

CANADA / JUDGMENT

1501642 Alberta Ltd. v. Braza Construction Ltd.

2018 BCSC 56

COURT

Supreme Court of British Columbia

DECIDED

17 January 2018

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2018 BCSC 56 1501642 Alberta Ltd. v. Braza Construction Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: 1501642 Alberta Ltd. v. Braza Construction Ltd., 2018 BCSC 56 Date: 20180117 Docket: S23253 Registry: Fort St. John Between: 1501642 Alberta Ltd. c.b.a. High End Hotel Construction Plaintiff And: Braza Construction Ltd. Penta Capitol Investment Ltd. Defendants And: Tarsem Dosanjh Tryon Land Surveying Ltd. Defendants by Way of Counterclaim

- and - Docket: S175474 Registry: Vancouver Between: AAA Plumbing & Heating Ltd. Plaintiff And: Braza Construction Ltd., Penta Capitol Investment Ltd., Jagjit Singh Gill, and Kulwinder Kaur Gill Defendants
- and - Docket: S175676 Registry: Vancouver Between: Golden Touch Painting Ltd. Plaintiff And: Braza Construction Ltd., Penta Capitol Investment Ltd., Jagjit Singh Gill, and Kulwinder Kaur Gill Defendants And: 1075939 B.C. Ltd. c.b.a. Buruj Construction Group Third Party
- and - Docket: S175675 Registry: Vancouver Between: High-Line Wall & Ceiling Ltd. Plaintiff And: Braza Construction Ltd., Penta Capitol Investment Ltd., Jagjit Singh Gill, and Kulwinder Kaur Gill Defendants
- and - Docket: S175674 Registry: Vancouver Between: Tvisha Technologies Ltd. Plaintiff And: Braza Construction Ltd., Penta Capitol Investment Ltd., Jagjit Singh Gill, and Kulwinder Kaur Gill Defendants And: Adept Electrical Services Ltd. Third Party
- and - Docket: S175473 Registry: Vancouver Between: Adept Electrical Services Ltd. Plaintiff And: Braza Construction Ltd., Penta Capitol Investment Ltd., Jagjit Singh Gill, and Kulwinder Kaur Gill Defendants
- and - Docket: S176434 Registry: Vancouver Between: Mustafa Ahmad Ghulamnabi Plaintiff And: Fareed Momen, Braza Construction Ltd., Penta Capitol Investment Ltd., Jagjit Singh Gill Defendants

- and - Docket: S1710237 Registry: Vancouver Between: Mohstucco Inc. Plaintiff And: Fareed Momen, Braza Construction Ltd., Penta Capitol Investment, Jagjit Singh Gill Defendants Before: Master Bouck Reasons for Judgment Counsel for 1501642 Alberta Ltd., AAA Plumbing & Heating Ltd., Golden Touch Painting Ltd., High-Line Wall & Ceiling Ltd., Tvisha Technologies Ltd., Adept Electrical Services Ltd. and Tarsem Dosanjh: D. Solimano N. Mann Counsel for Braza Construction Ltd. ("Braza"), Penta Capitol Investment Ltd. ("Penta") and Fareed Momen: A. Pabani Counsel for Tryon Land Surveying Ltd. ("Tryon"): S. Armstrong Counsel for Jagjit Singh Gill and Kulwinder Kaur Gill O. Ahmed Counsel for 1075939 B.C. Ltd. c.b.a. Buruj Construction Group, Mustafa Ahmad Ghulamnabi and Mohstucco Inc. A. Nuraney Place and Date of Hearing: Vancouver, B.C. December 11, 2017 Place and Date of Judgment: Vancouver, B.C. January 17, 2018 The Applications
- [1] These reasons address eight separate applications for orders that all of the above-named actions be joined for the purposes of trial. As the styles of cause reveal, all but one of the actions originates in the Vancouver registry. The exception to this circumstance is the first named action which was commenced in the Fort St. John registry (the "FSJ action"). If the joinder order is made, it would necessarily follow that the FSJ action would be transferred to the Vancouver registry for trial and perhaps even for all purposes. The applicants seek additional orders regarding both the use of evidence garnered in each action and also the ability of any party to pursue a remedy by way of summary trial.
- [2] For the most part, the various parties agree that the trials for the Vancouver registry actions should be heard at the same time. However, the defendants Gill, Momen, Penta and Braza together with the defendant by way of counterclaim in the FSJ action, Tryon, oppose the joinder of the FSJ action with any other proceeding.
- [3] No trial dates have been scheduled in any of the actions.
- [4] For reasons that follow, I will order that the trials in the Vancouver registry actions be heard at the same time but the trial in the FSJ action shall be heard independently. Additional terms to the joinder order will be set out at the conclusion of these reasons.

