
CANADA / JUDGMENT

JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.

2015 BCSC 1202

COURT

Supreme Court of British Columbia

DECIDED

10 July 2015

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2015 BCSC 1202 JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.,

2015 BCSC 1202

Date: 20150710

Docket: 14-3785

Registry: Victoria

Between:

JEKE Enterprises Ltd.

Plaintiff

And

Northmont Resort Properties Ltd.

Defendant

Corrected Judgment: Case name was corrected to read

JEKE rather than Jeke, dated July 14, 2015

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Plaintiff:

L. John Alexander

Lindsay R. LeBlanc

Counsel for Defendant:

Judson E. Virtue

Paul Manning

Place and Date of Hearing:

Vancouver, B.C.

March 9-10, 2015

Place and Date of Judgment:

Vancouver, B.C.

July 10, 2015

Written Submissions of the Plaintiff:

Vancouver, B.C.

May 29, 2015

Written Submissions of the Defendant:

Vancouver, B.C.

May 22, 2015

Introduction

- [1] In March 2015, the defendant Northmont Resort Properties Ltd. ("Northmont"), applied by way of summary trial to decide some of the issues raised in this action. Judgment was reserved.
- [2] By reason of later developments and before any decision was rendered by the court, Northmont withdrew its application. The issue now to be addressed is what costs consequences flow from that withdrawal.

Background Facts

- [3] The plaintiff, JEKE Enterprises Ltd. ("JEKE"), is the owner of certain time-share interests in a resort known as Sunchaser Vacation Villas, located in Fairmont Hot Springs, British Columbia (the "Resort"). The Resort was developed some years ago by Fairmont Resort Properties Ltd. ("Fairmont"). All told, there are approximately 18,950 owners holding time-share interests in the Resort, which are documented in what have been described in the litigation as vacation interval agreements, or "VIAs".
- [4] Fairmont became insolvent in 2009 and ultimately sought creditor protection in Alberta pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA"). In June 2010, Fairmont and its secured creditors entered into a foreclosure agreement, by which Northmont acquired all interests held by Fairmont in the Resort, including those interests held pursuant to the VIAs. That transaction was approved by the Alberta Court of Queen's Bench by a vesting order dated July 5, 2010 (the "Vesting Order").
- [5] Sometime after taking over the Resort, Northmont sought to raise funds from the VIA owners for the purpose of undertaking certain renovations and repairs. Alternatively, Northmont proposed that owners could surrender their interests upon payment of a cancellation fee. Many of the VIA owners have either contributed to the renovations or surrendered their interests, as proposed by Northmont. JEKE objected to this proposal, taking the position that Northmont was unable to unilaterally force payment or surrender pursuant to the VIAs. JEKE has made some strides in garnering support of its position from other owners.
- [6] The summary trial application was Northmont's second attempt to narrow the issues so as to avoid addressing the full breadth of the issues and facts that have been raised in this dispute by JEKE. This Court's determination of certain interpretation issues arising under the VIAs, by way of special case, was subsequently overturned on appeal: Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd., 2013 BCSC 2071, rev'd 2014 BCCA 227 (the "Special Case").
- [7] Arising from the decision in the Special Case, and JEKE and other owners' continuing refusal to contribute to the renovation costs or surrender their interests, Northmont commenced literally thousands of superior and provincial court actions against owners seeking payment under the VIAs, both in British Columbia and in Alberta.
- [8] This action was commenced by JEKE against Northmont in October 2014. In essence, JEKE seeks a declaration that its VIAs have been repudiated such that it can walk away from its interests under the VIAs without paying any renovation costs or cancellation fees. JEKE also seeks other compensation from Northmont. JEKE describes this as a "test case" in the sense that a determination of the issues in this action will likely affect the other actions commenced by Northmont.

