CITATION: CRD Construction Ltd. v. Uel McFall Consulting Inc, 2019 ONSC 1296
COURT FILE NO.: 64/14
DATE: 2019 02 25

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
CRD CONSTRUCTION LTD.	Josh Winter, for the Plaintiff/Defendant to Counterclaim
Plaintiff	
- and -	
UEL McFALL CONSULTING INC., UEL McFALL, TNS LANDCO INC., TRANSPORT N SERVICE INC., EARL ALLEN, KEVIN ALLEN, and TRINA ALLEN	Steve Atkinson, for the Defendants Uel McFall Consulting Inc. and Uel McFall Edward J. Dreyer, for the Defendants/Plaintiffs by Counterclaim TNS Landco Inc., Transport N Service Inc., Earl Allen, Kevin Allen, and Trina Allen
Defendants	
TNS LANDO INC., TRANSPORT N SERVICE INC., EARL ALLEN, KEVIN ALLEN, and TRINA ALLEN	
Plaintiffs by Counterclaim	
- and -	
CRD CONSTRUCTION LTD. and	Robert Kennaley, for Rob Leshuk,

ROB LESHUK Plaintiffs by Counterclaim	Defendant to Counterclaim
CHUNG & VENDER DOELEN ENGINEERING LTD. Proposed Defendant to Counterclaim	M. Susan Guzzo, for the proposed Defendant to Counterclaim, Chung & Vander Doelen Engineering Ltd.
M.A. BRYAN ENGINEERING INC. Proposed Defendant to Counterclaim	Tom Gallighan, for the proposed Defendant to Counterclaim M.A. Bryan Engineering Inc.
TACOMA ENGINEERS INC. Proposed Defendant to Counterclaim	Ian S. Epstein, for the proposed Defendant to Counterclaim Tacoma Engineers Inc.
	HEARD: December 10, 2018, at Guelph

REASONS FOR JUDGMENT

Fowler Byrne J.

[1] The Defendants/Plaintiffs to the Counterclaim, TNS Landco Inc., Transport N Service Inc., Earl Allen, Kevin Allen, and Trina Allen ("TNS Defendants"), have brought two motions:

a) a motion dated November 29, 2016, wherein the TNS Defendants seek leave to add Chung & Vander Doelen Engineering Ltd. ("C&VD") and M.A. Bryan Engineering Inc. ("MA Bryan") as defendants to the Counterclaim; and

b) a motion dated November 14, 2017, wherein the TNS Defendants seek leave to add Tacoma Engineering Inc. ("Tacoma") as a defendant to the Counterclaim.

[2] Both motions also seek leave to file a Fresh as Amended Statement of Defence and Counterclaim. All three proposed Defendants to the Counterclaim oppose to being added to the Counterclaim. The Plaintiff took no position on this motion.

Background

[3] TNS Landco Inc. ("Landco") operates a trucking business at 5075 Whitelaw Road, Guelph, Ontario ("the Property"). On November 6, 2012, Landco entered into a Design Build Contract with CRD Construction Ltd. ("CRD") for the construction of a building to house Landco's operations at the Property ("the Contract"). In the Contract, Landco is named the owner, CRD is named as the Design-Builder, and Tacoma Engineers Inc. ("Tacoma") is identified as a consultant. The definition of "consultant" contained in the Contract indicates that

the consultant "is to provide *Consultant Design Services* and to coordinate the provision of the *Design Services* of all other consultants employed by the *Designer-Builder*." Only Landco and CRD signed the Contract.

[4] The work was to be completed between November 19, 2012, and July 31, 2013. Substantial completion was actually attained on October 4, 2013.

[5] It is agreed that the septic system for the project was designed by C&VD. C&VD states that it was retained by CRD to design the domestic wastewater treatment in or about July 2012, and it delivered that design on or about September 7, 2012.

[6] It is also agreed that CRD retained Conestogo Mechanical Inc. ("Conestogo") in or about July 2012 to provide the HVAC and plumbing systems for the project. Conestoga retained MA Bryan to prepare the HVAC and plumbing drawings to be used by Conestoga and to inspect the work to ensure the installation was done pursuant to the drawings.

