

CANADA / JUDGMENT

Atema, Inc. v. Victoria (City)

2022 BCSC 2398

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2398 Atema, Inc. v. Victoria (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Atema, Inc. v. Victoria (City),

2022 BCSC 2398

Date: 20221114

Docket: S226654

Registry: Vancouver

Between:

Atema, Inc.

Plaintiff

And

The Corporation of the City of Victoria and

PCL Constructors Westcoast Inc.

Defendants

Before: The Honourable Mr. Justice Verhoeven

On appeal from: Decision of Master of the Supreme Court of British Columbia,

April 21, 2022 (Atema, Inc. v. Victoria (City), 2022 BCSC 616)

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

P.A. Kressock

Counsel for the Defendant PCL Constructors Westcoast Inc.:

M.J. Dew

For the Defendant Corporation of the City of Victoria:

No appearance

Place and Date of Hearing:

Vancouver, B.C.

November 14, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 14, 2022

- [1] THE COURT: This is an appeal from a decision of Master Bouck made April 21, 2022. Her reasons for judgment are indexed at 2022 BCSC 616.
- [2] The application before Master Bouck was for production of documents. The application was made by the defendant PCL Constructors Westcoast Inc. against the plaintiff Atema, Inc. The applicant ("PCL"), brought the application in its capacity as claimant in its counterclaim against Atema. These proceedings, as Master Bouck explained, were initially commenced by Atema seeking payment of several, three or four, unpaid invoices totalling \$68,999.38 that were issued by it to PCL at the tail end of their relationship.
- [3] Like Master Bouck, I will adopt the factual basis that is set out in the notice of application, which is set out in paragraph 5 of her decision, which is as follows:
- [5] For economy, I adopt this part of the Factual Basis from the notice of application:
1. The Johnson Street Bridge project involved the replacement of the pre-existing bascule span bridge (opened in 1924) that spanned over an inlet to the harbour in Victoria, BC.
 2. Steel fabrication for the new bridge began in 2013 and the new bridge was opened in 2018.
 3. PCL Constructors Westcoast Inc. ("PCL") was the general contractor hired by the City of Victoria to construct the new bridge.
 4. Jiangsu Zhongtai Bridge Steel Structure Co., Ltd. ("ZTSS"), located in China, was the structural steel fabricator hired by PCL to fabricate the bascule span, and related steelwork.

5. PCL hired Atema, Inc., an American quality consulting firm expert in steel fabrication, to provide quality control services in China in relation to fabrication of the bascule span and related steelwork.
 6. The fabrication of the bascule span was a substantial undertaking, and PCL paid Atema over \$8M USD for quality control services.
 7. There were quality issues with the steel fabricated in China.
 8. In this litigation Atema claims payment on certain invoices it issued to PCL, and PCL defends that claim by alleging set off, and also counterclaims for loss and damages that PCL says it suffered due to Atema not providing proper quality consulting advice.
- [4] PCL succeeded on one part of its application; that was to require production of insurance policies. That part of the decision is not the subject of this appeal. Master Bouck dismissed the remaining part of the notice of application. The notice of application, as Master Bouck noted, sought production of:
- b) All photographs Atema has related to the Johnson Street Bridge project.
 - c) All daily time and/or activity records or logs detailing time spent and/or tasks performed by Atema, Inc. on the Johnson Street Bridge project in the period 2013 - 2017.
- [5] In paragraph 2 of the notice of application, the applicant PCL expanded on that by seeking an order that the photographs be provided in native file format, e.g., jpg, and that spreadsheets be provided in native file format, in other words, Excel format, etc.
- [6] Master Bouck refused the application. The essence of her reasons are set out in paras.19 through 22. There she referred to certain relevant authorities that had not been referred to her during the course of argument on the application. No suggestion is made here that she did not refer to the appropriate authorities. I note that Master Bouck, as a master of long experience, would have a thorough understanding of the relevant principles on a document production application. She says:
- [21] . . . I have not been persuaded by either the evidence or counsel's submissions that the photographs or the time or activity records or logs may either directly or indirectly enable PCL to advance its case. If I am wrong in that conclusion, then I find that the production request is overly broad and disproportionate to the issues in dispute, even if the judgment sought on the counterclaim is in the millions of dollars. PCL has evidence of the work performed by the plaintiff by virtue of the invoices, weekly reports and other documents. Indeed, PCL's response to the demand for particulars indicates that it has the necessary knowledge of the plaintiff's work on the project. I agree with the plaintiff that the request for "all" photographs and essentially all documents that substantiate already paid invoices is a fishing expedition.

