

CANADA / JUDGMENT

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

2021 BCSC 2498

COURT

Supreme Court of British Columbia

DECIDED

8 October 2021

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2021 BCSC 2498 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., 2021 BCSC 2498 Date: 20211008 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. Defendants by Counterclaim Before: Master Vos Oral Reasons for Judgment In Chambers (Hearing proceeded via teleconference) Counsel for the Plaintiff: M.L. Bromm Counsel for the Defendant: S. Batkin (October 6) A.J. Piercy (October 8) Place and Date of Hearing: Vancouver, B.C. October 6, 2021 Place and Date of Judgment: Vancouver, B.C. October 8, 2021

- [1] THE COURT: The plaintiff, Bene (Oval) Development Ltd. ("Bene Oval"), applies for an order that would confirm it is entitled to conduct an examination for discovery of Dorwin Cho, as an agent of the defendant, 1148538 B.C. Ltd. ("114"). The defendant opposes the application. The defendants by counterclaim did not file an application response and did not participate in the hearing.
- [2] This decision is being delivered as oral reasons. If the oral reasons are transcribed, I may edit them to include references to background information and to clarify the judgment in written form. The result and the core analysis will not change.

Background

- [3] By way of a contract of purchase and sale dated January 10, 2018 (the "Contract"), 114 agreed to purchase two adjacent commercial properties from Bene Oval. The Contract provided that 114 could complete the purchase by way of an asset purchase or a share purchase. The clause relating to the share purchase option indicated that a share purchase would be "pursuant to a share purchase agreement in a form acceptable to both parties' solicitors acting reasonably."

- [4] 114 elected to complete the purchase by share purchase.
- [5] Bene Oval took the position that the share purchase arrangement proposed by 114 was not contemplated by the Contract.
- [6] Ultimately, the transaction collapsed.
- [7] This action concerns the failed transaction. On August 2, 2018, two days after the purchase failed, Bene Oval commenced the action.
- [8] The trial of this action had been scheduled for a six-day hearing starting on October 13, 2020, but that trial date was adjourned by consent. The trial has not been reset.
- [9] The defendant filed a notice of application on June 16, 2021, seeking summary judgment that would dismiss the plaintiff's claims. A hearing date is not set for that application. Counsel for the plaintiff indicated the plaintiff may bring on an application seeking summary judgment for the damages it claims in this action. The materials for such an application have not been filed with the court.
- [10] Counsel for the defendant has conducted an examination for discovery of the principal of plaintiff, Bene Oval.
- [11] 114 nominated its sole director, Mr. Mann, as its representative for the plaintiff's examination for discovery the defendant. Plaintiff's counsel initially went along with that suggestion and scheduled an examination for discovery of Mr. Mann for July 24, 2020. Nevertheless, in an email to 114's counsel dated June 23, 2020 (attached as Exhibit "F" to Brian Chung's first affidavit, made July 8, 2020) plaintiff's counsel advised defence counsel that he was most interested in conducting his examination for discovery on a specified issue. He indicated that he assumed 114's nomination of Mr. Mann as their representative for an examination for discovery meant that 114 regarded Mr. Mann as the most knowledgeable person on that issue. Plaintiff's counsel's email went on to say that if someone else was more knowledgeable on the specified issue, he wanted to examine that person. In other words, plaintiff's counsel took the nomination of Mr. Mann as 114's representative for an examination for discovery but reserved consideration of a more appropriate representative.
- [12] In September 2019 the plaintiff had delivered a lengthy notice to admit to the defendant, seeking admissions as to the authenticity of nearly 700 pages of documents. In its response to the notice to admit, the defendant denied the authenticity of the documents. On July 8, 2020 the plaintiff filed a notice of application seeking an order to strike the defendant's response to the notice to admit. In the time leading up to the hearing of the application, plaintiff's counsel became concerned that if he had to question 114's representative at an examination for discovery about the authenticity of each document, the examination could take a very long time. He decided to wait until after the application seeking to strike the defendant's response to the notice to admit was determined before proceeding with an examination for discovery. He therefore cancelled the examination for discovery he scheduled for Mr. Mann and released Mr. Mann from the appointment to examine for

discovery that had been served. The plaintiff has not re-scheduled an examination for discovery of Mr. Mann.