[7] MA Bryan completed the plumbing drawings in or about August 2012. MA Bryan rendered two invoices to Conestogo: one in July 2012 and one in August 2012. MA Bryan was involved again when they inspected the work on or about August 1, 2013, and then provided a letter to the Building Department of

Township of Guelph/Eramosa indicating that the mechanical work was substantially complete and in general conformity with their drawings.

[8] Tacoma is a structural engineering firm. It is agreed that it was retained by CRD in 2012 and the scope of its retainer was to design a building foundation, to provide advice regarding structural issues, to certify CRD's architectural and structural drawings, and to conduct general architectural and structural reviews under the Ontario *Building Code*, O. Reg. 332/12. It is disputed by Tacoma that it was also retained to be the consultant under the Contract. Tacoma claims it had no knowledge of being named as a consultant in the Contract.

[9] In the course of its retainer, Tacoma signed a Commitment to General Reviews by Architects and Engineers for the City of Guelph on October 11, 2012. In that document, Tacoma confirmed it was retained to provide general reviews of the architecture, structure, and other items under part 5 of the *Building Code*. In the course of this motion, it has provided copies of its invoices to CRD from October 31, 2012, to August 31, 2013, confirming the nature of their services.

[10] CRD has produced another document, "Commitment to General Reviews by Architect and Engineers", signed by Tacoma and dated October 10, 2012. In this document, in addition to agreeing to the general review already referred to above, Tacoma also agreed to be the coordinator of all consultants. Tacoma

claims that it was added as the coordinator of all consultants without its knowledge or consent, and after it signed this document.

[11] Landco and Transport N Services Inc. ("TNS") moved into the Property in early August 2013. They immediately became aware of various deficiencies at the Property. The deficiency list continued to grow, and the certificate of substantial completion was delayed for over two months. Eventually, either Landco or TNS hired Uel McFall of Uel McFall Consulting Inc. to manage the deficiencies and have them corrected. The TNS Defendants contend that the numerous deficiencies prevented them from utilizing the building and were impacting their ability to conduct business.

[12] Tacoma was further retained in January 2014 to conduct a site visit and review the cracks in the concrete floor topping two mezzanines at the Property. Tacoma prepared a structural report for CRD on May 2, 2014.

[13] Work on rectifying the deficiencies continued though the fall of 2013. Eventually, CRD refused to do any further work and commenced this action on January 24, 2014, wherein it sought payment of $493,048.37 under the Contract. The TNS Defendants counterclaimed on February 28, 2014, and sought payment of $750,000 relating to numerous deficiencies. A list of 115 deficiencies were

attached as a schedule to the Statement of Defence and Counterclaim. Of particular relevance to this motion are the following deficiencies:

Item No.	Date Open	Originator	Item Description	Assigned to:
49	8/29/3013	TNS	The issue of water getting into the pit in the shop needs to be resolved	CRD
94	Jan. 14 2014	TNS	The urinal in the shop washroom runs for a very long time once flushed. It should not run anywhere near as long as it does.	CRD/Conestogo

[14] In September 2014, the TNS Defendants noticed for the first time that there was a soft and mushy area of turf at the Property near Whitelaw Road. Originally, it was believed that it was related to the fire suppression system, but that was ruled out in or around September 29, 2014.

[15] Waterloo Biofilter Systems Inc. ("Waterloo Biofilter") was the manufacturer of the septic system. They were called to the site on October 10, 2014, because another tradesperson had caused some damage to the septic flatbed and Waterloo Biofilter was asked to inspect the damage. At that time, Mr. Backle, the operations manager for TNS, asked the Waterloo Biofilter employee, Frank Huemiller, to look at the mushy part of the lawn since he was

already there. Mr. Huemiller's first reaction was that it was unlikely to be related to the septic system.

[16] Later that same day, Mr. Huemiller obtained a copy of the 2012 C&VD design report, and Mr. Backle provided him with the drawings dated August 2012, which were submitted for the purposes of obtaining a building permit and which predated the C&VD design report. After reviewing these documents, Mr. Huemiller provided a short one-page report that same day. In this report, he opined on possible damage to the flatbed sewage treatment system caused by vehicular traffic and suggested a possible link between the sewage breakout and the high use of the truck wash bay. He stated that he had viewed the "as-built" drawings, which identified that the wash bay drainage was linked to the sewage line. He then recommended in his report that a flow meter be installed in order to measure the volume of flow discharged into the sewage bed in relation to the design flow of the system.

