

CANADA / JUDGMENT

Bene (Oval) Development Ltd. v. 1148538 B.C. Ltd.

2020 BCSC 1608

COURT

Supreme Court of British Columbia

DECIDED

29 October 2020

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2020 BCSC 1608 Bene (Oval) Development Ltd. v. 1148538 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bene (Oval) Development Ltd. v. 1148538 B.C. Ltd.,

2020 BCSC 1608

Date: 20201029

Docket: S188485

Registry: Vancouver

Between:

Bene (Oval) Development Ltd.

Plaintiff

And

1148538 B.C. Ltd.

Defendant

And

Bene Capital (Group) Ltd., DA Bao International Holding Co. Ltd.,

Dragon Source Investments Ltd., Goband Investment Ltd., and

Centron Investment Ltd.

Before: Master Harper

Reasons for Judgment

Counsel for the Plaintiff, appearing by teleconference:

M.L. Bromm

Counsel for the Defendant, appearing by teleconference:

O.C. Hanson

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

September 24, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 29, 2020

Overview

- [1] This application is about the adequacy of the defendant's response to a notice to admit (the "response"). The plaintiff seeks to have the response struck pursuant to Rule 9-5(1) of the Supreme Court Civil Rules as scandalous, frivolous, vexatious, or otherwise an abuse of the process of the court. If the response is struck, the plaintiff seeks an order that the admissions sought in the notice to admit be deemed admitted.
- [2] The litigation arises from a failed commercial real estate transaction. The plaintiff alleges that the defendant was obligated pursuant to the contract of purchase and sale to purchase the properties at issue for the sum of \$80 million either by way of asset purchase or share purchase. The defendant disagrees with the plaintiff's characterization of the terms of the contract. The deal collapsed and the plaintiff sold the properties for \$60 million. The plaintiff claims damages for the \$20 million loss. The central issue in the action is the correct interpretation of the contract.
- [3] The plaintiff says that the bulk of the evidence at trial will consist of letters and emails exchanged between the parties' respective solicitors leading up to the collapse of the transaction. The plaintiff says that it is unlikely that any of the communications themselves are disputed, although their interpretation and legal significance may well be.
- [4] Rule 7-7(1) provides:

- (1) In an action in which a response to civil claim has been filed, a party of record may, by service of a notice to admit in Form 26, request any party of record to admit, for the purposes of the action only, the truth of a fact or the authenticity of a document specified in the notice.
- [5] The effect of a notice to admit is set out in Rule 7-7(2):
- (2) Unless the court otherwise orders, the truth of a fact or the authenticity of a document specified in a notice to admit is deemed to be admitted, for the purposes of the action only, unless, within 14 days after service of the notice to admit, the party receiving the notice to admit serves on the party serving the notice to admit a written statement that
- specifically denies the truth of the fact or the authenticity of the document,
 - sets out in detail the reasons why the party cannot make the admission, or
 - states that the refusal to admit the truth of the fact or the authenticity of the document is made on the grounds of privilege or irrelevancy or that the request is otherwise improper, and sets out in detail the reasons for the refusal.
- [6] Although a notice to admit must adhere to a prescribed form, there is no prescribed form for a response. The response is a "written statement" made on behalf of the responding party, but it is not in affidavit form and it can be made (as it was in this case) by the responding party's counsel.
- [7] On September 30, 2019, counsel for the plaintiff delivered a notice to admit seeking some 160 admissions. The notice to admit attaches more than 650 pages of documents. The documents comprise communications between the parties' lawyers and contract documents.
- [8] The plaintiff seeks admission that the copies of the documents are true copies, that the dates and times emails were sent are correct, and that the individuals named in the various emails or letters sent and received them. On their face, the documents and facts appear to be uncontroversial and the defendant ought to have admitted them or at least explained why it could not make the admissions.
- [9] On October 11, 2019, counsel for the defendant delivered the response which stated "denied" next to each fact and each document. In the cover letter accompanying the response, counsel for the defendant wrote:

We would be pleased to consider a comprehensive document agreement closer to trial which not only addresses the authenticity of the parties' documents but addresses matters such as the authorship of a document, when the document was sent and received, and the manner in which it was delivered.

