

CANADA / JUDGMENT

Concord Pacific Acquisitions Inc. v. Oei

2020 BCSC 832

COURT

Supreme Court of British Columbia

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2020 BCSC 832 Concord Pacific Acquisitions Inc. v. Oei

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Concord Pacific Acquisitions Inc. v. Oei,

2020 BCSC 832

Date: 20200604

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

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

February 26, 2020

Dates of Further Written Submissions:

May 15, 25 and 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 4, 2020

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- [1] The Defendants, in their Notice of Application, seek an order pursuant to R. 13-2(31) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules") and the inherent jurisdiction of the Court for a stay of execution of any order requiring the Defendant, Mr. Hong Leong Oei, to return the sum of \$10 million to the Plaintiff pending:

The determination of: (i) the defendants' motion for special costs, and if granted, the determination of the amount and payment of those costs; (ii) the plaintiff's appeal from the trial judgement in the within action, in any proceedings arising from that appeal; and (iii) the action commenced by the defendants against the plaintiff and Terry Hui (Vancouver Registry No. S-161950: the "Abuse of Process Action").

- [2] Prior to this application being heard, counsel for the parties agreed on the first two conditions that are described in the preceding paragraph. Accordingly, the only remaining issue on this application is whether the stay that is sought by the Defendants should also be subject to the third condition, that being the determination of a separate abuse of process claim that has been brought by the Defendants against Concord Pacific Acquisitions Inc. ("Concord") and Mr. Terry Hui (the "Abuse of Process Claim").

BACKGROUND

- [3] The present application requires a proper understanding of various different, but nevertheless interrelated, proceedings and earlier determinations.
- [4] In May 2015, the parties signed a two-page document described as the Heads of Agreement (the "Heads"). That document pertained to the purchase by Concord, or an affiliate, of a 50% interest in the defendant, Hong Kong Expo Holdings Ltd. ("H.K. Expo").
- [5] H.K. Expo indirectly owned a significant piece of waterfront property in downtown Vancouver. The Heads further addressed an intended joint venture development of those lands by the parties. The lands that were the subject of the intended transaction were described by the parties as the Plaza Lands.
- [6] One aspect of the Heads expressly required Concord to make an initial payment of \$10 million to Mr. Oei who owned the shares of H.K. Expo. That payment was made and it is that \$10 million payment that is the subject matter of this application.
- [7] In the months that followed, the parties sought to negotiate various agreements that would reflect the intended arrangements that were contemplated by the Heads. They were, for various reasons, unsuccessful in their efforts. Concord commenced an action against the Defendants on October 30, 2015 (the "Main Action"). I case managed the Main Action for several years and heard a number of interlocutory applications. The trial of the action commenced in October 2018. Following a trial that occupied more than 40 days I dismissed Concord's action. My reasons for judgment are indexed at 2019 BCSC 1190 (the "Trial Reasons"). That judgment has been appealed by Concord though Concord has not yet filed

its factum and no dates have been set for the appeal.

[8] The following paragraphs of the Trial Reasons describe the parties:

[10] At all material times, Mr. Oei owned both shares of H.K. Expo. H.K. Expo is incorporated in Hong Kong and it owned 100% of the shares of Canada Metropolitan Properties Corp. ("CMPC") as its only asset. CMPC, in turn, held title to the Plaza Lands as its only major asset. As such, H.K. Expo indirectly owned or controlled the Plaza Lands.

i. The Plaintiff and its Witnesses at Trial

[11] The Plaintiff is part of the Concord Pacific Group--one of the largest residential developers in Canada. At the time of this trial, it had projects in British Columbia, Ontario, Calgary, Seattle and London (England). It employed approximately 200 people.

[12] Concord is led by Mr. Hui, its CEO and President. ...

[13] Mr. Ju is a vice president of Concord. ...

...

[16] Mr. Chu is Mr. Oei's brother-in-law. ... He continues to be the President of CMPC today.

[9] Several further facts provide some context for the Main Action. In May 2015, Mr. Hui and Mr. Oei agreed, in concept, on a price of \$500 million for the Plaza Lands: Trial Reasons at para. 52. Furthermore, 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.

[10] Finally, in the Trial Reasons and under the heading "The History of these Proceedings and Related Actions" I said:

[45] Finally, Mr. Oei, H.K. Expo and CMPC have commenced a separate abuse of process action in this Court, under Action Number S161950, against Concord and Mr. Hui, alleging that the instant action was commenced for the sole purpose of preventing the Defendants from selling or developing the Plaza Lands (the "Abuse of Process Claim"). Concord and Mr. Hui filed a Response and an Amended Response, respectively, to that claim.

