

CANADA / JUDGMENT

One West Holdings Ltd. v. The Owners, Strata Plan LMS 2995

2020 BCSC 1544

COURT

Supreme Court of British Columbia

DECIDED

19 October 2020

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2020 BCSC 1544 One West Holdings Ltd. v. The Owners, Strata Plan LMS 2995

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

One West Holdings Ltd. v. The Owners, Strata Plan LMS 2995,

2020 BCSC 1544

Date: 20201019

Docket: S-110378

Registry: Vancouver

Between:

One West Holdings Ltd. and 669268 B.C. Ltd

Plaintiffs

And

The Owners, Strata Plan LMS2995

Defendant

And

One West Holdings Ltd.

Defendant by Counterclaim

Before: Master Elwood

Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Date of Hearing:

Vancouver, B.C.

August 18, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 19, 2020

I. INTRODUCTION

- [1] This decision resolves an issue that was raised at a trial management conference concerning production of expert files under Rule 11-6(8) of the Supreme Court Civil Rules.
- [2] The action is a complex commercial case arising out of the ownership of parking stalls in a strata development. The plaintiffs seek to enforce a lease over the parking areas of the development. They allege the strata corporation has unlawfully taken the commercial benefit of the parking stalls. If the court finds the lease is enforceable, the plaintiffs will seek an accounting for the parking revenues or, in the alternative, damages for breach of contract.
- [3] The facts are not seriously in dispute. The litigation is primarily about the proper interpretation of the leases and the legality of the ownership structure of the parking lots.
- [4] The case was set for a summary trial in November 2018. In preparation for the summary trial application, the parties exchanged lengthy affidavits and conducted cross-examinations on the affidavits. The parties also exchanged comprehensive written submissions.
- [5] The original summary trial application was adjourned by consent on the eve of the hearing. The summary trial application was adjourned again in August 2019 because there was no judge available, and put over to March 2020. The March 2020 date was adjourned generally due to the COVID-19 pandemic and the suspension of normal court operations.

- [6] A full trial of the action is scheduled for 25 days to begin on November 16, 2020. The parties intend to make use of their extensive preparations for a summary trial by presenting all of the direct evidence at trial by way of the affidavits, and all of the cross-examinations by way of the transcripts of the cross-examinations on the affidavits. The parties have also agreed to bifurcate damages from the liability issues.
- [7] As part of their case, the plaintiffs will tender expert reports on Hong Kong and British Virgin Islands real estate law. The plaintiffs will argue that expert evidence of foreign law on strata transactions and the duties of developers is necessary because a number of the owners purchased their units pursuant to agreements with choice of law clauses selecting Hong Kong or British Virgin Islands law.
- [8] At the trial management conference, the defendant owners sought an order under Rule 12-2(9)(i) or (s) requiring the plaintiffs to produce their experts' files pursuant to Rule 11-6(8)(b), including but not limited to documents relating to the experts' involvement in providing advice on the development and leases at issue.
- [9] For the reasons which follow, I have concluded I should not make a TMC order requiring the plaintiffs to produce their experts' files.

II. ANALYSIS

- [10] The expert reports in question were delivered to the defendants as part of the plaintiffs' summary trial application materials. The defendants have not delivered any expert reports.
- [11] The defendants did not issue a demand within the demand period under Rule 11-7(2) requiring the plaintiffs' experts to attend the trial for cross-examination pursuant to Rule 11-7(3).
- [12] More recently, the defendants asked the plaintiffs to produce the experts' files pursuant to Rule 11-6(8)(b), which provides:

Production of documents

- (8) Unless the court otherwise orders, if a report of a party's own expert appointed under Rule 11-3 (9) or 11-4 is served under this rule, the party who served the report must,
- ...
- (b) if asked to do so by a party of record, make available to the requesting party for review and copying the contents of the expert's file relating to the preparation of the opinion set out in the expert's report,
- (i) if the request is made within 14 days before the scheduled trial date, promptly after receipt of that request, or
- (ii) in any other case, at least 14 days before the scheduled trial date.

- [13] The defendants say they will object to the admissibility of the expert reports on the basis of relevance, necessity and bias arising from the experts' involvement advising on the development.
- [14] There was some debate at the TMC whether the defendants provided adequate notice of these objections for the purposes of Rule 11-6(10). I do not find it necessary to resolve that debate. In their trial brief, the defendants gave notice of an intention to object at trial to the admissibility of the reports and the general bases of the objections. The current lack of particularity can be cured, in my view, with an appropriate trial management direction.
- [15] With no cross-examination on the reports anticipated, the plaintiffs argue, an order requiring them to produce the experts' files would be disproportionate to the time and expense of obtaining the documents. Production should not be required in these circumstances, the plaintiffs argue, unless there is an air of reality to the defendants' allegations of bias, which would require affidavit evidence.
- [16] The defendants argue production of expert files under Rule 11-6(8)(b) is as-of-right when requested. The purpose of Rule 11-6(8), they say, is to permit opposing parties to make informed decisions whether to require experts to attend trial for cross-examination. Although they acknowledge they did not give notice within the time under Rule 11-7(2), the defendants submit they should have an opportunity to reconsider whether to require the experts' attendance for cross-examination, based on the contents of the files.
- [17] The defendants' position does not find support in the timelines under the Rules. The default deadline for the notice requiring an expert to attend for cross-examination is 21 days after service of the report, whereas the deadline for production of the expert's file is 14 days before the scheduled trial date. Since expert reports must normally be delivered at least 84 days before the scheduled trial date, an opposing party will normally need to make the decision whether to require the expert to attend for trial before they can expect production of the expert's file.
- [18] The purpose of the deadline in Rule 11-7(2) for notice that an expert is required to attend the trial is to provide sufficient advance notice for experts to arrange their schedules and for parties to plan the trial and prepare their trial briefs. This purpose would not be well served, in my view, by allowing a party in receipt of an expert report to defer its decision whether to require the expert to attend the trial until it has had an opportunity to review the expert's file.
- [19] The defendants may seek leave of the court to cross-examine the plaintiffs' experts without the required notice under Rule 11-7(2). But the process they will have followed would be the exception, not the rule. At this time, their application for production of the experts' files must be considered from the perspective they will not cross-examine the plaintiffs' experts at trial.

