

CANADA / JUDGMENT

Concord Pacific Acquisitions Inc. v. Oei

2020 BCSC 368

COURT

Supreme Court of British Columbia

DECIDED

28 February 2020

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2020 BCSC 368 Concord Pacific Acquisitions Inc. v. Oei

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Concord Pacific Acquisitions Inc. v. Oei,

2020 BCSC 368

Date: 20200228

Docket: S158989

Registry: Vancouver

Between:

Concord Pacific Acquisitions Inc.

Plaintiff

And

Hong Leong Oei, Hong Kong Expo Holdings Ltd.

and Canadian Metropolitan Properties Corporation

Defendants

Before: The Honourable Mr. Justice Voith

Oral Ruling Re Application for Special Costs

In Chambers

Counsel for the Plaintiff and Terry Hui:

C.P. Dennis, Q.C.

G.R. Hall

R. Power

Counsel for the Defendants:

I. Nathanson, Q.C.

Counsel for One West Holdings:

D. Brown

Place and Date of Hearing:

Vancouver, B.C.

February 26, 2020

Place and Date of Ruling:

Vancouver, B.C.

February 28, 2020

- [1] THE COURT: The defendants, Hong Leong Oei, Hong Kong Expo Holdings Ltd. and Canadian Metropolitan Properties Corporation ("the Defendants") seek special costs of this proceeding against the plaintiff, Concord Pacific Acquisitions Inc. ("Concord") and a non-party, Mr. Terry Hui. A special costs award against Mr. Hui will apparently be advanced on the basis that he was the directing mind of Concord.
- [2] Still further, the Defendants seek an order that if Concord or Mr. Hui fail to pay the costs that are awarded within seven days of assessment, that One West Holdings Ltd. ("One West"), the apparent parent company of Concord, be required to pay such assessed costs to the Defendants. Each of Concord, Mr. Hui and One West intend, based on their Application Responses, to raise various substantive issues in response to the applications brought by the Defendants. In the first instance, however, they argue that the Defendants' application should be adjourned. These reasons for judgment only address that first issue.
- [3] The application to adjourn the Defendants' motion was advanced on two broad bases. The first such basis, raised by One West, who was separately represented on the application, was that counsel for One West had only recently been retained. He had accordingly not had time to fully consider the application. This included, among other things, the issue of what, if any, evidence should be filed on behalf of One West. This first issue, by reason of various modest scheduling accommodations, has become academic.
- [4] The second and principal basis for the application to adjourn the Defendants' motion was advanced by counsel for Concord. To fully understand these various submissions, it is necessary to have some background in relation to the action that was brought by Concord as well as in relation to both the various findings I made and the conclusions I reached. Those

findings and conclusions are found in reasons for judgment that are indexed at Concord Pacific Acquisitions Inc. v. Oei, 2019 BCSC 1190 ("the Trial Reasons"), The opening paragraphs of the Trial Reasons succinctly describe the action and the issues it raised:

- [1] On May 14, 2015, the Plaintiff, Concord Pacific Acquisitions Inc. ("Concord") and the Defendants, Mr. Hong Leong Oei and Hong Kong Expo Holdings Ltd. ("H.K. Expo"), signed a two-page document described as the Heads of Agreement (the "Heads"). The Heads addressed the purchase by Concord, or an affiliate, of a 50% interest of H.K. Expo. H.K. Expo indirectly owned a significant piece of waterfront property in downtown Vancouver. The Heads further addressed the intended joint development of those lands by the parties.
- [2] The parties, in the weeks and months that followed, sought to negotiate various agreements that would reflect these intended arrangements and that were necessary to give effect to them. They were, for various reasons, unsuccessful in their efforts. It is their respective agreements, positions and conduct in the period from shortly before May 14, 2015 to early October 2015 that underlie this action. On October 4, 2015, Concord was served with a claim by the Defendants, for breach of contract, in the High Court of Singapore.
- [3] Concord commenced this action on October 30, 2015. The action raises numerous issues. The primary issues are:
- i) Did the parties create an enforceable agreement on May 14, 2015?
 - ii) In the alternative, did the parties create an enforceable agreement to negotiate?
 - iii) Did the Defendants, in the circumstances of this case, owe Concord a duty to either negotiate or to perform in good faith? One of those circumstances is that Concord was not itself forthright or honest in its dealings with the Defendants.
 - iv) If the Defendants did owe Concord a duty to perform in good faith, did they breach that duty?
- [5] Concord's action, in terms of the financial issues that were involved, also provides perspective on the action. The development lands that were at issue were valued by the parties at \$500 million. In the Trial Reasons I said:
- [35] In earlier applications brought before me, this development was described as a "multiyear billion-dollar development". The Plaza Lands were slightly larger than 13 acres. Various pro forma statements that were generated by the parties after May 14 contemplated a development of nearly 2,000,000 ft.² that consisted of approximately 1,400,000 ft.² of residential development, 200,000 ft.² of social housing, 350,000 ft.² of commercial development and approximately 145,000 ft.² of projects that would be for the benefit of the community such as daycare and activity centres. These early pro forma statements anticipated that the hard and soft costs of the development would approach \$1.4 billion.

