IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lam v. University of British Columbia,* 2012 BCSC 670

Date: 20120510
Docket: S035269
Registry: Vancouver

Between:

Howard Lam

Plaintiff

And

University of British Columbia

Defendant

And

Arpel Industries Ltd., carrying on business as Arpel Security Systems, Arpel Security Systems Ltd., Arpel Security and Monitoring Ltd., Enerand Holdings Ltd., carrying on business as Caltech Tech Services, Peter Moore, carrying on business as Moore Security Systems, Thermo Forma Inc., Vancouver Coastal Health Authority operating as Vancouver General Hospital and UBC Hospital, Mallinckrodt, Inc. and Sanyo Electric Co., Ltd.

Third Parties

Before: The Honourable Mr. Justice Butler

Ruling re Amendment of Statement of Defence

Counsel for the Plaintiff:	Arthur M. Grant Peter E. Norell
Counsel for the Defendant:	Robert B. Kennedy, Q.C. Dylana R. Bloor
Counsel for the Third Party, Vancouver Coastal Health Authority:	John G. Dives, Q.C.
Place and Date of Hearing:	Vancouver, B.C. February 13, 2012
Place and Date of Judgment:	Vancouver, B.C. May 10, 2012

[1] The circumstances giving rise to this action, which has been certified as a class proceeding, are described in the certification reasons of this Court and the Court of Appeal: *Lam v. University of British Columbia*, 2009 BCSC 196; 2010 BCCA 325. The plaintiff, Mr. Lam, brings the action on behalf of all persons who stored semen in a freezer located in the Andrology Lab which was housed at the hospital located at the defendant university ("UBC"). The freezer failed on May 24, 2002 as a result of which the sperm samples were damaged. This action was commenced on October 2, 2003. In the Statement of Claim, the plaintiff alleges he contracted with UBC for the storage of sperm samples. UBC filed a Statement of Defence on December 3, 2003 in which it admitted that it contracted with the plaintiff "for the storage of sperm samples through the Andrology Lab of the Defendant." On August 21, 2008, UBC filed an Amended Statement of Defence in which it alleged:

> ... the Defendant states that until late 2000, the sperm banking service of the Andrology Lab was operated under the control and responsibility of the Vancouver Hospital and Health Science Centre, UBC Hospital Site ("UBC Hospital"). In or about late 2000, responsibility for the future operation of the Andrology Lab, including the sperm banking service, was transferred to UBC. On August 15, 1997, when the Plaintiff contracted for the storage of sperm samples through the Andrology Lab, he contracted with UBC Hospital, not UBC.

[2] In both the original and the Amended Statement of Defence, UBC relies on provisions of the Sperm Banking Facility Agreement (the "Facility Agreement") signed by the service provider (either UBC or UBC Hospital) and the sperm donors. UBC says that it is an express term of the Facility Agreement that UBC or the Andrology Lab would not be liable to the sperm donor for destruction of or damage to the sperm samples.

[3] It is apparent on the basis of the evidence on this application that from the 1980s, when the Facility Agreement was first used, until sometime in 2000, the UBC Hospital is named as the service provider in the Facility Agreement, although the description and name of the hospital changed from time to time. UBC now alleges that in 2000, UBC Hospital assigned responsibility for the Andrology Lab to it. Paragraph 11 of the Amended Statement of Defence states in part:

> The Defendant states that it is the successor and assign of UBC Hospital in terms of UBC Hospital's obligations to the Plaintiff and the Plaintiff's release of UBC Hospital under the terms and conditions of the Facility Agreement.

[4] Each party brings an application regarding the amendment contained in the Amended Statement of Defence. The plaintiff applies to strike the amendment as an abuse of process, or alternatively for a declaration that UBC is not permitted to withdraw the admissions in the Statement of Defence. UBC opposes the application and brings a responsive motion seeking a declaration that the allegations in the Statement of Defence do not constitute an admission such that leave is not required for the amendment, and alternatively, if leave is required, a declaration that leave be granted to withdraw the admission.

BACKGROUND

[5] I will set out the background and the circumstances which gave rise to the amended pleading and the extensive delay in bringing this issue forward for a ruling.