- [11] The Abuse of Process Claim, described in para. 45 of the Trial Reasons, is central to this application. In that claim Mr. Oei, H.K. Expo and CMPC are the plaintiffs. Concord and Mr. Hui are the defendants. The essence of the claim is captured in the following paragraphs of the Amended Notice of Civil Claim in the Abuse of Process Claim:
11. The allegations of Concord in the Amended Notice of Civil Claim that an agreement was concluded between Concord and these plaintiffs between May and August 2015, and on the terms alleged in the Amended Notice of Civil Claim, were entirely false and were known by the defendants to be false
 12. Terry Hui and Concord deliberately, with knowledge of the falsity of the claims advanced by Concord, as alleged in the original Notice of Civil Claim and in the Amended Notice of Civil Claim, and continued in subsequent amendments, determined that these claims would be advanced for the purpose of seeking to constrain the ability of the plaintiffs to deal with the Lands or to develop the Lands by means of a partnership or joint venture with other Canadian developers. In advancing these false claims, the defendants knew: (a) that the result of such claims would be that no other developers or others would enter into agreements with the plaintiffs for the development of the Lands as a mixed-use residential and commercial project; to act as general contractor for the construction of the project; to manage the marketing and sale of all residential condominiums in the project; to manage the lease-up of commercial space in the project, the ongoing leasing and other property operating matters relating to the commercial space; (b) the plaintiffs did not have the expertise to perform the services and required the retainer of third parties to do so; (c) the plaintiffs would be unable to sell the Lands while those claims were extant. The defendants thereby sought to induce or compel the plaintiffs, and particularly the plaintiff Oei, to continue negotiations with Concord for the purpose of entering into agreements by which Concord would have an indirect interest in the Lands and obtain for itself, or one of its affiliates, agreements to develop, construct, market and sell and/or lease the Lands.
- [12] Concord thereafter applied to dismiss the Abuse of Process Claim under R. 9-5(1)(a) and (d) on the basis that the claim did not disclose a cause of action. I dismissed Concord's application in reasons for judgment that are indexed at 2018 BCSC 1346. That determination was appealed by Concord. No decision has yet been rendered by the Court of Appeal. I have no knowledge of what, if any, further steps have been taken in the Abuse of Process Claim.
- [13] A third set of related considerations arises from the fact that I made various adverse findings of credibility against Mr. Hui and Mr. Ju in the Trial Reasons. The Defendants have given notice that they intend, in this action, to seek special costs against Concord and Mr. Hui. The Defendants have also given notice that they seek an order that if Concord and/or Mr. Hui fail to pay the costs that are being sought, One West Holdings Ltd., the parent company of Concord, will be required to pay such costs to the Defendants. Concord then applied to adjourn that special costs application until after the hearing of its appeal. I dismissed that application in reasons for judgment that are indexed at 2020 BCSC 368 (the "Adjournment Reasons").

- [14] In the Adjournment Reasons I noted, at para. 7, that "The Defendants' materials indicate that the total amount claimed for special costs, including fees, disbursements and taxes, will be in excess of \$6 million".
- [15] The last set of relevant considerations, which tie a number of elements together and which underlie this application, arises from the \$10 million payment that Concord made under the Heads.
- [16] Concord filed its claim in the Main Action to enforce the contract it said it had made with the Defendants. At trial it elected to seek damages for breach of that contract. Alternatively, however, if the Court determined that no enforceable contract had been made between the parties, Concord sought, in its pleadings, to have Mr. Oei return the \$10 million deposit that he had received.
- [17] The Defendants, in their Second Amended Response to Concord's Fourth Amended Notice of Civil Claim, pleaded:
4. In the event that the Plaintiff's claim for specific performance and damages are dismissed, these Defendants do not oppose the Plaintiff's claim for the return of the \$10M deposit but submit that execution be stayed, with respect to any order for the return of the \$10M deposit, pending determination of Supreme Court Action No: S-161950 in which these Defendants are Plaintiffs and Terry Hui and the Plaintiff are Defendants.
- [18] Though I addressed the \$10 million deposit in the Trial Reasons, I did not expressly order the return of those monies to Concord. That was an omission on my part.
- [19] Concord then brought a separate application, heard on the same day as the Defendants' present stay application, to have my order made July 19, 2019 (the day on which the Trial Reasons were issued) corrected or clarified to include the following term: "the plaintiff's claim for restitution is allowed and the defendant Oei shall return to the plaintiff the sum of \$10 million, with interest at commercial rates".
- [20] That application was not opposed by the Defendants and I made the Order in the terms requested. As a practical matter, however, counsel for Concord and for the Defendants had already agreed to parts of the Order for a stay that the Defendant sought and that I described in the first paragraph of this judgment. To be specific, counsel for the parties had already agreed to have the \$10 million paid into court pending Concord's appeal of the Main Action and further potential appeals therefrom, and pending the Defendants' application for special costs and, if successful, the determination of the amount and payment of those costs. Accordingly, as I have said, the only issue that remains outstanding and that is raised by this application is whether the stay that the parties have already agreed to should include a further term that that stay also be subject to a determination in the Abuse of Process Claim.