- [13] The plaintiff's application to strike the defendant's response to the notice to admit was heard on September 24, 2020. In reasons for judgment dated October 29, 2020, Master Harper struck the defendant's response to the notice to admit. She went on to order that the plaintiff, at its sole option, could serve interrogatories on the defendant in the form of the notice to admit. The plaintiff did so. The defendant responded to the interrogatories by way of an affidavit made by Mr. Mann. In that affidavit, Mr. Mann provided admissions as to the authenticity of the documents.
- [14] The plaintiff now wishes to conduct its examination for discovery of Dorwin Cho. He was 114's solicitor for the transaction. The plaintiff contends that Mr. Cho acted as an agent on behalf of 114 and was involved in matters relating to the transaction and the share purchase agreement negotiations.

Analysis

- [15] The plaintiff's application to examine Mr. Cho as an agent of the defendant, is pursuant to Rule 7-2(5)(c)(ii) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"), which provides: Examination of a party that is not an individual
- (5) Unless the court otherwise orders, if a party to be examined for discovery is not an individual,
 - (a) the examining party may examine one representative of the party to be examined,
 - (b) the party to be examined must nominate as its representative an individual, who is knowledgeable concerning the matters in question in the action, to be examined on behalf of the party, and
 - (c) the examining party may examine
 - (i) the representative nominated under paragraph (b), or
 - (ii) any other person the examining party considers appropriate and who is or has been a director, officer, employee, agent or external auditor of the party to be examined.
- [16] Whether a lawyer who has acted for a party can be examined as an agent for that party was considered by our Court of Appeal in *Penderville Apts. Development Partnership v. Cressey Dev. Corp.*, [1990] B.C.J. No. 278. In that case, the plaintiff alleged that a lawyer who acted for the defendant not only provided advice and drafted documents on behalf of the defendant, but also acted as an agent of the defendant. At pp. 12-13 of the reasons, the court characterized the plaintiff's application as seeking evidence of "the matrix of facts in which the agreement was set", quoting Lord Wilberforce in *Prenn v. Simmonds*, [1971] 3 All E. R. 237 H.L. at 239. On behalf of the court, Justice Southin went on to say (at p. 14): The matrix does not include either party's own reasons for wanting a particular clause or form of words

used in a document or any particular subject addressed by it. The matrix is the genesis, aim and object of the whole transaction -- the sort of thing that was once contained in recitals to instruments. Thus, I am tentatively of the opinion that this proposed examination will be useless in the sense that the questions and the answers will all fall afoul of the animadversions of Lord Wilberforce in *Prenn v. Simmons*, supra, in the passage beginning at p. 240(f) and continuing to p. 241(g). But although that may be so and although Mr. MacRae might refuse and rightly refuse to answer such questions, the question remains whether the plaintiffs are entitled to have him appear for examination for discovery just in case their counsel may have some proper questions to ask as to what took place in the period leading up to the execution of the instrument in question.

