CANADA / JUDGMENT

Smithe Residences Ltd. v. Boffo Investment Corp.

2024 BCSC 556

COURT
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2024 BCSC 556 Smithe Residences Ltd. v. Boffo Investment Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smithe Residences Ltd. v. Boffo Investment Corp.,

2024 BCSC 556

Date: 20240408

Docket: S1711962

Registry: Vancouver

Between:

Smithe Residences Ltd., by its receiver, MNP Ltd.

Plaintiff

And

Boffo Investment Corp. and Boffo Developments (Smithe) Ltd.

Defendants

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for the Defendants:

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Place and Dates of Hearing:

Vancouver, B.C.

January 22 and 31, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 8, 2024

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INTRODUCTION

[1] These cross applications concern document production, under the Supreme Court Civil Rules [Rules] and pursuant to a court order, respectively.

[2] The defendants, Boffo Investment Corp. and Boffo Developments (Smithe) Ltd. ("Boffo Smithe") (collectively, the "Boffo Defendants"), seek second stage document production by the plaintiff Smithe Residences Ltd. ("Smithe Residences") under the Rules.

[3] Smithe Residences, represented by its receiver, MNP Inc. (the "Receiver"), seeks to enforce a court order dated February 2, 2022 that required document production by the Boffo Defendants.

BACKGROUND FACTS

[4] This proceeding has a long and tortuous history. Many of the parties who were originally named in this action are no longer parties, but they still figure to a degree in relation to the present applications.

[5] Brendan James Schouw was the principal behind Smithe Residences and his other development companies, Homer Street Residences Ltd. ("Homer Residences"), Hornby Residences Ltd. ("Hornby Residences") and 4 Corners Properties Ltd. ("4 Corners").

[6] As of 2011, Homer Residences, Hornby Residences and Smithe Residences owned development lands in downtown Vancouver on the streets that corresponded with their corporate names. The Hornby development was to be known as the "Artemesia" and the Smithe development was to be known as the "Thalia". All of the properties were in foreclosure at the time.

[7] Around this time, the Boffo Group became involved. The "Boffo Group" includes various companies, including the Boffo Defendants.

[8] Pursuant to a joint venture agreement dated August 5, 2011 (the "JVA"), the Boffo Group agreed to advance monies to Mr. Schouw to allow him to re-advance the monies to Homer Residences, Hornby Residences and Smithe Residences in order to satisfy all of the encumbrances and mortgages on title to the lands. It was agreed that members of the Boffo Group would own all of the properties and develop the properties. The consideration for the transfer of the Smithe property alone was $11.6 million.

[9] Agreements were negotiated at the time between Mr. Schouw and his companies and the Boffo Group that any profits arising from the three developments would be shared between them based on a certain formula.

[10] In February 2013 (but stated to be effective on March 19, 2012), Boffo Smithe assumed ownership of the Smithe property from Smithe Residences and Smith Residences entered into a consulting agreement with Boffo Smithe (the "Smithe Consulting Agreement").

[11] A similar consulting agreement was executed with respect to the Hornby property. In spring 2014, the Hornby development (Artemesia) was completed by a member of the Boffo Group. The sale proceeds did not result in any profit sharing arising under the relevant consulting agreement with Hornby Residences.

[12] In early 2016, the Boffo Group sent a written request to Mr. Schouw seeking to terminate the Smithe Consulting Agreement, which was rejected by Smithe Residences.

[13] On May 6, 2016, the Boffo Group, including Boffo Smithe, sent a letter to Mr. Schouw alleging that Smithe Residences had breached the Smithe Consulting Agreement (the "Repudiation Letter"). In the Repudiation Letter, the Boffo Defendants alleged that the Smithe Consulting Agreement was an agreement of trust and that Mr. Schouw had been guilty of misrepresentation and material non-disclosure such that a right of repudiation arose.

[14] The Boffo Group purported to accept the alleged breach and terminate the Smithe Consulting Agreement. Smithe Residences denied having breached the Smithe Consulting Agreement and that the Boffo Defendants had any basis to terminate it. Smithe Residences alleges that, when the Smithe Consulting Agreement was signed, the Boffo Defendants knew or ought to have known of Mr. Schouw's financial difficulties or misdeeds, including the allegations of fraud.