- [7] The legal test on an appeal of an order of this nature has been the subject of some debate on this appeal.
- [8] I find helpful the discussion in *Marion Family Ventures Inc. v. Lam*, 2021 BCSC 1076, a decision of Justice Gomery. In that case, Justice Gomery was dealing with an appeal from a decision made by Master Elwood, as he then was. In that case, the defendant The Toronto-Dominion Bank was appealing the order of Master Elwood. Master Elwood had ordered production of the documents in question.
- [9] For purposes of these reasons, I adopt the following paragraphs of the *Marion Family Ventures* case:
- [4] Rule 7-1 of the Supreme Court Civil Rules [Rules] governs document discovery. It establishes a two-stage discovery process.
- [5] Subrule (1) of R. 7-1 requires parties to an action to list and produce documents that could "be used by any party of record at trial to prove or disprove a material fact" or to which a party intends to refer at trial. Production under subrule (1) may be thought of as "Stage 1" production.
- [6] Subrules (11) to (14) provide for the listing and production of additional documents. This may be thought of as "Stage 2" production. Stage 2 production is demand driven and discretionary.
- [11] On an appeal from a master in respect of a purely interlocutory order, the appellant must show that the order is clearly wrong; *Kondori v. New Country Appliances Inc.*, 2017 BCCA 164 at paras. 16-19, affirming the test established in *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.). A purely interlocutory order is to be contrasted with one that raises questions vital to the final issue in the case, or is one of those final orders which a master is entitled to make.
- [12] While counsel for the Bank argued weakly to the contrary, citing *Ho. v. Ming Pao Newspapers (Western Canada) Ltd.*, [1997] B.C.J. No. 2539 (S.C.), an order respecting the production of documents prior to trial is the epitome of a purely interlocutory order. It only sets the stage for the determination of the issues at trial; *Merth v. Merth* (1993), 18 C.P.C. (3d) 361 (B.C.S.C.) at para. 5; *Martell v. Ewos Canada Ltd.*, 2003 BCSC 1376 at para. 25; *Astels v. Canada Life Assurance Co.*, 2005 BCSC 1232 at para. 20, *aff'd* 2006 BCCA 110.
- [13] In *Shantz v. British Columbia's Children's Hospital*, 2005 BCSC 1747 at paras. 10-20, Loo J. comprehensively reviewed the authorities, including *Ho*, and held that the "clearly wrong" standard of review should be applied on appeals from document production orders except where the particular document in question is of vital importance. While *Ho* contains dicta to the contrary, Loo J. interpreted *Ho* as a case in which the document in question was of vital importance. It is worth noting that an alternative ground of decision in *Ho* was that the order under appeal was clearly wrong. There is nothing in the record to suggest that the documents at issue in this appeal are so critical to the determination of the issues that the

order should be regarded as critical to the determination of an issue rather than interlocutory, and I would suggest, with respect, that Ho is anomalous in this regard.

[14] I conclude that the burden is on the Bank to show that the master's decision is clearly wrong.

[27] These are propositions concerning the requirement in R. 7-1(11) that documents sought and produced in Stage 2 must "relate to any or all matters in question in the action". This is language carried over from R. 26(1) of the former Rules of Court. It imposed an obligation to give discovery of documents in the following terms:

A party to an action may deliver to any other party a demand in Form 92 for discovery of the documents which are or have been in the party's possession or control relating to any matter in question in the action, and the other party shall comply with the demand within 21 days by delivering a list, in Form 93, of the documents that are or have been in the party's possession or control relating to every matter in question in the action.