[17] When Mr. Huemiller wrote his short report, he did not actually have the "as-built" drawings as he indicated. Final drawings had not been prepared by that date. He had only reviewed the permit drawings. According to Mr. Backle, they did not necessarily reflect how the system was actually built. For example, he knew that the iron grit separator was not built in the location indicated on the permit drawings.

[18] From the 2012 C&VD report, Mr. Huemiller noted the septic system was designed for 6,000 litres per day. According to Mr. Backle, Mr. Huemiller indicated to him on that day that 6,000 seemed like a lot, but he wasn't sure what the problem was – the wash bay, a leaking toilet that was continually running, or other problems in the building. Not being sure, he recommended installing a flow metre. According to Mr. Backle, they were still exploring the source of the problem in October 2014.

[19] The Statement of Claim was amended on October 23, 2014, to add allegations that are not relevant for the purposes of this motion. The TNS Defendants amended their Defence and Counterclaim on December 22, 2014, to answer these new allegations.

[20] The October 10, 2014, one-page report of Waterloo Biofilter, which Mr. Backle indicates is not completely reflective of the discussions he had with Mr. Huemiller, was sent to counsel for the TNS Defendants, who then sent a letter dated October 29, 2014, to counsel for CRD. In that letter, CRD was put on notice that the septic system they installed was defective and may have to be removed and replaced.

[21] MA Bryan recalls receiving a telephone call in the fall of 2014 from Mr. McFall. Although they are not sure of the exact date, they claim it was before

November 2014. They were advised by Mr. McFall that the owners were having trouble with the septic system.

[22] The monitoring equipment recommended by Mr. Huemiller was installed sometime in November 2014. Given that there was not a lot of use of the wash bays from November until January 2015, they waited until January 1, 2015, to start the monitoring. The monitoring continued in January and February 2015, and the results were sent to Waterloo Biofilter on March 3, 2015. Sometime in March 2015, Waterloo Biofilter notified either Landco or TNS that the effluent from the wash bay was draining into the septic system and that the volume of effluent exceeded the 6,000 litres per day that the system was designed to handle. This was communicated by way of an email from Waterloo Biofilter to C&VD on April 2, 2015, in the hopes of finding a way to rectify the situation. In this email, TNS was also advised that the system wasn't designed to handle the wash bay water. The TNS Defendants claim it was not clear if that was in reference to volume of water or with respect to the type of water that came from the wash bay.

[23] On November 13, 2015, the TNS Defendants served an Amended Amended Statement of Defence and Counterclaim which increased the amount of the Counterclaim and added an allegation that CRD was negligent in the

design and construction of the septic system. No other parties were added as defendants to the Counterclaim at that time.

[24] In or around February 2016, Landco and/or TNS hired Eric Gunnell P. Eng. to investigate the cause of the septic failure and to make recommendations for its repair. Mr. Gunnell inspected the property on March 10, 2016, and April 26, 2016. Mr. Gunnell prepared a detailed report dated September 30, 2016.

[25] In his report, Mr. Gunnell concluded that there were a number of reasons for the failure of the septic system. One reason was the improper use of native silt/clay soils underneath the septic bed. Another reason was that the septic system was undersized in light of the additional effluent from the wash bay, and the system was not designed to handle the oils and grease that were in the wash bay effluent.

[26] At page 2 of his report, Mr. Gunnell states:

> I can only assume that CRD was inexperienced with the Ontario Building Code (OBC) as it applies to on-site sewage system disposal, which relates to domestic and non-domestic waste waters. CRD certainly erred in their ability to coordinate and ensure the professional engineering firms designed properly functions waste disposal system for the TSN property.

[27] He then concluded that:

> [C]ollectively and between all parties (see CRD, Bryan Engineering and C&VD) good design/engineering judgment was not exercised and/or did not follow what would be considered normal industry standards/best practices." He also opined that C&VD should have confirmed that only domestic wastewater would

> be discharged to the septic system, and therefore it did not follow normal industry standards.

[28] The TNS Defendants brought their motion to add C&VD and MA Bryan on November 29, 2016. The motion to add Tacoma was brought on November 14, 2017.