[15] On December 29, 2017, this action began when Mr. Schouw, Smithe Residences and 4 Corners filed the notice of civil claim against Homer Residences, the Boffo Defendants and the other Boffo companies involved in the Hornby and Homer developments. In part, the plaintiffs sought a declaration that the JVA and Smithe Consulting Agreement were valid and enforceable. They also sought recovery of all monies or their share of the profits under the various consulting agreements.

[16] In 2021/2022, the Boffo Defendants completed the construction of a residential and commercial condominium development on the Smithe property, named "The Smithe". The gross sale proceeds from the residential condominium units alone exceeded $177 million. The commercial space remains to be addressed.

[17] Smithe Residences alleges that it is owed millions of dollars by the Boffo Defendants under the terms of the Smithe Consulting Agreement for its share of the profits that Boffo Smithe realized as a result of the development.

[18] On October 13, 2023, a consent order was filed by which various claims were dismissed against various members of the Boffo Group. In essence, all of the claims that had previously been advanced in this action have been disposed of, save for Smithe Residences' claim against the Boffo Defendants under the Smithe Consulting Agreement.

THE PRESENT PLEADINGS

[19] On December 22, 2023, Smithe Residences filed its most current (4th amended) notice of civil claim. The sole issue raised is the validity of the Smithe Consulting Agreement and, if it is valid, what amount, if any, is owed to Smithe Residences. In the alternative, Smithe Residences claims unjust enrichment.

[20] The pleadings of the Boffo Defendants are extensive. They place great emphasis on their allegation that it was a material covenant that Smithe Residences would perform the Smithe Consulting Agreement in a "trustworthy manner". They also say that it was only in spring 2013 when they began to understand that Mr. Schouw had left many of his creditors unpaid and that Mr. Schouw had engaged in unsavory business practices in respect of both the Artemesia and Thalia projects.

[21] The Boffo Defendants allege that, as a result of Mr. Schouw's poor performance, dishonesty, fraud and misconduct, they were entitled to terminate the Smithe Consulting Agreement as set out in the Repudiation Letter.

[22] In addition to claiming the right to terminate the Smithe Consulting Agreement in May 2016, the Boffo Defendants also allege that they had "after-acquired cause" to terminate the Smithe Consulting Agreement by reason what they later discovered concerning Mr. Schouw's activities.

[23] Finally, the Boffo Defendants say that they redesigned the Smithe project and changed it from "Thalia" to "The Smithe", such that no development as contemplated in the Smithe Consulting Agreement was built so as to give rise to any monies being owed under the Smithe Consulting Agreement.

[24] Smithe Residence responds by asserting that the Boffo Defendants applied for a rezoning of the Smithe property in May 2015, which was approved in January 2016. As a result, the anticipated profit for the Smithe project rose substantially. Smithe Residences says that it was only then that the Boffo Defendants sought to terminate the Smithe Consulting Agreement, including via the Repudiation Letter, so as to keep the profits to themselves. Finally, Smithe Residences says that the Boffo Defendants are only using Mr. Schouw's activities as an excuse to support their position, when the Boffo Defendants knew of Mr. Schouw's activities well before entering into the Smithe Consulting Agreement. Indeed, Ottavio Boffo states in his Affidavit #1 affirmed June 3, 2021 that, in November 2012, the Boffo Group began to learn of the numerous actions, judgments, security and tax fraud allegations against Mr. Schouw.

[25] At present, the parties are seeking trial dates in early 2025.

PRESENT STATUS of MR. SCHOUW / SCHOUW ENTITIES

[26] In April 2015, Hornby Residences was placed into bankruptcy and Crowe MacKay & Company Ltd. was appointed as trustee (the "Trustee").

[27] On April 16, 2021, Justice Giaschi appointed The Bowra Group as receiver and manager of Mr. Schouw and Smithe Residences (the "Receivership Order").

[28] On June 21, 2021, Justice Ahmad appointed The Bowra Group as receiver and manager of Homer Residences.

[29] In late 2022, The Bowra Group merged with MNP Ltd. under the name "MNP Ltd." Doug Chivers, a licensed trustee in bankruptcy, is in charge of all the files being administered by the Receiver, including the conduct of this litigation on behalf of Smithe Residences.

BOFFO DEFENDANTS' APPLICATION

[30] Over the course of the five-year history of this litigation, document disclosure has been a constant source of controversy.