[6] Mr. Lai, University Counsel for UBC, says that when he instructed counsel to file UBC's Statement of Defence, the only Facility Agreement he was aware of named the "UBC IVF Program & Andrology Services, Division of Reproductive Endocrinology & Infertility, Department of Obstetrics and Gynaecology of the University of British Columbia" as the contracting party. In other words, the service provider named is a department of UBC. He knew the Facility Agreement had been in use for many years and it was his understanding that UBC operated the Andrology Lab. He received information to this effect from unnamed individuals within the Obstetrics and Gynaecology Department at UBC. Mr. Kennedy, counsel for UBC, says when the Statement of Defence was filed, his firm only had the version of the Facility Agreement which showed the UBC department as the service provider. This information formed the basis for the allegations in the Statement of Defence.

[7] Mr. Lai notes in his affidavit that UBC is among the largest medical schools in North America, has deep relationships with teaching hospitals throughout British Columbia, and has an organizational structure that is highly decentralized. As a

result, he says it is a “challenge for the University to maintain its institutional memory.” He implies that it would be difficult to find out whether it was UBC or one of its affiliated hospitals who was responsible for and operated the Andrology Lab.

[8] Of course, information about the operation of the Andrology Lab and signatories to the Facility Agreement was available. The available Facility Agreements and invoices covering the period from 1985 to 2000 suggest that the service provider was the UBC Hospital, which is described in a variety of ways including: Department of Gynaecology of the University of British Columbia Health Sciences Centre Hospital; UBC Health Sciences Centre Hospital; University Hospital, UBC Site; and Vancouver Hospital and Health Sciences Centre.

[9] Counsel for UBC became aware that UBC Hospital may have operated the Andrology Lab prior to 2000 as a result of discovery evidence given in *Gindhu and Laye v. UBC and others*, a related proceeding which also arises out of the failure of the freezer. Dr. Gregory Lee, director of the Andrology Lab from 1981 onwards, was examined for discovery on March 23, 2007 as a representative of UBC. He gave evidence that prior to October 2000 the lab was either operated by UBC Hospital or jointly operated by UBC and UBC Hospital. In late May 2007, following that discovery, counsel for the Vancouver Coastal Health Authority (“VCHA”) produced an undated and unsigned Transfer Agreement purporting to transfer past and present responsibility for the operation of the Andrology Lab from UBC Hospital to UBC. Counsel for the VCHA advised that it was his understanding the Transfer Agreement was indeed signed.

[10] Following the developments in the *Gindhu* action, UBC and VCHA amended their pleadings in the third party proceedings in this action in early 2008: UBC alleged that prior to 2001, the Andrology Lab was operated by UBC Hospital; VCHA alleged that prior to October 1, 2000, the lab was a joint operation of the two entities. UBC filed its Amended Statement of Defence on August 20, 2008. Counsel for the plaintiff were aware of the developments in the *Gindhu* action, as they were also counsel for the plaintiffs in that action. The issue which is before me on this application was evidently joined by August 25, 2008 when the certification

application was heard. At the commencement of the hearing, counsel agreed that the certification application should proceed on the basis of the allegations in the Statement of Defence. However, the parties referred briefly to their positions on the Amended Statement of Defence. Mr. Kovacs described the plaintiff's position:

> The plaintiff's position on that is going to be that the amended defence withdraws a key admission, and for that reason we say that it's incumbent upon UBC to bring an application to amend that defence, to obtain leave of the court.

[11] Mr. Kennedy responded with an explanation of UBC's position:

> We take the position in regard to the amended statement of defence, My Lord, that we are not withdrawing an admission and accordingly leave of the court is not required under Rule 31, since at this stage of the proceeding no trial has been set. We are certainly at liberty to amend the statement of defence without leave.

[12] At the certification application, I was not asked to rule on the amendment issue and merely noted at para. 15 of my ruling:

> ... Mr. Lam argued that UBC must seek leave to withdraw the admission made in its original statement of defence. This issue was not argued before me; the certification hearing proceeded on the basis of the original statement of defence.