Background

- [5] The circumstances that give rise to these actions are described in the consolidated notice of civil claim filed on August 29, 2016, in the FSJ action. This pleading resulted from an order made by Master Baker in August 2016 whereby two existing actions, one filed in the Vancouver registry and the other in the Fort St. John registry, were consolidated.
- [6] All of the above-named actions emanate from the construction of a Best Western hotel in the City of Fort St. John. Although the hotel is now fully operating, the construction of the premises did not go entirely smoothly. The plaintiff in the FSJ action says that it has not been paid for its work and thus seeks a remedy against the general contractor, Braza, and the owner of the lands, Penta, pursuant to the Builders Lien Act and under contract. In that same action, Penta and Braza allege in their counterclaim to have suffered loss and damages

as a result of the hotel being built 1.1 metres below the level identified in the design specifications.

- [7] The plaintiff in the FSJ action is a construction company that has taken part in the building of a number of Best Western hotels throughout Western Canada. The plaintiff's role, as pled, is to perform their (sic) work as directed and when instructed by a project's general contractor in combination with the surveyor and/or other consultants. In this particular project, the plaintiff is said to have provided material and labour for the construction of pilings, grade beam, foundation slab and framing. Perhaps self-evident, Tryon was the surveyor on the project. Tarsem Dosanjh, the defendant by counterclaim in the FSJ action, is said to be both the framer on the project and a representative of the plaintiff.
- [8] The defendants in the FSJ action have posted security for the plaintiff's builders' lien claims.
- [9] Neither the plaintiff nor the defendants by counterclaim in FSJ action are named in any of the other proceedings.
- [10] The Vancouver registry actions are brought by some of the sub-trades that worked on the project. None of these sub-trades filed liens on time and thus the actions may be described as debt claims. In addition, a breach of trust claim is asserted in all of these actions. The same defendants are named in the actions, except for the proceeding brought by Mohstucco Inc.
- [11] Jagjit Singh Gill is the sole director of Braza. Kulwinder Kaur Gill is the wife of Jagjit and named as a defendant in the all but one of the Vancouver actions because she holds an interest to certain real property that may be traced on the breach of trust claim. Ms. Gill is not named in the Mohstucco Inc. action but her husband is, along with the principal of Penta, Fareed Momen. Mohstucco Inc. alleges that it contracted with both Braza and Fareed Momen.
- [12] All of the counsel involved in these actions practice in the Lower Mainland. While not entirely clear, it appears that the witnesses to be called at the trials reside either in the Greater Vancouver area or at or near Fort St. John.
- [13] The parties have exchanged, or are in the process of exchanging, lists of documents but no examinations for discovery have been conducted. The Law
- [14] The law to be applied on this application was most recently reiterated by Master Taylor in *Grewal v. Grewal*, 2017 BCSC 291:
- [14] Rule 22-5(8) of the Supreme Court Civil Rules gives the court discretion to order the consolidation of proceedings, or for proceedings to be tried at the same time:
- (8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

- [15] The law to be applied on applications of this nature is well known and is ably set out by Master Keighley in *Funk v. Harder*, 2015 BCSC 2152, starting at para. 16 where he quotes from the decision of Master Kirkpatrick, as she then was, from *Merritt v. Imasco Enterprises Inc.* [1992] B.C.J. No. 160 (S.C.): I accept that the foundation of an application under R. 5(8) is indeed disclosed by the pleadings. The examination of the pleadings will answer the first question to be addressed: do common claims, disputes and relationships exist between the parties? But the next question which one must ask is: are they "so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense"? *Webster v. Webster* (1979) 12 B.C.L.R. 172 (C.A.). That second question cannot, in my respectful view, be determined solely by reference to the pleadings. Reference must also be made to matters disclosed outside the pleadings:
- (1) will the order sought create a saving in pre-trial procedures (in particular, pre-trial conferences)?
 - (2) will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?
 - (3) what is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest? and
 - (4) will there be a real saving in experts' time and witness fees? This is in no way intended to be an exhaustive list. It merely sets out some of the factors which, it seems to me, ought to be weighed before making an order under R. 5(8).
- [17] In the case of *Shah v. Bakken*, [1996] B.C.J. No. 2836 (BCSC), Master Joyce, as he then was, added two further factors for consideration:
15. Other factors which in my view can be added to the foregoing list are:
 - (5) Is one of the actions at a more advanced stage than the other? see: *Forestral Automation Ltd. v. RMS Industrial Controls Inc. et al.* (No. 2), unreported, March 6, 1978, No. C765633/76, Vancouver (B.C.S.C.).
 - (6) Will the order result a delay of the trial of one of the actions, and, if so, does any prejudice which a party may suffer as a result of that delay outweigh the potential benefits which a combined trial might otherwise have?
- [18] And finally, in the case of *Murray v. Morgan*, [1999] B.C.J. No. 2871, Master McCallum paraphrased Master Kirkpatrick's analysis in *Merritt* as: "Will the order make sense in the circumstances".
- [15] I note that while some of the parties' in their submissions used the words consolidation and joinder interchangeably, there is a clear distinction between those two remedies both under the Rule and at common law: *Discovery Enterprises Ltd. v. Ebco Industries Ltd.*, 2001 BCSC 235. Here, none of the parties are asking for a consolidation order. Discussion