Analysis

- [21] Counsel for the parties advanced various submissions that were based on the lens that they asserted was appropriate for the analysis of this application. Thus, for example, Concord argued that what the Defendants were seeking was in the nature of "prejudgment execution". Accordingly, it argued that the legal framework that is applicable to the grant of a Mareva injunction was relevant. The Defendants, on the other hand, relied on some authorities that pertain to the grant of a stay, post-judgment, by the Court of Appeal.
- [22] Respectfully, neither legal framework is directly applicable. Instead, the Rules and relevant case law establish various principles that are pertinent. Several distinct considerations are relevant.
- a) Jurisdiction
- [23] The jurisdiction of the court to grant a stay of execution of an order is found in R. 13-2(31) of the Rules:

Stay of execution

- (31) The court may, at or after the time of making an order,
- (a) stay the execution of the order until such time as it thinks fit, or
- (b) provide that an order for the payment of money be payable by instalments.
- [24] Rule 13-2(31) is identical to the previous version of the rule, being R. 42 (21)(a) of the Supreme Court Rules, B.C. Reg 221/90.
- [25] The court also has jurisdiction to grant a stay following a summary trial under R. 9-7(15)(b):

Judgment

- (15) On the hearing of a summary trial application, the court may
- (b) impose terms respecting enforcement of the judgement, including a stay of execution, ...
- [26] Finally, the court may also grant a stay of execution pursuant to its inherent jurisdiction: *Canada (Attorney General) v. Lau*, 2002 BCSC 1155 at para. 28; *Clearly Canadian Beverage Corp. v. Remic Marketing & Distribution Inc.*, [1992] B.C.J. No. 1867 (S.C.).
- [27] In *Peterson v. 446690 B.C. Ltd.*, 2016 BCSC 1318, Justice G.P. Weatherill, at para. 7, succinctly concluded: "There is no debate that this court does have the jurisdiction to stay the execution of an order in circumstances the court considers appropriate until such time as the court thinks fit."
- [28] The fact that there are separate Rules pertaining to the granting of a stay more generally and the granting of a stay on a summary trial application addresses one of the issues raised by counsel for Concord. Counsel correctly noted that each of the authorities relied on by the Defendants arose in the context of a summary trial. It is true that most stay applications

arise in this context. It is, however, quite clear that this arises as a practical matter rather than as a principled requirement. Accordingly, there are number of cases that address applications for a stay in different circumstances and that are not related to summary trials; see for example: *Borkovich v. Canadian Membership Warehouse Ltd.*, [1991] B.C.J. No. 651 (S.C.); 665530 B.C. Ltd. et al v. *Casino Tropical Plants Ltd. et al.*, 2006 BCSC 1512; and *Reliable Mortgages Investment Corp. v. Sidhu*, 2015 BCSC 2703. There is no basis in the relevant authorities or otherwise to consider that a different legal framework would apply to a stay of execution application that is brought after a trial as opposed to a stay of execution application that is brought after a summary trial.

b) Onus and Standard of Proof

- [29] The normal rule would place the onus with the party that seeks a particular form of relief. There is no reason that normal rule would not pertain to an applicant who seeks a stay of execution.
- [30] Furthermore, in the context of a stay pending appeal, the court must ensure that the position of a successful litigant, in this case Concord, as it relates to the return of its \$10 million payment, is protected: *Morrison-Knudsen Co., Inc. v. British Columbia Hydro & Power Authority*, [1976] 112 D.L.R. (3d) 397 (B.C.C.A.) at para. 28 and *Tannery Park Development Corp. v. Georgilas Investments Ltd.*, 2006 BCCA 381 at paras. 8 and 13.
- [31] The standard that must be satisfied on such an application is unclear. A number of cases have suggested that "special circumstances" must be present before a stay will be granted: Lau at para. 31 and Borkovich at para. 10, though in both cases, this comment was made in the context of the court's inherent jurisdiction to grant a stay: see also *Tesscourt Capital Ltd. v. FG Nutraceutical Inc.*, 2011 BCSC 814 at para. 39.
- [32] In *Greenside Properties Inc. v. 8458429 Holdings Ltd.*, 2001 BCSC 983, however, Justice D. Smith, as she then was, said:
- [13] The granting of a stay of execution is a discretionary remedy that seems to be fairly broad in its application provided the circumstances warrant the making of the order. While the test of "special circumstances" has been applied in making an order under Rule 42(a)(ii) for instalment payments on a judgment (see: *Bull Housser & Tupper v. Williams* (1998), 25 C.P.C. (4th) 336 (B.C.S.C.) at para. 5), and under s. 18.1 of the Court of Appeal Act R.S.B.C. 1996, c. 77 (see: *Bull Housser & Tupper v. Stromotich*, (1997), 9 C.P.C. (4th) 52 (B.C.C.A.) at paras. 2 and 3), I am satisfied the grounds for making such an order are not limited to establishing "special circumstances".

See also 665530 B.C. Ltd. at para. 22.

c) The Relevant Factors or Considerations

[33] There is a surprising lack of clarity or consistency in the case law that addresses the legal framework a hearing judge should apply on a stay of execution application and that considers what weight should be given to various factors within that framework. The following approaches are present in the relevant jurisprudence.

i) The Metropolitan Stores Framework

[34] A number of decisions of this Court have looked to and relied on the general legal framework found in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 and in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 when dealing with an application for a stay of execution. Thus, in *Coolbreeze Ranch Ltd. v. Morgan Creek Tropicals*, 2009 BCSC 151, Justice Pitfield said:

[64] The possibility of a stay of execution on a Rule 18A application is specifically contemplated by Rule 18A(11)(b), which empowers the court to impose terms respecting enforcement of the judgment, including a stay of execution, as it thinks just. Quite apart from that rule, the court has the capacity to stay execution of a judgment as part of its general or inherent jurisdiction.