[13] Following the Court of Appeal decision on certification, UBC sought leave to appeal to the Supreme Court of Canada. The leave application was rejected on February 17, 2011. No steps were taken to resolve the issue regarding the Amended Statement of Defence during that period of time. Indeed, the positions taken by the parties resulted in a procedural impasse. Each party maintained that the onus was on the other to set the application down for hearing. To resolve this impasse, I recently directed that this application be set for hearing so the issue could finally be resolved.

ISSUES

[14] The following issues are raised by these circumstances:

1. Who had the onus to bring the application to resolve the amendment issue?

2. Did the Amended Statement of Defence withdraw an admission such that leave of the court was required?

3. If leave was required, should UBC be permitted to withdraw the admission?

[15] For the reasons that follow, I have determined that once UBC filed its Amended Statement of Defence, the onus was on the plaintiff to apply to strike the Amended Statement of Defence. Accordingly, any delay that has occurred since August 2008 was not the fault of UBC. That is the case, even though I have also determined that UBC was wrong in asserting that it could withdraw the admission by filing an Amended Statement of Defence. The admission was a deliberate concession made by UBC for the benefit of the plaintiff. Finally, I have concluded that UBC has put sufficient evidence before the court to establish that there is a triable issue as to whether UBC Hospital operated the Andrology Lab and entered into the Facility Agreement with the plaintiff and the class members prior to October 2000. There is also a triable issue as to whether UBC Hospital assigned responsibility for the Andrology Lab to UBC. I have also concluded that it is in the interests of justice to permit the withdrawal of the admission.

Issue 1. Who had the onus to bring the application to resolve the amendment issue?

[16] As a result of the amount of time that has passed since this issue was first raised, the question of who bore the onus to bring the application has some significance. This is particularly the case as the plaintiff's argument on the substantive issue places great emphasis on delay.

[17] The provisions in the former *Supreme Court Civil Rules* that are relevant to this application and the positions taken by the parties in 2008 when this issue arose include:

> 24(1) A party may amend an originating process or pleading issued or filed by the party at any time with leave of the court, and subject to Rules 15(5) and 31(5)

> (a) once without leave of the court, at any time before delivery of the notice of trial or hearing, and
>
> (b) at any time with the written consent of all the parties.
>
> 31(5) A party is not entitled to withdraw
>
> ...
>
> (c) an admission made in a pleading
>
> except by consent or with leave of the court.

[18] The positions of the parties which caused the procedural impasse can be described by reference to these two rules. UBC says that it did not have to apply to withdraw an admission because it had not used the one free amendment permitted by Rule 24(1). It further says it could make the amendment to withdraw the allegation that it entered into the Facility Agreement with the plaintiff because that allegation is not an admission as described in the jurisprudence. UBC relies on *British Columbia Ferry Corp. v. T&N, plc*, [1993] B.C.J. No. 1827 (S.C.) for the proposition that Rule 31(5) only applies to admissions deliberately made as a concession to the opposing party. Further, it says that it could not advance that argument if it applied for leave to withdraw the admission: *Kamei Sushi Japanese Restaurant Ltd. v. Epstein* (1996), 25 B.C.L.R. (3d) 366 (S.C.). Finally, it says that once it had filed the Amended Statement of Defence it was up to the plaintiff to apply to strike the pleading if it did not accept that UBC could rely on Rule 24(1) to make the amendment.

[19] The plaintiff argues that Rule 31(5) governs the question of onus. Here, the purported amendment includes the withdrawal of an admission as a result of which the plaintiff says UBC could not rely on Rule 24(1) to file an Amended Statement of Defence. Given the nature of the proposed amendment, UBC was required to bring an application for leave to withdraw the admission.

[20] The difficulty with the position taken by the plaintiff is that it ignores the fact that UBC filed the Amended Statement of Defence. In essence, the plaintiff's position conflates the substantive question – did UBC withdraw an admission? – with

the procedural question – what step should the plaintiff have taken when it believed UBC improperly filed an amended pleading?