- [16] Having now had the opportunity to further consider the pleadings and the submissions of the parties, I conclude that the balance of convenience does not favour joining the FSJ action with the other actions for trial.
- [17] First, I find that the issues to be resolved on the FSJ action are distinct from those raised in the debt actions. The only overlap or commonality of facts is the project itself. The main issues to be resolved in the FSJ action are: who is responsible for the construction elevation defect and what if any consequences, including damages, flow from that defect? The plaintiff also seeks an order rectifying terms of its contract with the defendant Braza. None of these issues have any bearing on the outcome of the other actions.
- [18] Second, if the FSJ action were to be joined with the other actions, the actual trials will be conducted far into the future, perhaps even in several years' time given the potential length of the trial(s) and the number of counsel involved. The issues in the FSJ action are more complicated than those found in the debt actions and would reasonably require weeks, not just days, to be heard. If all of the actions were joined, there will need to be coordination of the calendars of multiple counsel to fix the trial dates. These circumstance prejudice the defendants and the defendants by counterclaim in the FSJ action, all of whom are entitled to a just, speedy and inexpensive determination of the merits of that proceeding.
- [19] Third, while there are common defendants in these various proceedings, the defendant Tryon is not one of them. In addition to a delay in a trial date, a joinder order would compel the defendant Tryon to attend a lengthy trial which, for the most part, has nothing to do with its involvement in the project. Similarly, if the actions were joined, at least Kulwinder Gill would be required to attend proceedings in which she has no particular interest. In my view, it matters not that Ms. Gill and her husband are represented by the same counsel.
- [20] Fourth, other than the convenience of counsel, I am unable to find that the joining of the FSJ action will result in any costs savings to the parties in that action or indeed any of the other actions. Either Vancouver based counsel or the client/party will be required to travel to attend trial, so the costs resulting from joinder are neutral.
- [21] The applicants submit that judicial management could allow for costs savings, such that certain parties could be excused from attending various pre-trial conferences or applications and indeed, portions of the trial itself. Such savings presumes either the involvement of a case management judge or the early assignment of a trial judge, with neither scenario a given or even a likelihood under the Supreme Court Civil Rules ("SCCR").
- [22] Fifth, because the issues involved in the FSJ action are so distinct, there is no risk of inconsistent judicial findings if that action proceeds to trial independent of the other actions.
- [23] In summary, I find that the orders that make sense in all of the circumstances are as follows:
1. The application of the plaintiff in the FSJ action is dismissed;

2. The trials in the above actions, except the FSJ action, shall be heard at the same time, subject to the direction of the trial judge;
 3. The evidence in one of the joined actions shall be admissible in the others, subject to the right of any party to raise issues of admissibility and relevance at trial;
 4. The joinder order shall not prejudice any party from bringing an application pursuant to Rule 9-7 of the SCCR for judgment generally or on an issue in one or more of the joined actions;
 5. An application under Rule 9-7 may be brought in each action without the necessity of giving notice to any of the parties named in the joined actions who would be unaffected by the result of the application;
 6. If the parties in the joined actions are unable to reach agreement in the next 90 days with respect to the length and timing of examinations for discovery, any party in the joined actions may set down a case planning conference or make application to the court, on notice to all affected parties.
- [24] This last order addresses the proposal of the Gill defendants to have their respective examinations for discovery limited in length. There was insufficient evidence before the court to address the appropriateness of such an order at this time.
- [25] That leaves the question of costs. The only party that was unsuccessful on these applications was the plaintiff in the FSJ action. The parties generally agreed on the joinder of the Vancouver actions. Except for the FSJ action, costs of the applications will be in the cause. In the FSJ action, costs related to the application will be to the defendants Braza, Penta and Tryon in their respective causes. "C.P. Bouck" Master C.P. Bouck

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