice arising from the requested amendment.

[25] Similarly, in the present case, had Iroquois Falls sued for breach of contractual warranty in its original statement of claim, the prejudice found by the motion judge would still have existed. It would not be prejudice arising from the amendment, or, to use the words of rule 26.01, it is not prejudice that "would result" from the proposed amendment.

[26] How might a party show a link between prejudice and a proposed amendment? Obviously the amendment itself cannot provide the link. If that were the case, only unmeritorious amendments would be granted.

[27] However, the expiry of a limitation period before a motion to amend was brought might provide the necessary link. An amendment to assert a new cause of action after the limitation period has run is presumed to be prejudicial to the opposing party. The

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opposing party could justifiably argue that the prejudice arose from the proposed amendment. That argument is not available to the defendants in this case because whether the limitation period has expired is a genuine issue for trial.

[28] Even a motion to amend before the expiry of a limitation period could give rise to prejudice that would result from the amendment. Take this example. A defendant has given advice to a plaintiff on two separate transactions. The plaintiff sues for negligent misrepresentation on the first transaction, but not the second. The defendant then destroys records pertaining to the second transaction in the ordinary course of its business. Or, the defendant fails to obtain the evidence of a material witness to the second transaction and the witness unexpectedly dies. If the plaintiff later seeks to amend its statement of claim to sue on the second transaction, the defendant may legitimately contend that it altered its position in reliance on the plaintiff's claim as originally framed. In this example, the destroyed records or the death of the witness may be items of non-compensable prejudice that would result from the proposed amendment.

[29] Nothing of this sort occurred here. The defendants did not change their position in reliance on the absence of a claim for breach of contractual warranty. They knew from the outset that whether Iroquois Falls sued for negligent design or breach of warranty, the key question in the litigation was the same: what caused the cracking? The prejudice the defendants relied on was pre-existing prejudice. It was not prejudice that would result from Iroquois Falls' proposed amendment to its statement of claim. I therefore disagree

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with the motion judge that the defendants incurred the sort of prejudice justifying a refusal to grant the amendment.

[30] However, should the action go to trial, my reasons do not prevent the defendants from arguing that these items of prejudice have adversely affected their ability to defend the claim. Nor do my reasons prevent the defendants from advancing a limitation period defence at trial. These are matters for the trial judge to determine.

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2) Did the motion judge err in holding that the amendment would require the withdrawal of an admission in the original statement of claim?

[31] The proposed amendment to the statement of claim is a claim for damages for breach of contractual warranty. The motion judge found that in its original statement of claim, Iroquois Falls admitted it would not pursue a claim for breach of warranty. Thus, according to the motion judge, the amendment requires the withdrawal of an admission. As Iroquois Falls could not meet the test for withdrawing an admission, the motion judge concluded that on this alternate basis the motion to amend must be dismissed.

[32] Iroquois Falls accepts that it cannot meet the test for withdrawing an admission, but submits that its proposed amendment does not require it to withdraw an admission. I agree with this submission.

[33] To put this issue in context, it is necessary to refer to the warranty section of the contract, section 2.3. That section contains two relevant warrantees, section 2.3.1 and section 2.3.2.

[34] Under section 2.3.1, Jacobs warranted that,

> (a) all aspects of the Work shall be performed in accordance with the Contract Documents;
>
> (b) every portion of the Work shall be free from defects and the Work and the Plant shall be fit for the purpose intended;
>
> (c) all materials shall be new; and
>
> (d) all aspects of the Work shall be equal to or better than that in the Benchmark Project unless otherwise specifically set out in the Contract Documents.

[35] Under section 2.3.2 of the contract, Jacobs warranted that it "shall promptly rectify and make good or cause to be rectified and made good any defect or deficiency which is identified in writing by the Owner or the Independent Engineer and that appears in the work prior to or during the period of 365 days following Takeover".

[36] In para. 9 of its original pleading, Iroquois Falls specifies that its claim in the action is not a claim for breach of warranty under section 2.3 of the contract.