[21] The position taken by UBC, while incorrect substantively, is procedurally logical and correct. UBC filed the Amended Statement of Defence which was an unequivocal assertion that it did not require leave to amend the allegation as to the operator of the Andrology Lab. Further, its decision not to seek leave was guided by, and in accord with, the decision in *Kamei Sushi*. In that case, the plaintiff filed an amended statement of claim, but subsequently sought leave to withdraw an admission. At the hearing of the application, the plaintiff argued, on the basis of *British Columbia Ferry Corp.*, that given the nature of the proposed amendment, it did not need to seek leave. In those circumstances, Curtis J. ruled that the plaintiff was estopped from asserting that it had a right to amend without seeking leave. This was because when the application for leave was brought, the issue was framed for the parties who expended time and money in the production of documents and cross-examination on affidavits relevant to the application for leave. Here, UBC was not prepared to relinquish an argument that it thought was meritorious by bringing an application for leave to withdraw an admission.

[22] By contrast, the plaintiff's wait and see position had the effect of leaving matters unresolved. While UBC knew the plaintiff did not agree with its position, it did not need to take any step to assert its position. It had already done that by filing the Amended Statement of Defence. If the plaintiff took no step to set aside the pleading, it would stand. The plaintiff had a simple and easy response to UBC's position: he could bring an application to strike the amendment. This is what parties must do when confronted with a new pleading which they believe does not comply with the provisions of the *Rules of Court*. However, the plaintiff sat back and did nothing to challenge the Amended Statement of Defence, aside from asserting it should not have been filed.

[23] If the plaintiff wished to bring the issue to a head, it had to make the application to strike the Amended Statement of Defence. I infer from the events following the certification application that no such application was brought because

the parties were occupied with other steps in the proceedings, and there was no rush to pursue the issue. Both parties were focused on the certification appeals. Later, they brought applications dealing with the formulation of the common issues and the class definition. While the parties knew that the amendment issue would have to be argued, they were both content, for different reasons, not to force the issue.

Issue 2. Did the Amended Statement of Defence withdraw an admission such that leave of the court was required?

[24] The leading decision in this area is *British Columbia Ferry Corp.* The plaintiff in that case alleged that the defendant asbestos companies supplied products containing asbestos to B.C. Ferries "and to their agents." It applied to withdraw the allegation that the asbestos products had been supplied "to their agents" because the defendant asbestos companies alleged that B.C. Ferries was fixed with any knowledge the agents may have had of the hazards of exposure to asbestos. Braidwood J. ruled that the plaintiff could withdraw the allegation, as it was not the kind of admission contemplated by Rule 31(5). He found that the rule contemplates unambiguous admissions of the kind he described at paras. 13 and 14:

> [13] The type of admission contemplated in the rule is an admission which would benefit the defendant in its defence of the case remaining after the amendment. Further, the admission contemplated by the rule must be a deliberate concession made by the plaintiff for the benefit of the defendant.
>
> [14] In that pleadings should contain statements of fact, in one sense every pleading is an admission where it contains a statement of fact. But that is not the type of admission contemplated by Rule 31(5). The rule contemplates an admission deliberately made by the party pleading it as a concession to its opponent. No particular form of words need be given but the concession must be clear.

[25] In *Kamei Sushi*, Curtis J. applied *British Columbia Ferry Corp.* and noted at para. 15 that pleadings made in error are generally not considered to be admissions:

> ... I would comment at this stage however that a factual pleading genuinely made in error could not fairly be characterized as a "deliberate admission". The rule appears to contemplate a party giving careful thought to the matters in issue and making an informed decision to concede some matter of fact in order to narrow those issues.

[26] Here, UBC says, on the basis of these decisions, that the allegation in the Statement of Defence that it contracted with the plaintiff for storage of sperm samples was made in error and could not be characterized as a deliberate admission. When the Statement of Defence was prepared, counsel only reviewed one version of the Facility Agreement. UBC says it is understandable that individuals acting on its behalf would not be aware of the subtleties of the arrangements between UBC and its teaching hospitals given the large number of departments, labs, and projects, and the complicated relations between them. Some employees, including Dr. Lee, were paid partially by UBC and partially by one of the hospitals.