[Emphasis added.]

[28] The long settled law was that the obligation under R. 26(1) to produce documents "relating to every matter in question in the action" extended to documents containing information that may relate to a matter in issue; *Dufault v. Stevens* (1978), 6 B.C.L.R. 199 (C.A.) at para. 9. The test was one established by *Cie Financiere du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A) [*Peruvian Guano*] where the Court stated at 63:

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may -- not which must -- either directly or indirectly enable the party ... either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly,' because, as it seems to me, a document can properly be said to contain information which may enable the party ... either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

[29] A principal purpose of pretrial discovery procedures, including discovery of documents, is to level the playing field between the parties by giving each access in advance of the trial to documents in the possession or control of its opponent that may assist it in making out its case or defeating its opponent's case at trial. That purpose is served by a policy of generous access exemplified by the *Peruvian Guano* standard.

[30] However, a policy of generous access is also costly and may give rise to privacy concerns. With the proliferation of volumes of documents generated by electronic messaging and record-keeping, lawyers and courts expressed discomfort with the scope of production required as a matter of course through the automatic application of the *Peruvian Guano* standard; *Centura Building Systems Ltd. v. Blackcomb Mountain Development Ltd.*, 2007 BCSC 939 at paras. 11-14. These concerns were eventually addressed in 2010 by the

replacement of R. 26 of the former Rules of Court with R. 7-1 of the current Supreme Court Civil Rules.

- [31] Under the former R. 26, the obligation to produce documents was triggered by delivery of a blanket demand requiring production according to the Peruvian Guano standard. Rule 7-1 substituted the two stage process described above. The first stage is automatic, not demand-driven, and the scope of production is narrower. The second stage is demand-driven and discretionary. The threshold test for production at Stage 2 is unchanged; *Marsh Canada Limited v. BFL Canada Insurance Services Inc.*, 2014 BCSC 1171 at para. 65; *Global Pacific Concepts Inc.* (cited by the master) at para. 9; *Biehl v. Strang*, 2010 BCSC 1391 at paras. 10-15, 29; *Burgess v. Buell Distribution Corporation*, 2012 BCSC 1494 at para. 19. It is still the Peruvian Guano standard. However, the party seeking Stage 2 production must describe the documents sought "with reasonable specificity" and explain why they should be disclosed, and the responding party may ask the court to exercise its discretion to refuse to order production.
- [32] Accordingly, it is settled law that documents "relate to any or all matters in question" and are potentially subject to a Stage 2 production order pursuant to R. 7-1(11) to (14) if they contain information that may, not must, either directly or indirectly, enable either party to advance its own case or damage the case of its adversary. The Bank's first proposition is incorrect.
- [10] The first question is whether the "clearly wrong" test applies, with the exceptions as set out in paragraph 11 of the *Marion Family* case; that in some cases the interlocutory application may raise questions vital to the final issue in the case, or is one of those final orders which a master is entitled to make.
- [11] The order made is not a final order. It is clearly an interlocutory order. I agree with counsel for the respondent on this appeal that in this case the appropriate test is the clearly wrong standard. There are perhaps cases where a particular document could be viewed as being of vital importance to the outcome of the case. It is difficult to state what kind of case that might be, but I can state that this is not one of those cases, which would be certainly exceptional.
- [12] So the standard to be applied, in my view, on this is the clearly wrong standard. As to that, various authorities have refined the meaning of that. A number of authorities have adopted the principles governing the question of clearly wrong set out by Justice Gropper in *Genesis Fertility Centre v. Yuzpe*, 2017 BCSC 1037. One such case is *Du v. Wang*, 2022 BCSC 1679. In *Genesis Fertility*, Justice Gropper stated that a decision that is clearly wrong is one where:
- a. the master abuses her discretion by acting arbitrarily or capriciously;
 - b. the master exercises her discretion under a mistake of law;
 - c. the master erred in law or principle;
 - d. the master misdirected herself;