- [6] I ultimately dismissed Concord's claim in its entirety: para. 517 of the Trial Reasons. I also made various adverse findings in relation to the credibility of Concord's two principal witnesses, Mr. Ju and Mr. Hui. It is those adverse findings which ground the Defendants' present application for special costs. Specifically, and based on the Defendants' Notice of Application, it will be argued that Concord, through its witnesses, sought to "fabricate a claim to advance a self-serving story" and "gave false evidence to mislead the court".
- [7] The Defendants' materials indicate that the total amount claimed for special costs, including fees, disbursements and taxes, will be in excess of \$6 million. I have case managed this action from the outset and I addressed most, but not all, of the applications that preceded the trial itself. It is important that Concord has appealed my judgment. I was advised that Concord has not yet filed its factum and that no date for the hearing of the appeal has yet been secured.
- [8] With this backdrop, I return to the submissions of Concord and Mr. Hui as well as to the response of the Defendants to those submissions. Concord advanced three principal submissions in support of an adjournment. The first of these submissions has two somewhat related branches. Concord argues that addressing the Defendants' special costs application gives rise to the risk that I might inadvertently say something in my reasons for judgment that would assist one or the other of the parties on appeal.
- [9] In the second branch of Concord's first submission, it is suggested that I should be mindful of the possible perception that, in addressing the special costs application, I would attempt to uphold or bolster the Trial Reasons. Counsel made clear that he was not suggesting I would actually endeavour to do this. Central to this first issue is an understanding of the focus of Concord's appeal. Thus, if that appeal sought, for example, to challenge the findings of fact I made in the Trial Reasons, my reviewing or revisiting those facts, albeit in a different context, would be a clear difficulty. Conversely, an appeal that was based on one or more of the many legal issues that were addressed in the Trial Reasons would be a less obvious basis for concern.
- [10] I was advised by counsel for Concord, and recognizing that it had not yet filed its factum, that its appeal would not directly challenge the findings of fact that were made at trial. Instead the focus of its appeal would likely be on the legal test for whether the essential terms required to form a binding contract were satisfied in this case. To be clear, it will likely be argued that I concluded that it was necessary for the parties to agree on more than was legally required. It would also, however, likely be argued that part of this error was influenced by my perception of the witnesses.
- [11] In support of its position, counsel for Concord argued, based on the submissions in the Defendants' Notice of Application, that I would be asked on the special costs application to go beyond the findings I made in the Trial Reasons. He gave several examples of this. I will only address the first of these examples. In para. 5 of the Defendants' Notice of Application they assert that:

5. ... Messrs. Hui and Ju, both during and in advance of trial - fabricated a false narrative in order to fill in important gaps in the parties' existing negotiations. ...
- [12] Counsel for Concord argues I made no such findings in the Trial Reasons.
- [13] Counsel for the Defendants, in turn, argues that the Defendants do not seek or need to go beyond the findings in the Trial Reasons. Instead the Trial Reasons give rise to or ground the specific submissions the Defendants will make. In support of these submissions, counsel for the Defendants also provided various examples. Two such examples are sufficient for present purposes to address the first illustration of difficulty that Concord provided. The first such example relates to whether the parties ever came to agreement on a particular tax issue that was described in the Trial Reasons as "the Deferred Tax Issue". In the Trial Reasons, I said:
- [219] Nevertheless I wish to address the evidence that Concord relies on in support of its position that a term, that the Defendants would be responsible for the Deferred Taxes, can be implied into the Heads. I do so because this evidence reflects a further lack of candor on the part of Concord. This particular thesis finds support in the 4th ANOC and in the April 20 Particulars and, specifically, in the assertion that "any value increments or decrements between the value of the Lands and the value of the Expo shares were to Oei's account. This by necessity required Oei to assume responsibility for the Land Profit Tax".
- [220] This thesis was developed, in the evidence of Mr. Hui and Mr. Ju, on the basis that the agreement of the parties contemplated "a clean balance sheet". I have earlier said that each of Mr. Hui, in the context of the private meeting, and Mr. Ju, in the context of the larger meeting, stated that there had been some discussion of "balance sheets" or "clean balance sheets".
- [221] Concord's evidence of an agreement based on "fresh balance sheets" is one of several examples of Concord advancing a narrative in its direct evidence that was intended to support a legal thesis advanced in its pleadings, but that fell apart on cross-examination. Both Mr. Hui and Mr. Ju resiled, in their cross-examinations, from the suggestion that there was any explicit discussion of either "balance sheets" or "clean balance sheets" on May 14. Furthermore, each of Mr. Oei and Mr. Chu denied there was any discussion, on May 14, of the working capital or the balance sheets of either H.K. Expo or CMPC. Finally, there was no expert or other evidence that suggested that, as of May 14, the future contingent tax liability of CMPC would be considered a balance sheet item in a financial statement.
- [222] I do not accept that the parties ever discussed or agreed that the Heads would be governed on the basis of CMPC having a clean balance sheet. Nor is there any other foundation in the evidence for the implied term that Concord seeks to import into the Heads.