Preliminary Issues

[29] Two preliminary issues were raised before argument of the motion began.

[30] First, the TNS Defendants opposed the filing of the supplementary affidavit by Ignac J. Zajac, on behalf of Tacoma, which was sworn and served after cross-examinations. For the oral reasons given on the date of the motion, I granted leave to Tacoma to file the supplementary affidavit in support of its position.

[31] Secondly, the TNS Defendants sought a further amendment to the proposed amended pleading contained in their most recent Motion Record, which struck out paragraphs 71 and 72. All three proposed Defendants opposed this further amendment, as it constituted a withdrawal of an admission and proper notice of the withdrawal was not given to them.

[32] Generally, a motion to amend a pleading is brought under r. 26.01 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. If the effect of the

amendment is a withdrawal of an admission, r. 51.05 applies: *BNP Paribas (Canada) v. Donald S. Bartlett Investments Limited et al.*, 2012 ONSC 5315, 113 O.R. (3d) 151, leave to appeal to Div. Ct. refused, 2012 ONSC 5604 (Div. Ct.), at para. 21, citing *Antipas v. Coroneos* (1998), 26 C.P.C. (2d) 63 (H.C.J.). Rule 51.05 states that any admission in a pleading may be withdrawn with the consent of the parties or with leave of the court.

[33] The paragraphs sought to be struck deal with the involvement of Waterloo Biofilter. The involvement of Waterloo Biofilter, their opinions, and the timing of their opinions are of particular relevance in this matter.

[34] If the TNS Defendants wish to make these further amendments, they are required to give notice pursuant to r.37.02 and make an argument that either the relevant paragraphs are not admissions or that the court should grant them leave to withdraw them. The Defendants to the Counterclaim are entitled to fully respond. As no notice was given on this issue and the parties were not prepared to fully argue this matter today, I will not consider the further amended pleading that was filed with the court on the day of this hearing. If the Statement of Defence and Counterclaim is to be amended on this motion, I will only refer to the draft Fresh as Amended Statement of Defence and Counterclaim that was attached as a schedule to the Notices of Motion of the TNS Defendants.

[35] This ruling is without prejudice to the TNS Defendants in bringing the necessary motion if they wish to pursue this further amendment at a later date.

Issues

[36] The issues to be decided on this motion are as follows:

a) Should this court grant leave to add the three proposed parties as defendants to the Counterclaim? And

b) Is Tacoma a proper party to these proceedings?

The Law – Adding Parties

[37] At any stage of a proceeding, a court *shall* grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment: r. 26.01. When this amendment involves the addition of a new party, r. 5.04(2) comes into play. Under this rule, the court *may* by order add a party on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment. While r. 26.01 is a mandatory provision, r. 5.04(2) clearly indicates that the decision of whether or not to add a party remains within the discretion of the court: *Pepper v. Zellers Inc.* (2006), 83 O.R. (3d) 648 (C.A.), at para. 14. The court's discretion is generally exercised in order to ensure procedural fairness: *Wong v. Adler* (2004),

70 O.R. (3d) 460 (S.C.), at para. 12, aff'd (2005), 76 O.R. (3d) 237 (Div. Ct.). The most common circumstance that gives rise to an allegation of prejudice in opposition to a r. 5.04 motion is the expiry of a limitation period: *1351428 Ontario Ltd. v. 1037598 Ontario Ltd.* (2003), 168 O.A.C. 66 (C.A.), at para. 11.

[38] It is not disputed that the applicable limitation period in this action is two years from the date the claim is discovered. The applicable subsections of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, state:

> **Basic Limitation Period**
>
> **4** Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> **Discovery**
>
> **5** (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> **Presumption**

> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[39] Accordingly, the claim must be brought on the earlier of ss. 5(1)(a) and 5(1)(b). Either the claimant must establish the date on which it had actual knowledge of all the factors set out in s. 5(1)(a)(i) to (iv), or an opposing party could argue that the reasonable claimant, with their abilities and in their circumstances, first ought have known of all the factors set out in s. 5(1)(a)(i) to (iv) on an earlier date.