[27] I reject UBC's submissions on this issue. There was nothing ambiguous about the admission contained in UBC's Statement of Defence. It was deliberate in the sense that it was made on the basis of documentary evidence with the intent that it would be relied upon by the plaintiff. To use the language in *British Columbia Ferry Corp.*, it was a deliberate concession intended to be relied upon and used by the plaintiff for its benefit. As a result of the concession, UBC agreed it was the contracting party. There was thus one less issue to litigate as the class members would not have to prove who agreed to provide to them the services of the Andrology Lab.

[28] UBC's real argument is that the admission was made in error on the basis of incomplete information. It says that the information now available indicates that UBC was not the contracting party, and that its concession to the contrary was made in haste and without full knowledge. The Statement of Defence was prepared and filed with limited information after a review of a single Facility Agreement. UBC appears not to have contacted Dr. Lee to obtain information about the operation of the Andrology Lab even though he had been the director since its inception.

[29] However, the fact that the pleading may have been made in haste without full information does not mean that it was not a deliberate concession intended to be relied upon by the plaintiff. Quite simply, the concession was clear and unambiguous and was made about a matter of substance. It was made in reply to

an allegation in the Statement of Claim. That is precisely the kind of concession that narrows the issues for trial. It is the kind of deliberate concession contemplated by Rule 31(5).

[30] By comparison, the allegations which were found not to be admissions in *British Columbia Ferry Corp.* are quite different. In that case, the plaintiff made an allegation which had an unintended consequence when the defendants used it to raise a new issue. In those circumstances the admission could not be regarded as unambiguous. In *Kamei Sushi*, the allegation was made in error and after extensive cross-examination on affidavits, the court accepted that it was not a deliberate admission intended for the benefit of the defendants. Both cases are distinguishable from the present situation.

[31] In summary, I conclude that the allegation in the Statement of Defence was a deliberate concession made by UBC for the benefit of the plaintiff. UBC's argument that the allegation is not true and was made hastily, with incomplete information can be taken into account when considering the third issue. However, it does not change the nature of the admission which does fall within the category of admissions contemplated by Rule 31(5).

[32] Having concluded that UBC was required to seek leave to withdraw the admission, I must consider UBC's alternative argument.

Issue 3. If leave was required, should UBC be permitted to withdraw the admission?

[33] Rule 7-7(5) of the current *Supreme Court Civil Rules* replaces Rule 31(5). Like the former rule, it provides that an admission made in a pleading may not be withdrawn "except by consent or with leave of the court." The Rule gives this Court discretion to grant leave for a party to withdraw an admission. The overriding principle governing such an application is whether, in the circumstances, the court is satisfied that it is in the interests of justice to allow the admission to be withdrawn: *Norlympia Seafoods Ltd. v. Dale & Co.* (1982), 141 D.L.R. (3d) 733 (B.C.C.A.).

[34] In *Munster & Sons Developments Ltd. v. Shaw*, 2005 BCCA 564, the Court noted that admissions of fact are not to be set aside lightly and, at para. 10, summarized the test to be applied and the factors to be considered on an application to withdraw an admission:

1. That the test is whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact.
2. That in applying that test, all the circumstances should be taken into account including the following:
3. That the admission has been made inadvertently, hastily, or without knowledge of the facts.
4. That the fact admitted was not within the knowledge of the party making the admission.
5. That the fact admitted is not true.
6. That the fact admitted is one of mixed fact and law.
7. That the withdrawal of the admission would not prejudice a party.
8. That there has been no delay in applying to withdraw the admission.

Position of the Parties

[35] The plaintiff argues that I should exercise my discretion to refuse leave for a number of reasons. First, the plaintiff says that the delay in bringing this application is excessive and has caused prejudice to the plaintiff. It is ten years since the failure of the freezer and eight and a half years since the Writ was issued. According to UBC, counsel became aware the concession may have been inaccurate five years ago. The plaintiff says it is simply too late to attempt to withdraw this admission. The prejudice arises because the certification proceedings have gone forward on the basis of the Statement of Defence. If leave to withdraw the admission is granted, there will be additional delay including the possible need for reconsideration of the wording of the common issues.