[65] A stay of execution is like an injunction and similar principles should apply in considering whether a stay is appropriate: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321. The governing principles are the existence of an arguable case and the balance of convenience, including the potential for prejudice to a party as a consequence of a stay being granted or denied.

See also, for example, *Natco International Inc. v. Photo Violation Technologies Corp.*, 2009 BCSC 1504 at para. 38; *Tesscourt* at para. 40; and, *Nie v. Kwang Chyun Enterprise Ltd.*, 2017 BCSC 1941 at paras. 54 and 55.

[35] The important point, for present purposes, is that this framework would only require a court to be satisfied that an applicant on a stay application had "an arguable case" or had raised "a serious issue" in the action the applicant was advancing. It would not be necessary, and indeed it might be inappropriate, for the court to engage in a more thorough assessment of the merits of the applicant's underlying counterclaim.

ii) The Lau Framework

[36] In *Lau*, Justice Burnyeat identified various pertinent considerations and said:

[27] There is no one test to determine when a stay of execution should be ordered. In *Humberstone v. Trelle* (1910), W.L.R. 145 (Alta. Q.B.), Beck, J. described the power available to the Court under rules such as Rule 42(21)(a) as follows:

The power of Courts temporarily to stay the issuing or execution is exercised in an almost infinite variety of circumstances in order that the ends of justice may be accomplished; in many cases this power operates almost as a substitute for proceedings in equity and enables the defendant to prevent inequitable use of the judgment or writ. (at p. 147).

- [28] Accordingly, the principle set out in *Barclays Bank of Canada*, supra, is only one factor to be considered in deciding whether it is an appropriate case to exercise the jurisdiction to order a stay of execution. There are a number of principles frequently considered by the Court when considering whether a stay should be granted:
- (a) the Court has the inherent jurisdiction to order a stay of execution "in special circumstances": *Buxton v. Carriss* (1958), 13 D.L.R. (2d) 671 (B.C.C.A.);
 - (b) the "balance of convenience" in determining the appropriateness of granting a stay: *CTF Holdings Ltd. v. Flint Motors*, [1996] B.C.J. (Q.L.) 1526 (B.C.S.C.);
 - (c) where the "justice between the parties" requires it, the Court has inherent jurisdiction to exercise a stay of judgment and, while the power ought not lightly to be exercised, in a proper case in order to avoid unnecessary proceedings and expense, and where it is necessary to do justice between the parties: *M & P Enterprises Ltd. v. London & Lancashire Guarantee & Accident Co. of Canada*, (1965), 54 D.L.R. (2d) 284 (Man. Q.B.) and *Humberstone v. Trelle*, supra;
 - (d) after weighing the relative prejudice to the parties; *Barclays Bank of Canada v. N.B. Cook*, supra, *Borkowich v. Canadian Membership Warehouse Ltd.*, [1991] B.C.J. (Q.L.) 651 (B.C.S.C.);
 - (e) to enable the Court to protect either litigant: *Leskovar v. Saskatchewan Government Insurance Office* (1964), 51 W.W.R. 46 (Sask. C.A.);
 - (f) where there is no outstanding appeal: *C.T.F. Holdings Ltd. v. Flint Motors Ltd.*, [1996] B.C.J. (Q.L.) No. 1526 (B.C.S.C.); and
 - (g) to allow sufficient time to a judgment debtor to prosecute a counterclaim against the judgment creditor: *Humberstone v. Trelle*, supra; *Morrison v. Mulry*, [1935] 1 W.W.R. 423 (B.C.S.C.); *Masterman v. Malin*, (1831) 131 E.R. 168; *Wells v. Knott*, (1910) 15 W.L.R. 285; *Olympia Pizza Ltd. v. Moon*, [1979] B.C.J. (Q.L.) No. 675 (B.C.C.A.); and *Re Royal Trust Corp. of Canada et al and Kendal Adjusters Ltd.*, (1984) 13 D.L.R. (4th) 472 (Alta.C.A.).

[Emphasis in original.]

- [37] A number of decisions of this Court have referred to *Lau*: *Rana v. Payless Tiles Ltd.*, 2008 BCSC 458; *Tesscourt*; *Peterson*. These decisions have not, however, generally applied the framework that is established in *Lau*.

[38] It is again noteworthy, for present purposes, that Lau does not specifically identify or address the merits of the applicant's potential counterclaim or cross-claim in the framework it establishes.

iii) The Dominant/Sole Issue Requires a Weighing of the Circumstances

[39] In *Barclays Bank of Canada v. N.B. Cook Corp.*, [1983] 48 B.C.L.R. 364 (B.C.S.C.), the Court, in the context of an application for a stay, at para. 5, said: "In my view the sole matter is whether the circumstances raise such circumstances as would warrant the exercise". See also *Greenside* at para. 12 and *665530 B.C. Ltd.* at paras. 25-28.

iv) The Dominant Issue is the Prejudice to the Parties

[40] In *Borkovich*, at paras. 10-11, the Court indicated that the primary issue, when deciding whether to grant a stay of execution, is the relative prejudice to the parties:

... It was held in *Buxton v. Carriss* (No.2) (1958), 25 W.W.R. 225 and *Gyursek v. Eng* (1977), 2 B.C.L.R. that the Court has an inherent jurisdiction to order a stay of execution in "special circumstances."