- [14] A second example that is relied on by the Defendants is found at para. 100 of the Trial Reasons and in the paragraphs that follow thereafter. This example relates to two alternate theories of liability that were advanced by Concord in its pleadings and that were advanced by it at an earlier summary trial application. These theories were based on the parties having agreed on the terms of a contract on either August 19, 2015 or October 3, 2015. At para. 100 of the Trial Reasons, and in relation to the August 19 contract, I said:
- [100] It is difficult to fully identify the difficulties with Mr. Ju's evidence. That evidence advances a fiction. It was a fiction at the time of the Summary Trial Application and, unfortunately, Mr. Ju sought to perpetuate that fiction at trial. Mr. Chu denied making any such agreements or communicating any such advice from Messrs. Henshall and Axworthy.
- [15] At para. 104 of the Trial Reasons and in the paragraphs that follow, I expressed similar concerns in relation to Mr. Ju's evidence about the October 3 contract. I have referenced these paragraphs only to address the submission that I would be asked on the special costs application to go beyond the findings in the Trial Reasons. It is not clear to me that that is so. Whether the findings I made in the Trial Reasons are sufficient to warrant or justify the exceptional remedy of special costs is a very different issue and would be for another day. Still further, and to the extent counsel for the Defendants strayed in their submissions from the findings in the Trial Reasons, I have no doubt that failing would be addressed by counsel for Concord.
- [16] A further issue is relevant. The Defendants will seek, as I have said, to make Mr. Hui and potentially One West responsible for any special costs award that might be made. This aspect of the Defendants' application appears to be relatively independent of the issues that were raised at trial or that are addressed in the Trial Reasons.
- [17] Similarly, Concord in its Application Response takes five alternative positions. Four of those positions appear to have little, if anything, to do with the Trial Reasons or Concord's appeal. Thus, Concord argues that the Defendants, by virtue of deficiencies in their document production, are not entitled to any costs. Alternatively, they argue that Concord was successful at trial and should have its costs. Alternatively, they argue that each party should bear its own costs.
- [18] A fourth issue Mr. Hui raises is that there is no basis to make an order of special costs against Mr. Hui. This issue, based on Concord's Application Response, appears to be based on legal and factual issues that are relatively distinct from the issues raised on Concord's intended appeal.
- [19] Based on the foregoing considerations, I do not consider that there is any real risk the reasons I would issue on the Defendants' special costs application or on the other issues the parties will raise would assist one or the other of the parties on Concord's intended appeal. Similarly, while I appreciate that with a pending appeal the Court must be perceived to be acting even-handedly, I view this too, in real terms, to be of limited concern. First, the parties to this litigation are exceptionally sophisticated. They understand the workings of

the Court far better than most litigants.