[40] In order to determine this issue, the court must decide when all the material factors on which the claim is based were discovered, or ought to have been discovered by the claimant by the exercise of reasonable diligence: *Pepper*, at para. 16; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.), at para. 24; and *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 22. It is a test is of "reasonable discoverability" and not "mere possibility of discovery": *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 35, citing *Van Allen v. Vos*, 2014 ONCA 552, 121 O.R. (3d) 72, at paras. 33-34.

[41] The discoverability of a claim for relief involves the identification of the wrongdoer and also the discovery of his or her acts or omissions that constitute

liability: *Johnson v. Studley*, 2014 ONSC 1732, at para. 59, citing *Aguonie*, at para. 24. It is not enough that the plaintiff has suffered a loss and has knowledge that someone might be responsible; the identity and culpable acts of the wrongdoer must be known or knowable with reasonable diligence: *Studley*, at para. 59, citing *Mark v. Guelph (City)*, 2010 ONSC 6034, 104 O.R. (3d) 471, at para. 26.

[42] Accordingly, the question to be decided is when the TNS Defendants discovered or should have discovered with reasonable diligence the facts necessary to determine (1) that C&VD was negligent in their design of the septic system; (2) that MA Bryan was negligent in their design of the plumbing system; and (3) that Tacoma was negligent and breached its duty of care to the TNS Defendants by failing to properly coordinate the designs of the plumbing and septic systems.

[43] The TNS Defendants claim they commenced both motions within two years of learning the material facts required to establish their claim against the proposed Defendants. The proposed Defendants state that any potential claim could have been discovered much earlier with the exercise of due diligence on the part of the TNS Defendants. They argue that the addition of the proposed Defendants a parties is statute barred.

[44] In situations such as this, the court must examine the evidentiary record in order to determine if there is an issue of fact or credibility on the discoverability allegation which is a constituent element of the claim. If such issues are evident, the court should allow the addition of the new party with leave to plead a limitations defence. If there is no such issue, for example when the evidence from the motion clearly indicates that the name of the tortfeasor and the essential facts that make up the cause of action against tortfeasor were actually known to the claimant more than two years before the motion to amend, the request to add a new party should be refused. If the issue is due diligence rather than actual knowledge, then this will more likely involve issues of credibility that require a trial or summary judgment motion, provided of course that the plaintiff gives a reasonable explanation on the proper evidence as to why the information was not obtainable with due diligence. The motion could be denied if the evidence is clear and uncontradicted that the plaintiff could have obtained the requisite information with due diligence such that there is no issue of fact or credibility: *Wong v. Adler* Div. Crt 2005 at para.45, *Arcari v. Dawson* 2016 ONCA 715 at para. 10, *Hughes v. Kennedy Automation Ltd.*, 2008 ONSC at para. 24.

[45] The moving party is not required to advance a great deal of evidence at the amendment stage to establish that the proposed defendants could not have been identified with due diligence within the limitation period. As long as the

plaintiff puts in evidence as to steps taken to ascertain the identity of the tortfeasors and gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence then that will be the end of the enquiry and the defendants will normally be added with leave to plead a limitations defence. This is not a high threshold: *Wakelin v. Gourley* (2005), 76 O.R. (3d) 272 (S.C.), aff'd on appeal, 2006 CarswellOnt 286 (Div. Ct.), at paras. 9-15. This principle could be extended to include evidence as to steps a plaintiff took to ascertain the other material facts that make up the cause of action. Again, the threshold is not high.

Analysis

[46] It is not disputed that the proposed defendants were all known to the TNS Defendants since 2012. It is not disputed that MA Bryan was hired to design the plumbing system and C&VD was hired to design the septic system. While the role of Tacoma is disputed, it is not disputed that they had been involved in the project since 2012. So, what must be determined on a review of the evidentiary record, is when the other material facts of the alleged negligence were known or should have been known by the TNS Defendants.

[47] A soggy part of the lawn was first discovered in September 2014. This on its own, could not lead a reasonable person in Mr. Backle's position to conclude

a septic system failure. With respect to the deficiency list dated February 2014, it would not be reasonable for Mr. Backle to assume that water getting in the pit of the shop, or even a long running urinal would point to a septic system failure. Mr. Backle hired Mr. McFall to take the necessary steps identify and rectify these and all the deficiencies.

