

CANADA / JUDGMENT

Greater Vancouver Water District v. Bilfinger Berger AG

2014 BCSC 2450

COURT

Supreme Court of British Columbia

DECIDED

5 December 2014

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2014 BCSC 2450 Greater Vancouver Water District v. Bilfinger Berger AG IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Greater Vancouver Water District v. Bilfinger Berger AG, 2014 BCSC 2450 Date: 20141205 Docket: S083856 Registry: Vancouver Between: The Greater Vancouver Water District Plaintiff And: Bilfinger Berger AG, Bilfinger Berger (Canada) Inc., Fru-Con Construction Corporation Bilfinger Berger/Fru-Con, a joint venture, Travelers Guarantee Company of Canada, La Compagnie Travelers Garantie Du Canada, Chubb Insurance Company of Canada and in French Chubb Du Canada Compagnie D'Assurance, and Zurich Insurance Company Zurich Compagnie D'Assurances Defendants And: Bilfinger Berger (Canada) Inc., Bilfinger Berger AG, Fru-Con Construction Corporation ,and Bilfinger Berger/Fru-Con, a joint venture Plaintiffs by Counterclaim And: Greater Vancouver Water District, Greater Vancouver Regional District, Greater Vancouver Sewerage and Drainage District, Hatch Mott MacDonald Ltd., and The Corporation of the District of North Vancouver Defendants by Counterclaim Before: The Honourable Madam Justice S. Griffin Oral Ruling re Particulars In Chambers Counsel for the Plaintiff and Defendants by Counterclaim, the "Metro Vancouver parties": John Singleton QC Stephen J. Berezowskyj Counsel for the Defendants and Plaintiffs by Counterclaim, the "Bilfinger Berger parties": Michael Skene Krista Johanson Counsel for Hatch Mott MacDonald: Frank G. Potts Timothy D. Goepel Place and Date of Hearing: Vancouver, B.C. November 20, 2014 Place and Date of Ruling: Vancouver, B.C. December 5, 2014

- [1] The defendant by counterclaim, Hatch Mott Macdonald Ltd. seeks directions as to whether the defendants and plaintiffs by counterclaim, known collectively as Bilfinger Berger, have complied with an earlier order of this court to provide particulars of certain allegations of misrepresentations and damages advanced in their pleadings.
- [2] The earlier order was made December 17, 2013 with reasons for judgment indexed at 2013 BCSC 2324 [the "Particulars Ruling"].
- [3] The earlier ruling was brought with respect to parallel action No. S084599. However, the two actions have since been consolidated for all purposes.

- [4] In the Particulars Ruling I held that the Bilfinger parties (the plaintiffs in respect of that ruling), ought to provide better particulars of allegations against HMM of misrepresentation, non-disclosure and damages, as follows: Particulars of Misrepresentation . 31 I grant HMM an Order that the plaintiffs provide better particulars of the alleged misrepresentations alleged at para. 61 of the Amended Statement of Claim, including for each representation:
- i. when, where, who made the representation; ii. how was the representation made; iii. how was it untrue, inaccurate, or misleading; iv. to which plaintiff was the representation made. Particulars of Non-Disclosure 32 HMM also seeks particulars of the plaintiffs' claim at para. 70 of the Amended Statement of Claim that HMM breached a duty to warn in "various ways". 33 The plaintiffs have provided a response which in my view provides sufficient detail of what they say HMM failed to disclose. 34 However, the plaintiffs attempt to reserve their rights to state that further particulars may be provided after full document discovery and examinations for discovery, "and at trial". . 38 HMM is entitled to an order that the plaintiffs clarify as to whether or not they are presently aware of any other particulars in respect of para. 70 of the Amended Statement of Claim, other than those already provided. Particulars of Damages 39 The plaintiffs claim in their relief sought against HMM, "general and special damages". 40 HMM submits that the plaintiffs must identify which plaintiff is advancing what heads of damages claimed against it, as there may well be differing defences that apply depending on the specifics of the damages and the plaintiff. 41 In this regard, HMM points to the fact that the tunneling construction contract between Metro Vancouver and Bilfinger was a contract involving the joint venture entity, which it suggests at best involves two of the plaintiffs but not the first named plaintiff, Bilfinger Berger (Canada) Inc. That contract contained a limitation of liability clause at clause 6.1.11, which HMM argues excludes any claim for consequential damages. 42 The plaintiffs rely on Rule 3-7(14) which provides that where general damages are claimed, the amount claimed must not be stated in any pleading. 43 The plaintiffs say they will provide particulars of special damages in advance of trial. 44 I consider this one topic for which information should be disclosed in layers. The first layer should involve disclosure of the heads of special damages that each plaintiff intends to claim against HMM as special damages. The plaintiffs should provide these particulars now. 45 At a later stage but in advance of trial, the plaintiffs should provide the actual calculations of special damages that they claim under these heads of damages. I will make no order for this at this stage because it appears that the plaintiffs acknowledge their intention to do this. If the parties cannot reach agreement on an appropriate timeline for this disclosure, they can always seek directions from this Court as with all other case management issues.
- [5] At a Judicial Management Conference on November 20, 2014, HMM complained that the Bilfinger parties had not complied with the order that they provide particulars; the Bilfinger parties argued that they had done so. HMM sought further direction from this Court in this regard, hence this ruling. Review of particulars provided by the Bilfinger Parties