- [20] Second, the reality is that trial judges address the factual and legal issues that are placed before them on a daily basis. They do so without seeking to either insulate their reasons from appeal or otherwise improperly influence the outcome of any appeal the parties may thereafter advance.
- [21] The second and third issues that were raised by Concord in support of an adjournment are somewhat related, and I propose to address them concurrently. Counsel argued both that the Defendants will suffer no prejudice if their special costs application is adjourned and that judicial economy militates in favour of an adjournment.
- [22] The parties have agreed, subject to certain other issues that were argued on the same day as Concord's adjournment application and that I will be required to address in separate reasons, to have \$10 million paid into Court. That \$10 million represents the initial payment that Concord made to the Defendants in May 2015 shortly after the parties signed a document known as the Heads of Agreement. Those funds have been held by the Defendants since that time. With this payment into court, Concord argues that the Defendants' interest in any potential special costs award is secured and that it will not be prejudiced by an adjournment. In relation to the issue of judicial economy, Concord argues that if it is successful on appeal, the issue of special costs becomes academic and a costs hearing will have served no purpose.
- [23] The Defendants respond to both these submissions concurrently. In response to the issue of prejudice, they argue that this matter may continue for some years. Following Concord's appeal and receipt of reasons from the Court of Appeal, one or other of the parties may seek leave to appeal that decision. It would be wrong, and prejudicial to the Defendants, to require them to wait until these matters were fully concluded before the Defendants could advance their special costs application. This same submission underlies their submission on judicial economy. They argue that it would much more efficient to have all trial issues, including costs, determined and to then place these various issues before the Court of Appeal so that they can all be determined concurrently.
- [24] On balance I agree with the Defendants. This is so for various reasons. The parties agree that there is no binding authority that guides or determines the outcome of this application. Instead its outcome requires the exercise of judicial discretion. There are, however, various additional factors that I believe inform that discretion. First, R. 1-3 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 confirms the object of the Rules and the importance of proportionality. Here, very significant sums of money are at issue, and the legal issues that were raised were relatively complex. Nevertheless, the timely resolution of the whole of the dispute between the parties remains important.
- [25] In this case, approximately four and a half years have passed since the action was commenced. It is not unlikely that several more years may pass before the appeals from the substantive issues that are raised by the Trial Reasons are concluded. It is similarly not

unlikely that the outcome of the Defendants' special costs application would be appealed by one or the other of the parties. This litigation has been hard fought. The special costs application involves a reasonably significant sum of money and it raises numerous legal issues. It is not, on balance, desirable that the Defendants would, if successful in the main appeal, then have to begin to determine the appropriate measure of the costs they were entitled to and to address any appeals that might follow from that determination.

- [26] A case in point is the very recent decision of the Court of Appeal in *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69. That case and its related decision took well over a decade to conclude. The trial judge's reasons for judgment, which included a special cost award, were appealed and upheld. Leave was sought from that appeal and denied. Special costs were then assessed, and that assessment was then appealed - first to the trial court and then to the Court of Appeal.
- [27] A further factor that is relevant to the exercise of my discretion is the Court of Appeal's general preference to have the various matters that arise from a trial and that may have been heard separately, advanced at the same time so that those various matters can be addressed concurrently. Thus, it is common, but not invariable, to have both the decision of a trial judge on an action, as well as a separate and subsequent decision of that trial judge on costs, or double costs, or special costs before the Court of Appeal when the appeal is heard: see for example *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15; *Pallot v. Douglas*, 2017 BCCA 254; *Chemainus Park Holdings Ltd. v. Island Timberlands GP Ltd.*, 2015 BCCA 325; *Oh v. Usher*, 2010 BCCA 429, leave to appeal ref'd, [2011] S.C.C.A. No. 123; and *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2015 BCCA 170.
- [28] A final consideration is that the parties have not yet filed their factums - though Concord hopes to do so in the next month or so. The Defendants' intended special costs application can be heard within approximately ten days. Depending on the outcome of that application, one of the parties may seek to appeal. If Concord chose to appeal, its appeal of the trial decision would not, however, be delayed in any meaningful way.
- [29] For the reasons I have described, Concord's application to adjourn the Defendants' application for special costs is dismissed.
- [30] Does anything arise from these reasons?
- [31] MR. NATHANSON: I would ask that there be an order for costs to the Defendants.
- [32] THE COURT: Counsel, did you hear that? Mr. Hall?
- [33] MR. HALL: Yeah, barely. I am having difficulty hearing. I assume there was a request for costs.
- [34] THE COURT: There was, by Mr. Nathanson. He seeks costs of the application.

- [35] MR. DENNIS: If Mr. Hall - with his permission, I would simply propose that the costs of this application be dealt with in the cause as part of costs of the special costs application.
- [36] MR. HALL: Yeah.
- [37] THE COURT: As part of the special costs application. Can I just ask you this question? One of the things that Mr. Nathanson seeks, if I remember the application properly, is special costs of the special costs application. You are not suggesting that that would ensue; you simply suggest that I deal with everything at the same time?
- [38] MR. DENNIS: Yes. Once you have made - determined the outcome of special costs.
- [39] THE COURT: All right. That seems appropriate, Mr. Nathanson?
- [40] MR. NATHANSON: Yes. I am content with that, My Lord.
- [41] THE COURT: All right. That is the order I will make.
- "Voith, J."

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Prepared on 25 October 2026 · Esheria