- e. the master disregards a principle;
 - f. the master misapprehends facts or takes into account irrelevant factors; or
 - g. the order of the master would result in an injustice.
- [13] In my view, the decision made by the master in this case has not been shown to be clearly wrong.
- [14] I note that, as did the master, the orders sought were extremely broad in scope.
- [15] It is true that the master noted a number of matters having to do with the proceedings generally that may not have been relevant, such as the fact that the claim in its initial format is a claim for a limited amount of money, whereas the counterclaim appears to be for a large amount of money, and the fact that there were other proceedings brought by PCL that deal generally with the same project.
- [16] However, those other matters do not form part of the actual reasoning of Master Bouck, which are the reasons that I referred to and quoted earlier.
- [17] What is essentially argued is that the photographs could be of value as they relate particularly to PCL's claims that it suffered damage as a result of delay. There are very specific particulars of various breaches of contract that are alleged by PCL. The master had some criticism of the particulars, but again, although I think that her criticism of the particulars is not relevant to the determination of the issue, on my reading of the reasons for judgment, she did not do so. That is, she did not rely on her concern about the particulars as a basis of her decision. Her decision was stated to be on the basis of the appropriate legal standard, which, as I see it, is second stage discovery of documents pursuant to the well-known *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.) standard, and that is evidenced by her reference in para. 21 of her decision to photographs or activity logs that "may either directly or indirectly enable PCL to advance its case."
- [18] So she determined that it had not been shown that the records were relevant on that broad test.
- [19] On the hearing of the application, counsel for PCL indicated that it would be possible to significantly narrow the scope of the document production demand and the scope of the application. I agree, however, with counsel for the respondent on the appeal that it is fundamentally my task to determine whether the master was clearly wrong, or not, on an appeal of this nature, and that under the clearly wrong standard, this appeal should not be turned into a hearing *de novo* where I consider afresh the entirety of the application and make a decision different than that of the master, on the basis of a rehearing. The application as brought was extremely broad, so the standard that was before the master was whether it had been shown that those documents could be relevant to the issues set out in the pleadings. She determined that she had not been persuaded of that, and that the

application was a fishing expedition.

- [20] PCL has, I think appropriately, provided detailed particulars of the failures and breaches of contract that it says Atema has made. What I have not been persuaded of, as the master was not persuaded of, was that there is a link between those particulars and those allegations of breach and, for example, the entirety of any photographs that Atema might have.
- [21] Arguments were made on this appeal that Atema's invoices, as produced, were incomplete. PCL acknowledges that, for the most part, the invoices that it has in its possession are the complete invoices that it was sent by Atema. It argues that, at least in a couple of cases, the invoices provided were lacking in detail. However, that was not the nature of its application, and is not the nature of the appeal. Its application was not simply to produce more backup documents for the invoices in some specific respects. The application is again for all photographs and all time records, essentially.
- [22] I agree with the respondent's argument where it relies on a decision of Justice Giaschi in *Mann v. Jagpal*, 2020 BCSC 1919, at para. 56:
- [56] . . . If [the applicant] had properly identified the specific documents or specific classes of documents production of which was required, and had made a proper limited demand for those specific documents, then it is possible that these applications might not have been required. The practice of making broad and vague document requests, especially of non-parties [which this is not], is to be very much discouraged. An applicant should not expect or anticipate that the court will cure such defects by paring down such requests and doing what the applicant should have done in the first instance.
- [23] PCL argues and emphasizes that, at least in part, its claims are what it characterizes as claims for damages for delay. What I understand it to be saying is that Atema's failures to properly perform the oversight work it was contracted to do led to delays in the project. It says that it needs all the photographs and all the time records to do a full analysis of everything done by Atema during the course of its work, which spanned several years.
- [24] That was the proposition that Master Bouck was not persuaded of, and I have not been persuaded that she erred in coming to that conclusion.
- [25] PCL did not request before Master Bouck that it be granted liberty to apply on a different document demand or following further potential amendments to its pleadings, and so Master Bouck made no comment in that respect. On the appeal, PCL argues that the court on the appeal should conclude that Master Bouck erred in not granting liberty to apply or leave to apply in certain circumstances in the future.
- [26] It seems axiomatic to me that Master Bouck cannot be said to have erred in a matter that she was not asked to adjudicate upon. However, I concede this much; I deal with the appeal that is presented to me. If there are amendments in future or further evidence arises on examination for discovery, and I am told examinations for discovery have not yet commenced or occurred, it is possible that a future application could be brought which