[48] It is not disputed that Frank Huemiller of Waterloo Biofilter was asked to review the situation on October 10, 2014. He reviewed the soggy lawn, reviewed the C&VD report and the permit drawings, and provided a short report.

[49] As stated above, the TNS Defendants maintain that the October 10, 2014 report does not refer to the right drawings, and it doesn't accurately reflect the conversation between Mr. Huemiller and Mr. Backle. Mr. Backle stated that the permit drawings show that the wash bay waters passed through an oil/grit separator on their way to the septic system. It was also suspected that the oil/grit separator was not working well, or that a long running urinal was causing higher effluent to run through the system. Mr. Backle stresses that these issues were relatively minor and at this point they were only dealing with a mushy area on the lawn. It was not until the spring of 2016 that the septic system alarm was continually being activated.

[50] The TNS Defendants also state that although their counsel sent a notice letter on October 29, 2014, they were still at the investigation stage in October and were conducting their due diligence. Landco or TNS then followed Mr. Huemiller's recommendations and had a flow meter installed, which was activated as of January 1, 2015 for two months. Following the review of this data in March 2015, it was determined that there was definitely a tie between the wash bay water and the septic system, and that the design capacity of the septic system was being exceeded.

[51] Based on the foregoing, there is at a minimum an issue of fact or credibility as to when the TNS Defendants were aware of the material facts that make up their claim against the proposed Defendants to the Counterclaim. While difficulties were identified in October 2014, it was not until March 2015 that the fact of the excessive and oily flow through the septic system was confirmed and it was determined that corrective measures were required. Whether these facts could have been determined earlier than March 2015 with due diligence is an issue best left to trial. The fact that unsuitable soil materials were used below the septic bed had not even been identified at this time.

[52] This resolves the motion with respect to MA Bryan and C&VD. These two parties shall be added as defendants to the Counterclaim, but will have leave to plead the limitation period issue at trial.

[53] The addition of Tacoma must be treated differently. The TNS Defendants did not seek to add it as a defendant to the Counterclaim for another year. Even if it is determined at trial that the TNS Defendants were not aware of the material facts of their claim until March 2015, the addition of Tacoma would still be statute barred. In order to be successful on this motion, the TNS Defendants need to establish that the material facts that form the basis of a claim against Tacoma were not discovered until after November 14, 2015. In order to do so, the TNS Defendants are taking the position that they were not aware of the material facts regarding Tacoma until they retained Mr. Gunnell in February 2016.

[54] At no time in the report is Tacoma mentioned. Mr. Backle admitted in cross-examination that Mr. Gunnell was probably not aware of the role of Tacoma in the Contract. It is telling that no one at Landco or TNS saw it as important enough to advise Mr. Gunnell about Tacoma, given that it is the position of the TNS Defendants that Tacoma was responsible for coordinating the consultants since 2012. The TNS Defendants knew by March or April of 2015 that (1) the wash bay waste water was tied into the septic system; (2) that the septic system was not designed to deal with the type of oil/grease effluent that came from the wash bay; and (3) that the rate of flow into the septic system was more than what the system was designed to handle. Accordingly, it can be inferred that from at least March or April 2015, the TNS Defendants had the

material facts necessary to conclude that there was some breakdown or lack of communication between the designers of the septic system, the designer of the plumbing system, and the design/builder. While the issue regarding the exact type of fill under the septic bed was probably not discovered until Mr. Gunnell's investigation, the type of fill used in the septic bed had nothing to do with Tacoma's alleged role as a coordinator between consultants.

[55] As indicated in *C.H. Clement Construction v. Seguin Racine Architectes et Associes Inc.*, 2013 ONSC 7237, at para. 38, expert reports are not always required in order for a party to have the material facts needed to establish a claim. What must be established is that the claimant had the material facts and access to someone who had the knowledge to assist in determining whether a *prima facie* case was made out: *Lawless*, at paras. 27-28.

[56] Applying s. 5 of the *Limitations Act, 2002*, to this action, the claim against Tacoma was discovered when the TNS Defendants knew of Tacoma's identity; that the loss or damage suffered was caused by an omission of Tacoma; that Tacoma, as the coordinator of consultants, was the proper party against whom the claim should be made; and that adding them as a party to the lawsuit would have been the proper step to take. All these material facts were known to the TNS Defendants as a result of the analysis conducted by Waterloo Biofilter in the spring of 2015.