- [9] Therefore, the central issue in the litigation generally, but not on this summary trial application, is who bears the obligation to pay for the renovation costs that seem to be admittedly required at the Resort. The critical provision arises under paragraph 9 of the VIAs which addresses the responsibility of the lessee to pay "operating costs and reserve for refurbishing" in addition to the requirement under paragraph 10 to pay a "management fee" to the manager for its services.
- [10] In March 2015, this Court heard Northmont's summary trial application relating to certain discrete issues that arose from Fairmont's CCAA proceedings and the Vesting Order. Both parties agreed that the Vesting Order was fully enforceable in respect of the Alberta court's approval of agreements by which Northmont took over the Resort. They fundamentally disagreed, however, as to the effect of that Vesting Order.
- [11] At the summary trial, Northmont sought various declarations that were directed at limiting the issues to those arising after the granting of the Vesting Order by which Northmont had taken over the Resort, and not any pre-existing issues arising between the owners and Fairmont. Northmont sought the following declarations:
- a) that Northmont acquired the VIAs (or Fairmont's interest in the VIAs) free and clear of all claims or disputes created or arising in relation to the VIAs between Fairmont and JEKE; and
 - b) that Northmont has no obligation to repair or rebuild Building 7000, save in accordance with a limited subsidy agreement, and that Northmont has complied with its obligations under that limited subsidy agreement.
- [12] JEKE objected to the summary trial on two bases: firstly, that the matter was not suitable for summary trial; and, secondly, that Northmont's interpretation as to the effect of the Vesting Order was incorrect. Both parties agree that the limited subsidy agreement may apply, subject to JEKE's other arguments that a proper interpretation of the VIAs would place full responsibility for the renovation costs on Northmont.
- [13] There have been significant efforts made by all four courts, JEKE, and Northmont to address the substantial number of outstanding actions. This was assisted, in large part, by the consensus between the parties that the other actions would be held in abeyance pending this "test case" for a determination of the central issues that affected them all.
- [14] However, for some time now, there has also been an outstanding action in the Alberta Queen's Bench in *Charles Edwards v. Resort Villa Management Ltd. and Northmont Resort Properties Ltd.* (Action 11303-08538) (the "Edwards Action"). I know little about this action save that the plaintiffs are VIA owners and that the issues include many, if not all, of the same issues raised in this litigation. In addition, Northmont filed a counterclaim for amounts said to be owing to Northmont by the plaintiffs under the VIAs. In March 2015, Alberta counsel for the plaintiffs in the Edwards Action was not the same as JEKE's counsel in British Columbia.

- [15] When the summary trial application materials were filed in February 2015, it was generally known that the Edwards Action was going to be set for trial in Edmonton commencing June 1, 2015. However, when the summary trial application was heard in March 2015, counsel did not address what effect, if any, the disposition of the Edwards Action might have on the issues raised at the summary trial. Confirmation of the June 2015 trial date in the Edwards Action was only filed after the summary trial on March 25, 2015.
- [16] After the hearing of the summary trial, the Court brought further case authorities to the attention of counsel and invited further written submissions, which were received from both counsel by late March 2015. In April 2015, JEKE submitted further court materials from the Alberta CCAA proceedings and submissions on those materials were received by mid-April 2015.
- [17] In a case planning conference in late April 2015, the parties secured a trial date commencing January 4, 2016, which was substantially earlier than the late 2016 trial dates that had been proposed by JEKE's counsel since early 2015.
- [18] On May 19, 2015, this Court convened a case management conference to address other issues arising in this action and in the Special Case. At that time, I specifically asked Northmont about the Edwards Action and whether the CCAA issues raised at the summary trial were going to be addressed. Mr. Virtue confirmed that the Edwards Action was set to proceed and that the CCAA issues were to be addressed by the Alberta court.
- [19] When the summary trial application was filed in February 2015 for the March dates, JEKE's proposed trial date in late 2016 would have allowed more than enough time to obtain a ruling on the summary trial issues in terms of the scope of the then outstanding document production and future examinations for discovery. However, arising from the delay in addressing the authorities and materials in the summary trial, and the earlier trial dates being secured, Northmont realized that it needed to move quickly to complete the necessary pre-trial procedures. Accordingly, even before the May 19th hearing, and in part due to the somewhat compressed timeframe, Northmont agreed to full pre-trial disclosure of Fairmont's historical dealings in respect of the Resort and the VIAs.
- [20] In light of these developments, on May 19, 2015, Northmont's counsel was invited to consider whether it wished to still proceed with its summary trial application.
- [21] On May 22, 2015, Northmont's counsel advised that, in light of the impending trial dates both in the Edwards Action and in this action, and the risk of overlapping judicial decisions on the same issues, it wished to withdraw its application for summary trial. JEKE does not oppose the withdrawal but seeks its costs. JEKE did, however, reasonably suggest that the outcome of the Edwards Action might be of relevance to the withdrawal.
- [22] The commencement of the trial in the Edwards Action was preceded by an application by the plaintiffs on May 29, 2015 to adjourn the trial in order to allow this action to proceed to trial first. That application was refused. This was followed by another adjournment

application by the plaintiffs on June 1, 2015 at the start of the trial in order to allow for amendments to the pleadings. By this time, the plaintiffs' Alberta counsel had been replaced by JEKE's British Columbia counsel. When that application was also refused, plaintiff's counsel advised that they were abandoning their claims and advancing no defence on the counterclaim. Accordingly, the claims were dismissed and Northmont obtained judgment for the amounts claimed by it.