- [20] Documents relating to the preparation of an expert report for possible use in litigation are subject to litigation privilege. At common law, the privilege was waived when the expert was produced for cross-examination, requiring the witness to produce any documents that may relate to the substance of the opinion or his or her credibility: *Vancouver Community College v. Phillips, Barratt et al* (1988), 20 B.C.L.R. (2d) 289 (S.C.), at para. 297-298.
- [21] Rule 11-6(8) modifies the timing of the waiver of the litigation privilege:
- a) Sub-rule (a) sets out a number of documents that must be produced immediately on request: written statements or statements of facts on which the expert based his or her opinion; records of independent observations made by the expert in relation to the report; data compiled by the expert in relation to the report; and the results of any tests conducted by the expert or inspections conducted by the expert.
 - b) Sub-rule (b) requires that the contents of the expert's file "relating to the preparation of the opinion set out the expert's report" be produced 14 days before trial (or forthwith if the request is made within 14 days of trial).
- [22] In *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Minister of Education)*, 2014 BCSC 741, Madam Justice Russell held that the scope of production under Rule 11-6(8)(b) turns on the interpretation of the phrase "relating to the preparation of the opinion set out in the expert's report". This question is determined based on the principles of statutory interpretation, by reading the words in their entire context harmoniously with the scheme of the Rules, the object of the Rules and the intention of the Legislature: para. 34, citing *Evans v. Jensen*, 2011 BCCA 279 at para. 16, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26.
- [23] In *Conseil scolaire*, Madam Justice Russell held that Rule 11-6(8)(b) does not require production of materials in an expert's file that do not relate to the preparation of the opinion, at para. 44:

As I see it, on request pursuant to R. 11-6(8)(b), an expert must produce the contents of the expert's file that are relevant to matters of substance in his or her opinion or to his or her credibility unless it would be unfair to do so. However, the expert need not produce materials that relate to the expert's role as an advisor to counsel about matters that are not addressed in the expert's report.

- [24] In my view, the disclosure obligation in Rule 11-6(8)(b) cannot be divorced from the truth-finding process it is intended to serve. In other words, production of an expert's file is required by Rule 11-6(8)(b), not for stand-alone discovery purposes, but rather for the purpose of testing the substance and credibility of the expert's opinion at trial.

- [25] Disclosure under Rule 11-6(8)(b) is not automatic. The Rule allows that the court may "otherwise order". Rule 11-6(8)(b) must be applied in a manner consistent with the overall objective of the Rules, which is to secure the just, speedy and inexpensive determination of every proceeding on its merits. This includes, as far as is practicable, conducting proceedings in ways proportionate to: the amount involved in the proceedings, the importance of the issues in dispute and the complexity of the proceedings: Rule 1-3.
- [26] In this case, the parties have agreed on a trial procedure that will streamline the proceedings, ensure the liability issues conclude within the available time and reduce the number of individuals potentially exposed to the coronavirus, as well as travel requirements.
- [27] I agree with the plaintiffs that an order requiring them to produce the experts' files is out of proportion with the practical benefit from such production under the streamlined trial process to which the parties have agreed, in which, as matters currently stand, the experts will not be attending (in person or otherwise) for cross-examination.
- [28] The defendants may object to the admissibility of the plaintiffs' expert reports without cross-examining them. In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182, the Supreme Court of Canada held that expert witnesses have a special duty to the court to give fair, objective and non-partisan opinion evidence. A proposed expert who is unwilling or unable to comply with this duty is not qualified to give expert opinion evidence. In other words, the alleged bias of the plaintiffs' experts arising from their role as advisors on the development may be relevant to admissibility as well as weight.
- [29] However, in my view, Rule 11-6(8)(b) does not require production of documents from an expert's file solely for the purpose of objecting to the admissibility of the report. In this case, documents relating solely to the alleged bias or lack of objectivity arising from the experts' prior involvement in advising on the development are not documents "relating to the preparation of the opinion set out the expert's report".
- [30] Should the circumstances change between now and trial, such that disclosure of the expert files may serve a practical purpose, the defendants may apply in chambers for an order requiring their production. I am not convinced I should make that order without affidavit evidence at a TMC.

III. CONCLUSION

- [31] I decline to make an order requiring the plaintiffs to produce a copy of their experts' files.
- [32] I will direct that, by October 23, 2020, the defendants set out in writing, and provide to the plaintiffs, the particulars of any and all objections to the admissibility of the plaintiffs' expert reports.

"Master Elwood"

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Prepared on 28 October 2026 · Esheria