The concept of "special circumstance" involves an examination of the degree of prejudice which might be suffered by either party: see *Leskovar v. Saskatchewan Government Insurance Office* (1964), 51 W.W.R. 46. That case cited several earlier decisions and concluded that the rule is designed to enable the Court to protect either litigant as may be required under the particular circumstances of the case.

[41] *Borkovich* has been referred to and relied on, for example, in *Paramount Drilling & Blasting Ltd. v. TNL Paving Ltd.*, 2001 BCSC 1617 at para. 18 and *Golden Capital Securities Ltd. v. Holmes*, 2002 BCSC 1596 at paras. 10 and 12-14. See also *Frederick M. Irvine, ed., McLachlin & Taylor: British Columbia Practice*, 3rd ed., vol. 2 (Toronto, Ont.: LexisNexis Canada Inc., 2006) at 13-66.

v) The Primary Consideration is the Strength of the Counterclaim/Cross-Claim Being Advanced by the Applicant

[42] The starting point for this position is found in *Rana*. Justice Brine referred to various authorities, including *Lau*, *Clearly Canadian* and *F.A. Bernard v. Western Floral Craft Supplies* (1994) Ltd., 1999 BCCA 635, and then said:

[17] Tysoe J's. decision in *Clearly Canadian* was considered at length by the B.C. Court of Appeal in *F.A. Bernard v. Western Floral Craft Supplies* (1994) Ltd., 1999 BCCA 635. In that case, Hall J.A., for the Court, noted (at ¶11) that whether or not a stay of execution should be granted very largely depends upon the facts of each case. Nevertheless, it is primarily the strength of the counterclaim which will likely determine whether and upon what terms a stay may be granted.

- [43] Several of the cases referred to by Brine J. referred to the merits of a counterclaim as being relevant to whether a stay should be granted. Respectfully, however, neither *Clearly Canadian* nor *F.A. Bernard* nor any other case referred to in the judgment indicated that the "primary" or dominant consideration in deciding whether to grant a stay is the merits of the cross-claim or counterclaim that the applicant for the stay is advancing.
- [44] In *HSBC Bank Canada v. Ba-Oose, Inc.*, 2011 BCSC 4, Justice Willcock, as he then was, considered *Rana* at some length and said:
- [62] An application for a stay requires an examination of the right or question standing as a potential obstacle to the successful party enjoying the fruits of its litigation. Occasionally the applicant for a stay has appealed the judgment, occasionally the applicant for a stay relies upon an unresolved counterclaim. Rarely stays have been sought on the ground that an issue has arisen in the interval between trial and judgment that should properly be determined before execution.
- [63] In *Rana v. Payless Tiles Ltd.*, 2008 BCSC 458, Brine J. considered the court's obligation to look at the merits of the applicant's case (a counterclaim, in that case) as the starting point on a stay application, before turning to the question of the prejudice to the parties that might arise from a stay of execution. After considering the jurisprudence, in particular the decision of the B.C. Court of Appeal in *F.A. Bernard v. Western Floral Craft Supplies (1994) Ltd.*, 1999 BCCA 635, and the decision of Tysoe J. in *Clearly Canadian Beverage Corp. v. Remic Marketing & Distribution Inc.* (1992), 22 C.P.C. (3d) 387 (B.C.S.C.), Brine J. concluded at para. 17:
- ...whether or not a stay of execution should be granted very largely depends upon the facts of each case. Nevertheless, it is primarily the strength of the counterclaim which will likely determine whether and upon what terms a stay may be granted.
- [45] I observe that *HSBC Bank Canada* raised two issues. One was whether a stay should be granted. The other was whether *res judicata* operated as a bar to the subsequent litigation the applicant sought to bring. This is relevant because on appeal, at 2011 BCCA 511, the Court of Appeal, which upheld the judgment of the chambers judge, did so on the basis of the second issue I have identified. The Court of Appeal did not address the stay application that had been dismissed or the considerations that were relevant to it.
- [46] In *Huynh v. Nguyen*, 2018 BCSC 1207 the chambers judge said:
- [15] In deciding whether to extend the stay of the writ of possession, Rule 13-2(31) requires that I examine the apparent strength of the tenant's claim and balance its merits with the prejudice incurred if the stay remains intact.
- [47] The chambers judge then referred to paras. 62 and 63 of *HSBC Bank Canada*, which, in turn, incorporated the reference in para. 17 of *Rana*, and undertook a consideration of the merits of the applicant's cross-claim.