> In consequence, the only time limit for claims under the Contract was that restricted to warranty claims of the type contemplated under Section 2.3 of the Contract whereby [Jacobs] was obliged to "rectify and make good… any defect or deficiency which was identified in writing by the owner… that appeared in the Work prior to or during the period of 365 days following takeover", being "the warranty period". *The claim in this Action is not made under nor of the type contemplated by Section 2.3 of the Contract.* [Emphasis added.]

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The italicized sentence that concluded para. 9 is the "admission" relied on by the motion judge.

[37] In its proposed amendment, however, Iroquois Falls seeks to advance a claim for breach of the warranty in section 2.3.1 of the contract. In its proposed statement of claim, it therefore seeks to revise para. 9 to exclude only a claim under section 2.3.2:

> In consequence, the only time limit for claims under the EPC Contract was that restricted to warranty claims of the type contemplated under Section 2.3.2 of the EPC Contract whereby Delta was obliged to "rectify and make good… any defect or deficiency which was identified in writing by the owner… that appeared in the Work prior to or during the period of 365 days following takeover", being "the warranty period". The claim in this Action is not made under nor of the type contemplated by Section 2.3.2 of the Contract.

[38] The motion judge found that the last sentence in para. 9 of the original statement of claim was an admission covering both section 2.3.1 and section 2.3.2 of the contract, and that it precluded the proposed amendment.

[39] I doubt that the last sentence in para. 9 in the original statement of claim, "the claim in this action is not made under nor of the type contemplated by section 2.3 of the contract," is an admission at all. I view it simply as a clarification of the claim being advanced in the original action, and, I add, an unnecessary clarification. However, even if this sentence could be construed as an admission, read in context, it is an admission that pertains to the warranty in section 2.3.2 of the contract, not the warranty that is the subject of the proposed amendment, the warranty in section 2.3.1. That is evident from

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the rest of para. 9 in the original statement of claim, which tracks the language of section 2.3.2 of the contract.

[40] The defendants unquestionably understood that Iroquois Falls' original pleading clarified only that it was not pursuing a claim for breach of the warranty in section 2.3.2 of the contract. At para. 21 of their statement of defence, the defendants responded to para. 9 of the original statement of claim and referred specifically to the warranty in section 2.3.2, and not the warranty in section 2.3.1:

> In response to paragraph 9 of the Statement of Claim, these Defendants state that the Plaintiff's claims are precluded by the provisions of section 2.3 of the Contract and the expiration of all relevant warranty and limitation periods for such claims. These Defendants rely upon the 365 day warranty period in article 2.3.2. Northland assumed control and beneficial use of the facility in September 1996. Takeover under the Contract has been conceded by Northland in paragraph 29 of the Statement of Claim to have occurred not later than January 20, 1997 and accordingly, the warranty period under section 2.3.2 of the Contract expired not later than January 19, 1998. The claims now asserted by the Plaintiff could only be made under the terms of the Contract as warranty claims subject to the procedures and time period stipulated in section 2.3.2.

[41] The defendants were not misled by para. 9 of the original statement of claim into thinking that Iroquois Falls had admitted it would not assert a claim for breach of section 2.3.1 of the contract. I would hold that the motion judge erred in concluding that the proposed amendment required the withdrawal of an admission.

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D. CONCLUSION

[42] I would allow the appeal, set aside the order of the motion judge and grant Iroquois Falls' motion to amend its statement of claim. In my view, no prejudice would result from the proposed amendment, and the amendment would not require Iroquois Falls to withdraw any admission in its original statement of claim.

[43] Iroquois Falls is entitled to its costs of the appeal, which I fix in the amount of $25,000, inclusive of disbursements and G.S.T. In accordance with the agreement of the parties, the costs of the motion are remitted to the motion judge.

RELEASED: June 25, 2009
"JL"

"John Laskin J.A."
"I agree M. Moldaver J.A."
"I agree J.C. MacPherson J.A."

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