- [23] As Northmont's counsel points out, there is therefore no remaining risk of concurrent deliberations or conflicting decisions from this Court and the Alberta Queen's Bench on the CCAA issues. Nevertheless, Northmont still seeks to withdraw its summary trial application for the other reasons advanced as above.

Discussion

- [24] Northmont has requested that the court allow a withdrawal of its summary trial application on a without costs basis. JEKE seeks its party-and-party costs of the summary trial, including its earlier unsuccessful application for an adjournment of the summary trial.
- [25] Generally speaking, this Court has declined to award costs against an applicant if a summary trial application is dismissed and the parties are still required to proceed to trial. In *Antrobus v. Antrobus*, 2008 BCSC 1789, the court stated:
- [6] The general, although not invariable, rule is that costs are not awarded against a party who makes an unsuccessful application under Rule 18A because that party may eventually be successful at trial. That rule was stated in *Falkoski v. Osoyoos (Town)*, [1995] B.C.J. No. 1346 where the court nevertheless awarded costs against a defendant in what were considered to be the exceptional circumstances of the case. One of those circumstances was a "David and Goliath" aspect to the action, in which the plaintiff was an individual and the defendants were a municipality and a corporate developer.

See also 656925 *British Columbia Ltd. v. Cullen Diesel Power Ltd.*, 2009 BCSC 1088 at para. 10.

- [26] I see no reason to depart from that approach where there is a withdrawal of a summary trial application, rather than a dismissal.
- [27] JEKE takes the position that it has been put through unnecessary expense and that costs are therefore justified in accordance with the Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 14-1(14). As I have stated, JEKE took the preliminary position at the summary trial that summary trial was not appropriate and, in fact, it sought an adjournment of the application which was refused. JEKE now says that there are no substantial changed circumstances relating to the Edwards Action upon which the court should conclude that the summary trial was appropriate initially, but is not now. I agree with JEKE's submission on this point in terms of the outcome of the Edwards Action.

- [28] In my view, however, there was arguably some merit to Northmont's approach in bringing the summary trial in terms of addressing a fairly discrete issue that was largely based on a review of the CCAA pleadings, orders and other related materials. Given the anticipated dates for trial being discussed at the time, if successful on the summary trial, Northmont would have been able to take the position that the scope of discovery was substantially more limited than that sought by JEKE.
- [29] There is inevitably a concern about litigating in slices and JEKE certainly raised that issue on the summary trial. Given the course of the litigation after the summary trial, Northmont recognized, correctly in my view, that when a summary trial is scheduled very close to the actual trial date, inevitably, the question is raised as to whether the time, expense and judicial resources are justified: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, [1989] 36 B.C.L.R. (2d) 202 at 210-219 (C.A.); *Western Delta Lands Partnership v. 3557537 Canada Inc.*, 2000 BCSC 54 at para. 24. There are also often timing issues in terms of the court being able to issue its reasons within a timeframe where it will actually provide some beneficial results in terms of avoiding trial preparation time and expense.
- [30] Further, in light of Northmont's later agreement to full pre-trial disclosure of Fairmont's historical dealings in respect of the Resort and the VIAs, the utility of the summary trial was made redundant. Accordingly, much of what was intended to be avoided in the event that I acceded to Northmont's position on the summary trial application is being done in any event. The expenditure of judicial resources in addressing the issues arising from the summary trial are now not justified, particularly when those issues can be addressed at the trial in the near future.
- [31] In my view, these circumstances are not "exceptional" and do not justify departing from the general rule. Much of the arguments advanced on the summary trial can be addressed at the trial set for January 2016 and, in that sense, there should be little further effort in developing the relevant documentation and the parties' arguments at that time. Further, any cost issues arising from the summary trial, including JEKE's adjournment application, can be considered by the court depending on the outcome of those issues after trial.

Conclusion

- [32] The summary trial application of Northmont is considered as withdrawn. Costs of the summary trial including JEKE's application to adjourn the summary trial are to be addressed by the trial judge.

"Fitzpatrick J."

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