might have a different outcome. I am unable to express any opinion on such hypothetical circumstances. As I said, I deal with the appeal as presented, on the basis of the record before me.

- [27] Master Bouck's alternative point rested on the principle of proportionality., Under the Rules, the court may excuse a party from complying with the second tier Peruvian Guano discovery on the basis that it would be unwarranted and disproportional. There was little or no evidence before Master Bouck about the actual difficulty that might be encountered in respect of complying with the demand.
- [28] I think it is fair to say that she could have inferred that it would have been onerous, simply by the description itself. There was evidence before Master Bouck that Atema took photographs. It included photographs in its regular reports to PCL. It may well be, and could be expected that it would have other photographs as well.
- [29] In terms of the time records, as well, presumably, in fact, Atema does have further time records. There is no particular evidence before me about that. I prefer to deal with the appeal on the basis of the first ground. In my view, it is not necessary for me to say anything further about Master Bouck's alternative ground on the point of proportionality, other than the comments I just made.
- [30] So for those reasons, the appeal is dismissed.
- [31] Anything about costs?
- [32] CNSL P. KRESSOCK: Justice, in light of the dismissal of the appeal, we'd seek costs of the appeal in any event of the cause. I note that the court relied heavily on the decision in *Marion v. Lam*, 2021 BCSC 1076. That was the order in that case. In my submission, that is the appropriate order here.
- [33] THE COURT: Yes. Okay, yes?
- [34] CNSL M. DEW: So Justice, I would submit that costs should be costs in the cause as the more typical order that is made in these kind of cases. I'm not sure what -- there are any special circumstances that my friend is referring to in the *Marion* case. But as well, I was hoping you would be willing to just clarify, so you said if there's any amendments to the pleadings or there's any future -- any further discovery which might lay a foundation for further document production. I just -- I just thought it might be a point of dispute between my friend and I, because I've already requested whether we can agree that if that was -- if future events were to happen like amendment to the pleadings or discovery, would that foreclose document production? And my friend said, well, Master Bouck at paragraph 21 ruled the record irrelevant. So if you, Justice, are just dismissing the appeal, I'm wondering if there can be some kind of declaration that --
- [35] THE COURT: No.

[36] CNSL M. DEW: -- it is --

[37] THE COURT: I see where you are going, but no, I am not going to make a further order in that respect. I said I am dealing with the appeal that is before me and I have dismissed the appeal. I was, I think it would be fair to say, making obiter dicta about the fact that at some future time there could be a different application and I am not dealing with such an application. Whether that application at that time would be seen to be res judicata or subject of issue estoppel, or whether it would be truly something that the court could deal with, I have no idea. I am not dealing with any of that. That is for another person at another time. I think it is inappropriate for me to prejudge such an application or any of those sorts of issues.

[38] As to costs, in my view the costs of the appeal should be viewed as a discrete matter that are somewhat separate from the general cut and thrust of interlocutory applications during the course of the proceedings, and I am well aware that in many cases matters never do reach a conclusion, so costs in the cause are never actually paid.

[39] So in my view, in this case, the appropriate order is for the successful respondent on the appeal to receive costs of the appeal in any event of the cause.

"Verhoeven J."

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