d) Reconciliation of these Various Approaches

- [48] Aspects of the cases I have referred to are reasonably consistent. The jurisdiction to grant a stay of execution is broad: Greenside at para. 13 and Paramount Drilling at para. 17. The question is where the balance of convenience lies: Coolbreeze at para. 65; Natco International Inc. at paras. 39 and 44. Differently expressed, the question is where the "interests of justice" or the "ends of justice" lie; F.A. Bernard at para. 11 and Litynsky v. Litynsky, 2012 BCSC 1160 at paras. 62 and 64 or whether the "circumstances raise such circumstances as would warrant the exercise": Barclays Bank of Canada at para. 5. A stay is "conditioned by the extant facts of a given case": F.A. Bernard at para. 11.
- [49] Each of these various formulations is consistent with a court having a broad discretion, having regard to the various factors that are present in a given case, to do what it considers appropriate or just. In addition to the factors or considerations I have already identified, a number of further factors can be relevant:
- a) The relatedness of the counterclaim: 665530 B.C. Ltd. at para. 27.
 - b) Whether the amount of the counterclaim can be calculated with reasonable certainty: 665530 B.C. Ltd. at para. 27; But not necessarily, see Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corporation, 2007 BCSC 286 at para. 97.
 - c) The defendant's delay, if any, in pursuing their counterclaim: China Dragon Fund Ltd. v. FIC Real Estate Fund Ltd., 2010 BCSC 1698 at para. 48.
- [50] As I have foreshadowed, however, the issue of the extent to which the merits of an applicant's counterclaim or cross-claim should be considered is unclear. As a result of that lack of clarity, I asked counsel for the parties to provide me with further assistance on the issue. In their further written submissions, counsel for Concord addressed both the question I had posed and included further information going to other issues. On account of the conclusions I have come to, I advised counsel for the Defendants that there was no need to respond to those further issues.
- [51] Counsel for the Defendants, in their written submissions, argued that there was no inconsistency between such cases as Coolbreeze, Nie and Tesscourt (the "First Group of Cases") and Rana, Clearly Canadian, HSBC Bank Canada and Huynh (the Second Group of Cases). Respectfully, I do not agree. It is true that a case such as Clearly Canadian, which stated that a court "should assess the merits of the counterclaim" did not expressly address whether the court should do this as a threshold issue to determine whether an applicant's counterclaim/cross-claim raises "a serious question" or an "arguable case" or, alternatively, whether the court should undertake a fuller assessment of the merits to determine the strength of that counterclaim/cross-claim.

- [52] But in other instances, the distinction between the First Group of Cases and the Second Group of Cases is more marked. In *Nie*, for example, Justice Pearlman, having determined that though the applicant's case was "not particularly strong", nevertheless concluded that it met "the low threshold of establishing a serious issue to be tried". He then went on to consider the further parts of the *RJR-MacDonald* test.
- [53] Conversely in *Huynh*, for example, the chambers judge focused primarily on the strength of the applicant's case and undertook a fuller assessment of the merits. It will be apparent that these two approaches have the prospect of giving rise to quite different results.
- [54] *Concord*, in its further written submissions, reasserted its original position that an applicant, for a stay of execution, must establish a "strong prima facie case". Respectfully, I do not agree with this either. This position does not appear to find express support in any of the cases that have been decided under either R. 13-2(31) or R. 9(7)(15)(b).
- [55] Instead, that standard is one that is usually applied in the *Mareva* injunction context. Without developing this at length, the courts have created different frameworks and different tests for different forms of injunctive relief. Some part of this is a function of the fact that some forms of relief, *Mareva* injunctions and *Anton Piller* orders being examples, are extremely intrusive in their nature. Furthermore, such orders are overwhelmingly brought *ex parte*.
- [56] On balance, I consider that it is the framework that is found in the First Group of Cases that governs an application for a stay of execution. This is so for various reasons. First, *Metropolitan Stores* and *RJR-MacDonald*, decisions of the Supreme Court of Canada, confirm that a "stay of proceedings and an interlocutory injunction are remedies of the same nature"; at paras. 30 and 41 of the two cases respectively.
- [57] Furthermore, though *Metropolitan Stores* and *RJR-MacDonald* arise in the constitutional context, and though both decisions emphasize this (see para. 34 and para. 48 of the two cases respectively), the decisions have been applied much more broadly: See, for example, *RJR-MacDonald* at para. 44; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 25; *Independent Contractors and Businesses Association v. British Columbia*, 2018 BCCA 429 at para. 22; and *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 37.
- [58] Second, the general framework in *Metropolitan Stores* and in *RJR-MacDonald* appears to have been applied, in the stay of execution context, in other jurisdictions: see for example *Desautels Creative Printing Papers Inc. v. Printcrafters Inc.* [1999] M.J. No. 453 at paras. 13-15 (Man. C.A.); *Bernum Petroleum Ltd. v. Birch Lake Energy Inc.*, 2014 ABQB 652 at paras. 107-108; and *Hillcourt (Docklands) Ltd. v. Teliasonera AB*, [2006] EWHC 508 at para. 20 (Ch.). The Rules in Ontario appear to be quite different and appear to provide for an automatic stay of execution pending the appeal of any provision in an order for the payment of money, subject to a party applying to lift that stay: Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 63.01(1).