History of Document Disclosure

[31] Much of that history of Smithe Residences' document production is recounted in Justice Edelmann's reasons for judgment issued on March 27, 2023 [Edelmann Reasons]. In brief,

a) July 2019: the initial plaintiffs (Smithe Residences, Mr. Schouw and 4 Corners) served their list of documents ("LOD");

b) February 2022: the initial plaintiffs served an amended LOD;

c) March 2022: Mr. Schouw attended an examination for discovery ("E/D") and there were certain outstanding requests for documentation;

d) April 2022: members of the Boffo Group, including the Boffo Defendants, served demands for documents pursuant to R. 7-1(10) and (11) of the Rules on 4 Corners, and the Receiver for Smithe Residences and Homer Residences;

e) After months of negotiations relating to the Boffo Group's request for document discovery, in November 2022, the initial plaintiffs delivered a second amended LOD;

f) November 2022: the Boffo Group took the position that the document production and responses to E/D were lacking;

g) January 27, 2023: the Boffo Group delivered its letter, setting out approximately 207 document requests (the "January 2023 Document Demand");

h) February 2023: the Boffo Group filed a notice of application, not for document production, but to dismiss the action or adjourn the trial dates; and

i) February/March 2023: the matter came for hearing before Edelmann J. on two separate dates. Over that period of time, the initial plaintiffs filed a third amended LOD and a fourth amended LOD (listing around 200 items).

[32] It is apparent from the Edelmann Reasons that the adequacy of document production by the initial plaintiffs, including by the Receiver on behalf of Smithe Residences, was addressed. The January 2023 Document Demand was, however, not in evidence before Edelmann J. (para. 15).

[33] Justice Edelmann addressed the document production by each of the plaintiffs. With respect to 4 Corners, he found a "remarkable lack of diligence" in producing documents (paras. 24-25) but no willful non-compliance. Similarly, with respect to Mr. Schouw, he also found no willful non-compliance. With respect to the Receiver of Smithe Residences, Edelmann J. stated:

[22] The receiver has filed an affidavit stating that he has provided all documents in his possession and control as required by the order. The applicants do not suggest that the receiver is in possession of any documents not disclosed. However, they suggest that according to the terms of the order, the receiver ought to have exercised the broad powers granted under the receivership to seek out any and all of the documents described. I do not accept that the wording of the order is so clear as to require such an open-ended exercise of what are rather broad powers, in particular in circumstances where it is unclear who would bear the cost of such an open-ended inquiry. Whether or not the order supports such an interpretation, I do not find the conduct of the receiver in the circumstances to constitute a willful failure to comply with the order.

[34] On April 12, 2023, members of the Boffo Group, including the Boffo Defendants filed a notice of application, seeking document production of the 207 document requests outlined in the January 2023 Document Demand.

[35] On April 27, 2023, the plaintiffs provided their fifth amended LOD. On that same date, the plaintiff's then counsel delivered a specific written response to each of the 207 document demands set out in the January 2023 Document Demand. These responses included Mr. Schouw's advice as to the disposition of certain documents and whether they were still in his possession or control.

[36] On May 10, 2023, counsel for the Boffo Defendants sent a letter to the plaintiff's then counsel taking the position that insufficient responses had been provided in response to the January 2023 Document Demand.

[37] In addition, in May 2023, the Boffo Defendants sought to obtain documents which Mr. Schouw had provided to the Trustee of Hornby Residences. On March 13, 2019, the Trustee was discharged. However, the Trustee responded that the documents provided had either been returned to Mr. Schouw or had been destroyed.

[38] In September and October 2023, these Boffo Group members filed further notices of application essentially seeking this same relief, but now including a demand for Mr. Schouw to provide an affidavit verifying the plaintiffs' LODs.

The Present Application

[39] On January 9, 2024, the Boffo Defendants filed the present application. Again, they seek an order that Smithe Residences, through the Receiver, amend the LOD and provide the over 200 document requests set out in the January 2023 Document Demand. Also, again, the Boffo Defendants seek an order that Smithe Residences, through Mr. Schouw, provide an affidavit verifying the LODs and describing the efforts, including specific searches, undertaken to comply with the further document disclosure demanded.