- [10] The plaintiff concedes that the response could not, at this point, be challenged because the defendant was entitled to issue a bare denial despite signalling the possibility of a document agreement that would accomplish the same objective as the notice to admit.
- [11] The notice to admit issue lay dormant for about eight months. Eventually, counsel for the plaintiff wrote counsel for the defendant on June 23, 2020 by email inviting the defendant to reconsider the response:

I should discuss a related issue with you now: that of the Notice to Admit I delivered dated October 11, 2019. By way of response to that notice, your client has actively asserted that each and every document referred to in the Notice to Admit is inauthentic. In the letter under cover of which the response was delivered, you advised that you would be willing to discuss a comprehensive document agreement closer to trial. This suggests that the assertion by your client of the inauthenticity of the documents is, at least in part, not a genuine denial, but rather simply a refusal to deal with the substance of the Notice to Admit until a later date, which is obviously not in keeping with the Rules and seems unreasonable. It also leads to a practical issue: I am unwilling to depend on the possibility that you will eventually agree to a document agreement that results in an unambiguous record. I will therefore be forced to put each document from the Notice to Admit to Mr. Mann at his examination and seek an admission, or determine the basis for his assertion that it is not a genuine document. As you can appreciate, that isn't likely to be an efficient use of time, especially where you and I both know that the documents as to which I sought admissions are utterly uncontroversial. You may of course take the position that proving the documents I want to prove is my problem, in which case I will simply press forward and let the chips fall as they may. But before we go down that unnecessary and potentially expensive toad, I thought I'd invite you to reconsider your client's response to the Notice to Admit; I do so now.

- [12] By return email June 24, 2020 (the "June 24 email"), counsel for the defendant responded:

With respect to your clients' Notice to Admit, we do not agree that our denial of authenticity equates to a positive assertion that the documents are "inauthentic"; it is simply a refusal to admit. Second, the fact that we proposed the possibility of a document agreement prior to trial does not make our denial less "genuine". Third, in our view, the Notice to Admit was wholly inappropriate. In almost all instances, the documents specified in the Notice were documents which my clients were not the author nor the recipient [sic].

Issues

- [13] The issues for determination on this application are:
- Should the statements made in the June 24 email be read together with the response? If so, do those statements establish that the defendant has failed to provide a response that complies with Rule 7-7?

- b) If the answer to (a) is "yes", should the response be struck and the facts and authenticity of the documents set out in the notice to admit deemed to be admitted?

Analysis

- a) Should the statements made in the June 24 email be read together with the response? If so, do those statements establish that the defendant has failed to provide a response that complies with Rule 7-7?

[14] Rule 7-7(2) requires a party who receives a notice to admit to do one of four things:

- a) make the admission sought, either expressly or by not responding to the notice to admit;
- b) specifically deny the truth of the fact, or the authenticity of the document;
- c) refuse to make the admission sought and explain why the party cannot make the admission;
or
- d) particularize an objection to the admission sought on the basis of relevance, privilege, or some other objection to the appropriateness of the admission sought.

[15] The purpose of Rule 7-7 is obvious on its face: a party should make concessions where appropriate so that the parties can focus their attention on the real issues in dispute. The principles of Rule 1-3 apply to Rule 7-7, as they do to all Rules. Accordingly, the object of Rule 7-7 is to secure the just, speedy, and inexpensive determination of the proceeding on its merits. The proceeding should be conducted in ways that are proportionate to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding.

[16] The defendant was entitled to respond to the notice to admit by simply invoking "denied" as Rule 7-7(2)(a) permits. The response is not sworn evidence and requires no justification for the position taken. If the position is unreasonable, the only recourse is an award of costs pursuant to Rule 7-7(4).

[17] The plaintiff says, however, that the June 24 email puts the response into a different category of permissible responses. The plaintiff says that the correct interpretation of the June 24 email is that the defendant was not specifically denying the admissions sought. Rather, the defendant was simply refusing to make the admissions, but without stating the reasons why as subrule (b) requires. Therefore, the plaintiff argues, the response is deficient by claiming a bare denial without reasons, blending the advantage of subrule (a) without paying the price of subrule (b).

[18] The defendant says that the response is proper on its face and that the June 24 email does not change the character of the response.