- [59] Third, as a practical matter, there can be some risk associated with an extended or detailed assessment of the merits of a case, or, for example, a counterclaim in a stay of execution application. Such applications are generally brought, as I have said, in the summary trial context, when an applicant's counterclaim or cross-claim may well still be in its early stages, before any discovery of documents or examinations for discovery have taken place, and before the evidence has been developed in a meaningful way: see F.A. Bernard at para. 11.
- [60] Courts, for good reason, are often reluctant to comment on the merits of a case in such circumstances. In RJR-MacDonald, the Court, at para. 50, confirmed that "a prolonged examination of the merits is generally neither necessary nor desirable": See also Vancouver Aquarium at para. 39.
- [61] Accordingly, I consider that Metropolitan Stores, RJR-MacDonald and the First Group of Cases dictate the legal framework that governs applications for a stay of execution that are brought under the Rules. That framework, in most instances, contemplates a reasonably cursory assessment of the merits of an applicant's counterclaim or cross-claim. I say "in most cases" because even in the interlocutory injunction context, there are some exceptions to this. Once an applicant has established a "serious question" or an "arguable case", it will be necessary for the court to consider the question of irreparable harm and the myriad other factors, many of which I have identified, that can inform the balance of convenience.

e) Application of the Relevant Framework in the Context of this Case

- [62] To reiterate, the Metropolitan Stores and RJR-MacDonald test applies on an application for a stay of execution, as summarized in Nie at para. 54:

First, the court must be satisfied that there is a serious question to be tried. Second, the court must determine whether irreparable harm would be suffered if the application were refused. Third, the court weighs the balance of convenience to determine which of the parties would suffer greater harm from the granting or refusing of the stay pending a decision on the merits.

- [63] I do not consider that the Defendants have raised a "serious question" or an "arguable case" in the Abuse of Process Claim that they have filed. Though the Defendants argue that the existence of an improper or collateral purpose for the commencement of the Main Action is within the knowledge of Concord and Mr. Hui, and that these issues will be developed as the action is advanced, they must nevertheless advance some evidence which establishes some level of merit in the claim they have filed.
- [64] Civil claims require that a claimant establish both the elements of the particular cause of action they have advanced and some loss or damage. In this case, the Defendants have filed evidence both from an individual who was interested in acquiring the Plaza Lands, who has stated what he was prepared to pay, and who has deposed that he did not do move forward on account of the existence of the Main Action as well as evidence from an appraiser which addresses the diminution in value of the Plaza Lands over the time that the Main Action was outstanding. However, these affidavits primarily address the issue of damages.

- [65] The Defendants also argue that the various findings of credibility I made in the Trial Reasons, which were serious and adverse to Concord and its representatives, have strengthened the claim of the Defendants in the Abuse of Process Claim. The nature or legal significance of the adverse findings of credibility that I made in the Trial Reasons will be further clarified in the Defendants' application for special costs. It will be in that application that I am asked to determine, among other things, whether Concord's representatives simply gave evidence that I did not believe or whether their object in giving such evidence was to knowingly mislead the Court.
- [66] The first of these possibilities would not appear to advance the Abuse of Process Claim. The second may well provide some circumstantial evidence from which inferences can be drawn though even then the dishonesty of Concord's representatives at trial, without more, would not appear to establish an improper purpose on the part of Concord when the Main Action was filed.
- [67] Finally, the Defendants have filed evidence from each of Mr. Oei and Mr. Chu which indicates: i) that Mr. Oei was told by Mr. Ju, during a break at an examination for discovery, that Concord could hold the Defendants "for more than 5 years with the litigation"; and, ii) that during a break in the trial, Mr. Ju approached Mr. Chu and told him to "be careful". Both of these comments, if true, and they are not contested, are troubling. Neither, however, directly addresses Concord's purpose, whether improper or otherwise, in bringing and then advancing the Main Action.
- [68] Based on the foregoing, I do not consider that the Defendants have, at this point, established an arguable case in relation to the Abuse of Process Claim. That conclusion obviates the need for me to further develop the additional considerations that are raised in the Metropolitan Stores or the RJR-MacDonald analysis.
- [69] A further matter is, however, relevant. In *F.A. Bernard, Hall J.A.*, for the Court, said:
- [11] The grant or refusal to grant a stay of execution will always be conditioned by the extant facts of a given case. To some extent, the question may be a "moving target". By that, I mean that as further facts come to be illuminated in the progress of the counterclaim, the original decision to stay or not to stay and on what terms may require to be altered to reflect the strength and dimensions of the counterclaim. I should think generally the proper forum for such decisions would be the trial court which can assess the matter in light of present circumstances. Here, if the respondent moves for execution to realize on the real property against which it has now registered a judgement, the appellants can then seek a stay of such proceedings based on the current known facts and circumstances. I would be reluctant to fetter the discretion of trial and chambers judge is to make orders as required in this area over the course of litigation to meet the interests of justice concerning the respective litigants. For that reason, I would decline the invitation advanced by the appellants to interfere with the terms of the stay ordered here by the trial judge but would leave that matter to be dealt with, if necessary, by a judge in the trial division before whom the

appellants may, if thought necessary, in future bring such an application.