[57] Given my ruling on the limitation period, it is unnecessary to address the issue of whether Tacoma is a proper party to these proceedings. Nevertheless, a number of facts support an inference that Tacoma is not a property party to these proceedings. In particular,

a) Tacoma is not a signatory on the Contract;

b) The description of their participation in the project, as stated in their invoices and the Construction Review Reports, confirms that Tacoma was not providing coordination services;

c) During construction, Tacoma was not consulted with respect to the septic system or plumbing design;

d) At no time when the TNS Defendants were conducting their investigations in 2014 and 2015 did they ever contact Tacoma;

e) At no time between 2012 and 2017 was Tacoma ever advised that they should be coordinating the other consultants;

f) The TNS Defendants have provided no evidence to support their position that Tacoma was to act as a coordinator of the other consultants; they produced no correspondence between Tacoma and other consultants showing them fulfilling this role or any

communication between CRD and Tacoma regarding the coordination of the project; and they produced no retainer agreement between Tacoma and CRD;

g) Mr. Gunnell did not mention Tacoma as a coordinator in his expert report and assumed that CRD took on that role; and

h) The only other document that the TNS Defendants have produced indicating that Tacoma had a duty as a coordinator of consultants, was a document dated October 2012, which was just produced. Leaving aside the authenticity of the document, it clearly shows that the purported role of Tacoma as a coordinator was well known by the TNS Defendants in October 2012, but they took no steps to notify Tacoma of the septic issues or even to seek their assistance to remedy the problems.

[58] Accordingly, based on the evidentiary record, it is clear that the material facts that make up the claim against Tacoma were known to or ought to have been known by the TNS Defendants by the spring of 2015, given the further investigation by Waterloo Biofilter. There is no issue of due diligence on this issue. While due diligence did continue, the essential facts which form the basis of the claim against Tacoma were known by the spring of 2015. Accordingly, as

per the direction given in *Wong*, the request to add Tacoma as a defendant to the Counterclaim is dismissed.

Conclusion

[59] I make the following orders:

a) The Defendants/Plaintiffs to the Counterclaim TNS Landco Inc., Transport N Service Inc., Earl Allen, Kevin Allen, and Trina Allen are granted leave to add M.A. Bryan Engineering Inc. and Chung & Vander Doelen Engineering Inc. as defendants to the Counterclaim;

b) M.A. Bryan Engineering Inc. and Chung & Vander Doelen Engineering Inc. have leave to plead the *Limitations Act, 2002*, in their defence to the Counterclaim;

c) The Amended Amended Statement of Defence and Counterclaim shall be amended to the form "Fresh as Amended Statement of Defence and Counterclaim" as found in Schedule "A" to the Notice of Motion dated November 29, 2016;

d) The motion to add Tacoma Engineers Inc. as defendants to the Counterclaim and to amend the Amended Amended Statement of

Defence and Counterclaim to the form found as Schedule A to the Notice of Motion dated November 14, 2017, is dismissed;

e) The parties are encouraged to resolve the issue of costs between themselves; if they are not able to do so, the moving party may serve and file their written submission on costs, limited to two pages, single sided and double spaced, exclusive of a costs outline, offers, and case law, no later than 4:30 p.m. on March 11, 2019; responding submissions, with the same size restrictions, may be served and filed by 4:30 pm. on March 25, 2019; the moving party may serve and file reply submissions, with the same size restrictions, no later than April 1, 2019.

Fowler Byrne J.

Released: February 25, 2019

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

CRD CONSTRUCTION LTD.

- and –

UEL McFALL CONSULTING INC., UEL McFALL, TNS LANDCO INC., TRANSPORT N SERVICE INC., EARL ALLEN, KEVIN ALLEN, and TRINA ALLEN

-and between-

CRD CONSTRUCTION LTD. and ROB LESHUK

-and-

CHUNG & VANDER DOELEN ENGINEERING LTD.

Proposed Defendant to Counterclaim

M.A. BRYAN ENGINEERING INC.

Proposed Defendant to Counterclaim

TACOMA ENGINEERS INC.

Proposed Defendant to Counterclaim

REASONS FOR JUDGMENT

Fowler Byrne J.

Released: February 25, 2019