[36] The plaintiff also argues that UBC has not put forward a sufficient evidentiary basis to establish the existence of a triable issue, and justify withdrawal of an admission. While there are some documents suggesting that UBC Hospital was the contracting party, there is no direct evidence on the issue. Neither Dr. Lee nor anyone else involved in the Andrology Lab has provided affidavit evidence on this

issue. While Dr. Lee's discovery evidence has been attached, the plaintiff argues UBC should not be permitted to utilize the evidence of its own witness given on an examination for discovery. Even if UBC can refer to that evidence, Dr. Lee suggests that the Andrology Lab was a joint operation between the UBC Hospital and UBC.

[37] The plaintiff also notes that the allegations of fact in question have always been within the knowledge of UBC and its employees, including Dr. Lee. In these circumstances, UBC cannot say there was inadvertence in the making of the admission. Further, it cannot say the admission was made hastily, as the time for filing a defence was extended by agreement. Taking all of these circumstances into account, the plaintiff says that it is in the interests of justice to deny leave to withdraw the admission.

[38] UBC argues there is ample evidence to establish a triable issue as to whether UBC Hospital contracted with the class members prior to October 2000 and whether UBC is the successor and assignee of the rights and obligations of UBC Hospitals under the Facility Agreement. Further, it says it is in the interests of justice to have the case decided on its merits and not on a fiction. This can only be accomplished if the admission is withdrawn. Further, UBC argues that there is no prejudice in the circumstances. While it has been many years since the freezer failed and the Writ was issued, the case is still at an early stage. No trial date has been set. Discovery of documents is incomplete and discovery of parties has yet to commence. The resolution of the action will not be delayed in a significant way. There is no step taken that has to be revisited. The only prejudice the plaintiff can point to is that it cannot rely on the admission. That is insignificant when compared to the prejudice that would occur if UBC was not permitted to rely on the assignment defence and have the case heard on its merits.

Analysis

Triable Issue

[39] The plaintiff says that UBC has not put forward sufficient evidence to establish a triable issue. In particular, there is no direct averment by someone from

UBC asserting the facts alleged in the Amended Statement of Defence. I do not consider that the absence of a direct statement is fatal to this application. The Facility Agreements which have now been produced indicate that UBC Hospital was named as the service provider from the 1980s up to 2000. This is direct evidence which is significant. On their face, the Facility Agreements suggest that UBC Hospital was the service provider and contracting party. Further, the correspondence between UBC and UBC Hospital about the transfer of responsibility for the Andrology Lab, as well as the existence of the unsigned Transfer Agreement provide sufficient evidence to raise triable issues as to the nature of the relationship between those parties, and whether UBC Hospital made an assignment of rights and obligations to UBC. The absence of an affidavit from a UBC employee about those events is explained by Mr. Lai. I accept that the size of the institution and the nature of its relationships with teaching hospitals create challenges with respect to "institutional memory". In addition, given the nature of this application, reference to the transcript of Dr. Lee's discovery in the *Gindhu* action is not objectionable. I need not determine if his evidence is true, simply whether there is a triable issue. Further, his discovery evidence in the *Gindhu* action was the trigger for exploration of the issue by UBC and UBC Hospital.

Delay

[40] Having concluded there is a triable issue, the next step in the analysis is to consider the relevant factors to determine if it is in the interests of justice to grant leave to UBC. The plaintiff placed great reliance on the allegation that UBC delayed almost four years in bringing on the application. In the unusual circumstances of this case, I have concluded that UBC cannot be blamed for the delay since August, 2008. The filing of the Amended Statement of Defence effectively raised the issue and the plaintiff could have pursued his remedy. While I have determined that UBC's position was incorrect, its position was not frivolous.

[41] The delay prior to August 20, 2008 remains a concern. As I have noted, UBC had access at all times to the Facility Agreements entered into prior to October 2000. It also had access to the information that was eventually supplied by the

VCHA in the *Gindhu* action. The delay in recognizing the existence of this issue was partly the fault of UBC in failing to examine available information, and partly that of counsel in relying on limited and clearly incomplete information as a basis for the initial pleading.