- [70] The foregoing passage appears to contemplate an ability on the part of an applicant to return to court as "further facts come to be illuminated" and to revisit an original application for a stay.
- [71] This conclusion is consistent with the decision of the court in *Columbia Research Capital Inc. v. Business to Business Wall Planners Ltd.*, 2001 BCSC 1347 at para. 48. In most cases this prospect will be academic. The monies that the applicant seeks to secure will have been dispersed or returned to the other party. However, in some cases, this case being an example, the monies or property that are the subject matter of the stay application will still be available at the time a further stay application is brought.
- [72] I have a further comment. Courts, for various reasons, will normally be reluctant to entertain more than one interlocutory application in relation to the same issue. This would pertain, for example, to a second application for an adjournment or a second application to sever some issue in an action. The same concerns would pertain to a second or further application for stay of execution. Accordingly, the circumstances when a second or further application for a stay will be entertained, will likely be infrequent.
- [73] Thus, it may be necessary for a party who seeks to revisit a stay application to establish, for example, that circumstances have changed and/or that the further evidence they now rely on could not, with reasonable diligence, have been available to them at an earlier time. It will, however, be necessary for future courts to refine these considerations.
- f) The Res Judicata Issue
- [74] Concord raised one further issue in its opposition to the Defendants' application for a stay.
- [75] Concord also argued, relying on the doctrine of issue estoppel, that the Defendants were barred from seeking a stay of execution. Specifically, Concord argued that the Defendants should have raised and argued the present stay application at the conclusion of the Main Action when the parties made their respective final submissions. Having failed to do so, Concord submitted that it is no longer open to the Defendants to do so now.
- [76] Though I have dismissed the Defendants' application, it remains necessary to address this further issue. This is because, on the basis of *F.A. Bernard*, it remains open, in concept, for the Defendants to bring a further stay application at some future date. The position that is advanced by Concord pertains to both the Defendants' present application for a stay and to any such further or future application.
- [77] I do not consider, for several reasons, that the doctrine of issue estoppel, which is rooted in the principles of *res judicata*, is relevant.

[78] First, R. 13(2)-31 allows a party to seek a stay "at or after the time of making an order" (underlining added). See, for example, *The Owners, Strata Plan K855 v. Big White Mountain Mart Ltd.*, 2014 BCCA 397 at para. 20.

[79] The explicit jurisdiction to seek a stay after the court has made its original order aligns with the apparent practice of this Court. For example, in *Clearly Canadian*, the Court, at para. 13 said:

On the application for summary judgment by the plaintiff it is often not possible to properly consider the merits of the counterclaim and the potential amount of an award of the counterclaim. If it is not possible, a separate application will have to be scheduled and execution on the judgment in its entirety can be stayed for a reasonable period in order to allow the defendant to bring on the application.

See also *Glacier Creek Development* at paras. 96-98. Still further, *F.A. Bernard* contemplates that an applicant might bring more than one stay application as circumstances change or evolve.

[80] Conversely, I am aware of no decision, made in the context of an application for a stay of execution, where the doctrines of issue estoppel or *res judicata* acted as an impediment to such an application being heard after the trial of an action.

[81] Second, I do not consider, on a separate principled basis, that the doctrines of issue estoppel or *res judicata* have relevance in the present circumstances. A stay of execution is an interlocutory order. Even in cases where an earlier interlocutory order has been made it does not appear, in this jurisdiction, that a second interlocutory application, in relation to the same issue, is necessarily barred. See for example *D.J. Lange, The Doctrine of Res Judicata in Canada*, 4th ed. (Toronto, Ont.: LexisNexis Canada Inc., 2015)) at pp. 317-318 and 329; *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 46; *Can-Auto Inspection Inc. v. Vascor, Ltd.*, 2010 BCSC 1895 at paras 2 and 3; and, *Mee Hoi Bros. Company Ltd. v. Borving Investments (Canada) Ltd.*, 2017 BCSC 1910 at para. 114.

[82] The fact that it is open to a party to bring a second or further interlocutory application for a stay, under *F.A. Bernard*, also does not align with the submission that the Defendants were compelled, at the risk of being prevented from doing so at a later date, to bring their application for a stay at the conclusion of the Main Action.

[83] Finally, even if the requirements for *res judicata* are met, a court still has a discretion not to bar litigation or an application in relation to a matter based on overriding principles of fairness in the administration of justice: *Chriscan Enterprises Ltd. v. St. Pierre*, 2016 BCCA 442 at para. 47.

[84] The third point I would make is practical. Applications for a stay are often contingent on the outcome of the trial. In this case, had *Concord* succeeded in the Main Action, any application for a stay that the Defendants might have brought would have been academic. In addition, in this case, the Defendants subsequently sought a stay on two additional grounds, one being in relation to *Concord's* appeal and the other, the Defendants' intended special

costs application. Concord decided to accede to both of these grounds though it might not have. These additional matters also arose or emerged as the results and findings in the Main Action became clear. Had the Defendants brought an initial stay application, based on the Abuse of Process Claim alone, it might still have been necessary for them to have brought a second and separate application in relation to these further grounds.

- [85] No useful purpose would be served in bringing such applications in piecemeal fashion. Not only would it be inefficient to do so but there is a real prospect of separate applications distorting the right result. Thus, in this case, had the Defendants sought a stay at the conclusion of the Main Action, the issue of harm or prejudice to Concord would have been addressed differently than at this stage where Concord had already agreed to have the \$10 million held in court for what is likely to be an extended time.
- [86] It makes perfect sense that, in some cases, the parties will await the outcome of an action before deciding whether, and on what basis, to seek a stay of execution. Such measured behaviour will, in many cases, enhance efficiency, be more cost-effective and yield more just results. Each of these objects underlie the Rules: See R. 1-3.

Conclusion

- [87] The Defendants' present application for a stay of execution is dismissed.

"Voith J."

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