- [19] In my view, because the response is a "written statement" and not a pleading or an affidavit, the "written statement" may include written statements made after the delivery of the response. Therefore, I may take the June 24 email into consideration in determining whether the response complies with Rule 7-7.
- [20] Counsel for the defendant submits that the email exchange was a "philosophical" discussion of the meaning of "deny" versus "refusal to admit". I do not agree that "deny" means "refusal to admit" in the context of Rule 7-7. Subrule (b) requires the party responding to the notice to admit to "specifically deny" the facts and authenticity of documents. The rule does not contemplate a philosophical discussion between the parties on the meaning of "specifically deny" versus "refusal to admit", especially in light of the overlay of Rule 1-3 principles.
- [21] If the defendant was unable to admit the facts or documents because he was not the author or recipient, it ought to have made a response pursuant to Rule 7-7(2)(b), but only after taking steps to inform itself of the facts or documents: *Ceperkovic v. MacDonald*, 2016 BCSC 939, para. 36.
- [22] In the June 24 email, counsel for the defendant suggests that if the plaintiff wished to obtain admissions, counsel for the plaintiff could put the facts and documents to the defendant's representative at his examination for discovery, within the constraints of the seven hours permitted under the examination for discovery rule. In my view, this would be a waste of time when Rule 7-7 is available and, again, not in keeping with Rule 1-3 principles.
- [23] Although it is true that a party who unreasonably refuses to make admissions may face costs consequences, those consequences are inadequate compensation for an unreasonable refusal to make sensible admissions. The costs consequences come late in the proceeding and, unless the court awards special costs, the costs award would be less than the real cost to the party who sought the admissions.
- [24] Counsel for the defendant suggests I may take comfort in the defendant's willingness to enter into a document agreement. I do not take such comfort. A document agreement is not a substitute for a meaningful response to a notice to admit. A document agreement is not mandatory, although highly desirable, and is usually not made until close to trial. Until it is finalized, the party seeking the admissions has no idea whether the opposing party will, in fact, make the admissions. In short, it is no answer to a notice to admit to say that a document agreement may be coming later.
- [25] For the foregoing reasons, I conclude that the response does not comply with the requirements of Rule 7-7.
- b) Should the response be struck and the facts and authenticity of documents set out in the notice to admit be deemed to be admitted?

- [26] The plaintiff advances four grounds under Rule 9-5(1) that it says justify the response being struck: scandalous, frivolous, vexatious, or otherwise an abuse of the process of the court. The plaintiff does not specify which ground should apply.
- [27] The plaintiff cites Whalen Company v. Olympic International Agencies Ltd., 2017 BCSC 1771 in support of its position that the response should be struck. The court in Whalen found that the response was frivolous because it was without substance, was groundless, and trifled with the Rules. The response was "a waste of time": para. 48.
- [28] I take from the plaintiff's reliance on Whalen that its position on this application is that the response should be struck because it is frivolous.
- [29] The defendant did not comply with its obligations to provide a meaningful response given the overarching principles set out in Rule 1-3. The defendant responded in a perfunctory manner. The June 24 email establishes that the defendant did not make a genuine effort to comply with Rule 7-7. The response was frivolous. I, therefore, conclude that the response should be struck.
- [30] The remedy the plaintiff seeks is that the admissions sought are deemed admitted. I think that is too draconian a remedy. A fairer option would be a direction that the defendant provide a response that meaningfully addresses the requirements of Rule 7-7. However, that option is inefficient.
- [31] In my view, a third option would better reflect the principles set out in Rule 1-3. The notice to admit should be converted to interrogatories. Interrogatories would move the litigation forward in a way the Rules intend. By being required to answer the interrogatories in affidavit form, the defendant's representative is compelled to address his mind to the issues in the litigation and make a responsive statement. If the representative takes the position that he cannot answer the question because he is not the author or recipient of a piece of correspondence, he will be required to inform himself.

Conclusion

- [32] The response is struck.
- [33] Pursuant to Rule 7-3(1)(b) the plaintiff, at its sole option, may serve interrogatories on the defendant in the form of the notice to admit, adapted as necessary to conform with Form 24 on the following terms and conditions pursuant to Rule 7-3(3):
- a) there is no requirement to serve copies of the documents that have already been served with the notice to admit;
 - b) the defendant's representative must inform himself as necessary in accordance with Rule 7-2(22); and

- c) the time for service of the affidavit in answer to the interrogatories will be 45 days from the delivery of the interrogatories to counsel for the defendant.
- [34] If I am incorrect in determining that the response should be struck and the plaintiff granted leave to serve interrogatories, I would have extended the time limited for the examination for discovery of the defendant's representative beyond the prescribed seven hours. I would extend the examination for discovery to ten hours on the basis that if the plaintiff were required to put every fact and document referenced in the notice to admit to the defendant's representative, a great deal more time than seven hours would be required. Such a result, however, would be an unfortunate waste of time and not in keeping with the object of the Rules.
- [35] The defendant will pay the plaintiff its costs of this application in any event of the cause.

"Master Harper"

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