[42] While there was a lengthy delay in recognizing the existence of this triable issue, that delay does not weigh significantly against UBC's application to withdraw the admission. The reason the delay prior to August 2008 is not a significant factor is that the action was still in its infancy when the Amended Statement of Defence was filed. The certification application had not been heard, as a result of which no significant steps in the litigation had been taken. The decision regarding certification is not affected by the amendment. Other than the existence of the delay itself, the plaintiff has not pointed to any prejudice suffered because the issue was raised in August 2008, rather than earlier.

Circumstances of making the admission

[43] As UBC argued, the concession was made on incomplete information. It was made hastily in the sense that UBC's Legal Counsel, Mr. Lai, and its solicitors relied on the review of a single Facility Agreement even though there are more than 400 class members who signed a Facility Agreement. In the circumstances, the Statement of Defence was filed without full knowledge of the facts.

Truth of the Fact Admitted

[44] On the basis of the documentary evidence alone, it appears that UBC Hospital entered into the Facility Agreement with the plaintiff and with other class members who signed agreements prior to October 2000. In other words, it appears that the fact admitted may not be true.

Determination on the merits

[45] As a result of my ruling on July 6, 2011, the wording of common issue number 4 is:

> Is the defendant, UBC, entitled to rely on the exclusion clause against any or all of the proposed class members?

The allegations contained in the amendments are highly relevant to that common issue. It is not possible to decide this common issue on its merits without consideration of the factual issues raised by the amendment.

[46] Understandably, our courts have a decided preference for determining issues on the merits, rather than on the basis of inaccurate facts. The comments of Taylor J.A. in *La v. Le* (1993), 25 B.C.A.C. 12 are applicable here:

> [9] The case is, in my view, clearly distinguishable from those in which leave is sought to withdraw an admission made with full knowledge of the relevant facts. There was, of course, delay here in bringing the application after the defendant became aware, and had made counsel for the plaintiffs aware, of the new information, and that is a factor to be taken into account. But in the end the matter had to be decided by weighing the prejudice to the plaintiffs in reopening an issue previously closed by admissions, on the one hand, against the injustice which might result, on the other, if the defendant or his insurer were prevented from obtaining a decision of the court on the merits, as they might be established by the evidence.
>
> [10] It is to be remembered, of course, that if the courts do not permit admissions to be withdrawn when new facts are unexpectedly brought to light thereafter, parties will inevitably be discouraged from making what seem at the time to be proper admissions, to the considerable disadvantage of litigants and the administration of justice generally.

[47] In the circumstances here there is a far greater risk of injustice occurring if UBC is prevented from obtaining a decision of the court on the merits as they might be established by the evidence.

Prejudice

[48] When I balance all of these factors, I have no hesitation in concluding that it is in the interests of justice to permit the admission to be withdrawn and allow the case to be heard on its merits. The action will not be unduly delayed as a result of the withdrawal of the admission. Counsel suggested there may be a need to revise common issue number 4 as a result of the new pleading. I do not see that as an issue that will cause delay. If it is necessary to reconsider the issue, it can be addressed at the upcoming case planning conference. No other steps taken will have to be revisited and the ultimate resolution of the case will not be delayed. The plaintiff has not alleged any prejudice other than delay.

[49] On the other hand, if UBC is not permitted to withdraw the admission, it could mean that the action is decided on a fiction. The potential for injustice in that situation is magnified where, as here, the proceeding is a class action. The determination of liability for hundreds of class members should not be made on the basis of an admission that may be incorrect. It should certainly be avoided in these circumstances where the prejudice in permitting the withdrawal is minimal.

[50] In summary, the plaintiff's applications are dismissed. I grant leave to UBC to withdraw the admission in its Statement of Defence and grant leave to file the Amended Statement of Defence in its current form.

Application for an affidavit verifying UBC's List of Documents

[51] The plaintiff also applies for an order that UBC swear an affidavit of documents. The basis for the application is that UBC has produced and attached 10 to 15 documents to affidavits which have yet to be listed. Ms. Bloor indicated at the hearing of the application that these will be listed shortly. Given the stage of the proceedings, I consider the application for an affidavit of documents to be premature. Accordingly, I dismiss the plaintiff's application without prejudice to his right to reset the application following the upcoming case planning conference.

"Butler J."