- [6] I will briefly touch on the further particulars that have been provided by the Bilfinger parties.
- [7] In a document dated March 19, 2014, the Bilfinger Parties delivered "Further Particulars of the Amended Statement of Claim" ("Further Particulars"). Given the consolidated action, this can be considered part of the pleadings in support of Bilfinger's counterclaim herein.
- [8] One of the themes of HMM's earlier application was that the Bilfinger parties have grouped themselves in their pleadings as though they are a single party, under the name "Bilfinger", when in fact they are different entities and they ought to be obliged to identify which entity makes which claim (although HMM contests that the joint venture is a legal entity). As indicated in my Particulars Ruling, this argument was accepted to a degree.
- [9] HMM is critical of the fact that at paragraph 3 of the Further Particulars, the Bilfinger parties once again defined themselves collectively as "Bilfinger Berger" or "Bilfinger".
- [10] This criticism fails to take into account the fact that there are many specific allegations within the Further Particulars for which the Bilfinger parties identify which Bilfinger party was involved in a particular fact alleged.
- [11] In my view when viewed as a whole, by the Further Particulars the Bilfinger parties have provided particulars of their allegations as to who made what representation to whom in paragraphs 32 through 40.
- [12] As for damages, at para. 45 of the Further Particulars, the Bilfinger parties identified the categories of special damages they claim. Then at paras. 46 and 47 they claim each Bilfinger party suffered these categories of damages from the time when they respectively became involved in the project i.e. all of the Bilfinger parties except Bilfinger Canada claim special damages from May 13, 2004 and throughout; but Bilfinger Canada only became involved as of October 20, 2004 and so that is when it asserts the time period starts for when it suffered special damages.
- [13] Later, by cover letter dated November 10, 2014, the Bilfinger parties provided the exact numbers of their group's claims against HMM for special damages, totalling approximately \$86 million, based on the delivered opinion report of professional accountants dated November 7, 2014 ("Additional Particulars"). In summary, this report and letter do not breakdown the damages claimed as per each Bilfinger entity, but rather, suggest that the damages caused by HMM were suffered by the Bilfinger parties jointly and are based on the theory that but for the alleged misrepresentations by HMM, the Bilfinger parties would not have entered into the contract for the project and will be entitled to claim all of their losses to date, calculated for the period after May 31, 2008.

- [14] Reflecting on how this special damages start-date in the Additional Particulars ties in with the Further Particulars, the latter document identified that the start date for the last Bilfinger party to become involved in the project, Bilfinger Canada, was October 20, 2004. Since the Additional Particulars assert that the special damages were incurred after this date, starting after May 31, 2008, it appears clear that the Bilfinger parties are not going to assert that any one of them suffered different special damages than the other.
- [15] As summarized in the Particulars Ruling, two of the key purposes of particulars are to avoid surprise at trial and to tie a party down (at para. 22).
- [16] The Bilfinger parties' position is that they do not intend to prove individual special damages but instead will advance a claim that they had one common "pot" of costs shared between them. In my view, the Further Particulars and Additional Particulars provided by the Bilfinger parties give notice of this.
- [17] HMM argues that the Bilfinger parties ought to identify through their particulars which one of them incurred a particular cost and not lump them all together.
- [18] The Particulars Ruling did not preclude the Bilfinger parties from taking the position that one or more of them suffered damages jointly. Rather, the exercise was meant to require the Bilfinger parties to clearly identify their position in this regard.
- [19] While the HMM defence theory is that the Bilfinger parties cannot advance a claim for joint damages, the Bilfinger parties are not required to fit their theory of their claim for damages into HMM's theory of defence.
- [20] The Bilfinger parties are free to take their own risks that if the Court ultimately accepts HMM's position and concludes that the Bilfinger parties do not have a single common shared damages claim but that only one or more of them is entitled to a remedy, the Court might nonetheless accept HMM's argument that the winning Bilfinger entities failed to prove that they suffered damages.
- [21] I am of the view that the Bilfinger parties have given proper notice of the particulars of their claims.
- [22] Costs will be in the cause.

The Honourable Madam Justice Susan A. Griffin

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