- [17] At p. 15 of the reasons, Southin J. said: In my view, anyone who does something for another is for that very limited purpose an "agent". That it seems to me is the rationale of the judgment of this court in *Karl's Sporthaus Ltd. v. Allstate Insurance Company of Canada* (1983), 44 B.C.L.R. 169. In that secondary sense, Mr. MacRae was, at the time in question, the agent of his client and, thus, is within the literal meaning of Rule 27(4). It follows that the appellant is entitled to obtain an appointment to examine Mr. MacRae. The appointment being obtained and served, the Rule requires that the person to be examined "shall attend and submit to examination".
- [18] In *Le Soleil Hospitality Inc. et al, v. Louie et al*, 2006 BCSC 303, the plaintiffs provided notice to the defendants indicating they wanted to conduct an examination for discovery of a lawyer who had acted for one of the defendants, on the basis that the lawyer was an agent of the defendant. The defendants then applied for an order that would require the plaintiffs to examine someone other than the lawyer. The court noted that the lawyer had a role in a related injunction proceeding and that the lawyer had instigated and participated in a meeting that resulted in a letter of intent concerning general terms of agreement between the parties. At para. 29, the Court concluded the lawyer fit within the category of agent under the applicable rule, referring to the passage in *Penderville* concerning an "agent" under the rule (quoted above). The Court held that it was appropriate for the plaintiffs to examine the lawyer as an agent of the defendants (para. 33).
- [19] In the present case, there is no real doubt that Mr. Cho fits within the description of agent as set out in *Penderville*. The plaintiff has shown that Mr. Cho acted for the defendant on matters relating to the proposed share purchase arrangement and may have knowledge of the matrix of facts regarding the genesis, aim and object of the proposed arrangement. Plaintiff's counsel points out that many of the nearly 700 pages of documents included in the plaintiff's interrogatories were letters and emails between Mr. Cho and Bene Oval's lawyer. The application record includes Mr. Cho's first affidavit for this case, made June 11, 2021. The affidavit shows that Mr. Cho had a significant role with respect to dealings between the parties.

- [20] The defendant opposes the application, arguing that the plaintiff has elected to examine Mr. Mann as the representative for the defendant and should complete its examination of Mr. Mann. The defendant takes the position that once the plaintiff completes its examination for discovery of Mr. Mann it would only be able to conduct an examination of Mr. Cho if it meets the test that applies for a second examination for discovery of a representative of a party who is not an individual. The defendant also points out that the request to examine Mr. Cho was only presented after the defendant served the application materials for its summary judgement application, which included an affidavit from Mr. Cho. The defendant submits that the plaintiff's application should have been to examine Mr. Cho on his affidavit.
- [21] The defendant's argument that the plaintiff should only be entitled to seek an examination for discovery of Mr. Cho as a second examination of a representative of the defendant is based on a false premise. It would require the court to rule that, for purposes relating to the determination of who can be examined for discovery on behalf of a company, service of an appointment to examine for discovery is equivalent to conducting an examination. It is not. The law is not to be applied in such a technical, illogical manner.
- [22] All the plaintiff did was schedule an examination of Mr. Mann. The plaintiff never proceeded with an examination of Mr. Mann and specifically released him from his obligation to attend at an examination for discovery.
- [23] To find that the plaintiff has somehow irrevocably elected to proceed with an examination for discovery of Mr. Mann as the representative of the defendant would be unfair. It also would ignore the reality that lawsuits are dynamic and parties to an action sometimes need to alter their course of action as the case develops.
- [24] The defendant also argues that the plaintiff should be required to conduct its examination for discovery of Mr. Mann, rather than Mr. Cho, because it was Mr. Mann who provided the affidavit to answer the plaintiff's interrogatories. Counsel for the defendant provided no case authority in support of this proposition. The argument will not prevail here. Rule 7-2(5) does not limit who can be examined as a representative for a company simply because the company provided answers to interrogatories.
- [25] The plaintiff has not yet commenced an examination for discovery of a representative of the defendant. Under Rule 7-2(5), the plaintiff may choose to not examine the representative nominated by the defendant and may proceed with an examination of an agent of the defendant. The plaintiff is within its right to elect to examine Mr. Cho as an agent of the defendant. This would be the plaintiff's first examination of a representative of the defendant and would not be limited to an examination on matters stated in the affidavit Mr. Cho provided for the defendant's summary judgment application. Result
- [26] The application at part 1, para. 1 of the plaintiff's notice of application filed July 7, 2021 is granted.
- [27] Are there submissions on costs? [DISCUSSION RE: COSTS]

[28] The default order on a chambers application is that costs be determined as costs in the cause. That would be the appropriate order on this application. The plaintiff was successful on its application. It is entitled to costs of the application as costs in the cause, pursuant to Rule 14-1(12). "Master Vos"

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