[40] The Boffo Defendants say that the January 2023 Document Demand is required for them to defend this action. They say that it will help them prove or disprove material facts in this action, pursuant to R. 7-1(1) of the Rules. They further say that these issues will include the misrepresentations or material non-disclosures that are said to have induced them to enter into the various agreements, Mr. Schouw's disreputable conduct that they say justified the Repudiation Letter, and the question of what services were provided under the Smithe Consulting Agreement.

[41] It is quite apparent that the 207 document demands are extensive. Although the Boffo Defendants' description of those documents has shifted over the course of this hearing, the categories are now broadly described as:

a) Documentation regarding services provided under the Smithe Consulting Agreement, including by members of James Schouw & Associates (described as the "Consultant Team" and which includes Mr. Schouw), who I understand were not employees of Smithe Residences. This includes all of the documents relating to the design, construction and development of "Thalia" and all documents relating to marketing and sales of that project;

b) Documentation regarding services provided under the consulting agreement with respect to the Artemesia project on the Hornby lands, including by the Consultant Team. This includes all of the documents relating to the design, construction and development of "Artemesia" and all documents relating to marketing and sales of that project;

c) All valuation documents relating to the Hornby, Smithe and Homer lands as of August 2011 and all documents relating to the initial purchase of those lands;

d) Documents relating to "specific representations", including: the cost to complete "Artemesia"; all documentation regarding the Consultant Team's debts and liabilities relating to the Hornby, Smithe and Homer properties; communications between the Consultant Team and Canada Revenue Agency ("CRA"); all documents relating to various judgments, orders and court orders; all documents by the Consultant Team regarding the insolvency of Hornby Residences; communications regarding 4 Corners' claim against the Smithe property and its security interest, including by the Consultant Team;

e) "Specific Repudiation Documents" including communications by the Consultant Team regarding Mr. Schouw's fine under the Excise Tax Act, R.S.C. 1985, c. E-15, and communications regarding Mr. Schouw having been named in certain newspaper articles; and

f) Documentation by the Consultant Team relating to a registration by Azura Management Ltd. in the Personal Property Registry.

[42] Originally, the Boffo Defendants also sought what they described as "Non-Privileged Lawyer Documents", but they withdrew that request at the continuation of the hearing on January 31, 2024.

Discussion

[43] The parameters of document production under R. 7-1 of the Rules are well settled:

a) All "parties of record" must list their documents that are in that party's "possession or control" that could be used to prove or disprove a material fact: R. 7-1(1)(a);

b) The Court may order that a party of record deliver an affidavit verifying a LOD: R. 7-1(8);

c) Second tier document production can be requested by a party of record. That party may demand an amended LOD (R. 7-1(10)); and that demand must contain an explanation with "reasonable specificity" why the documents that are within the other party's "possession, power of control" are being sought: R. 7-1(11); see Przybysz v. Crowe, 2011 BCSC 731 at para. 30;

d) If the party does not comply with the demand under R. 7-1(10) or (11), an application can be made to the Court. The onus of establishing that production has been made, as required, rests on the producing party: Canreal Management Corporation v. Mercedes-Benz Canada Inc., 2010 BCSC 642 at para. 23;

e) The Court has the discretion to order that a LOD be produced referring to documents in a party's possession, power or control "relating to any or all matters in question in the action". The Court may also exercise its discretion to excuse a party from any further production: R. 7-1(13) and (14): Przybysz at para. 29; and

f) Document production is subject to the objective of proportionality, pursuant to R. 1-3(2), which also applies to the exercise of the Court's discretion under R. 7-1(14).

[44] As counsel for the Boffo Defendants correctly describes, the issue is whether to order the production of these documents when there have already been responses in relation to the demands for production. They say that there is still reason to believe that documents have yet to be produced for various reasons: (1) production has occurred after court hearings; (2) there are "credibility' issues; (3) there are obvious gaps in production and there is more to search through; and (4) the documents provided to the Trustee by Mr. Schouw are "problematic" because they should still exist in electronic formats.

[45] The Boffo Defendants therefore say that the Court should not be satisfied with the responses to date by the "Plaintiffs".

[46] I will first address the responses of the only plaintiff who remains, which is Smithe Residences.

[47] Following the fifth amended LOD delivered in April 2023, in early October 2023, the plaintiffs delivered yet another LOD, being the sixth LOD. This was around the time when the litigation was being streamlined to include only Smithe Residences as the plaintiff. The new LOD included documents produced by the Receiver in Schedule B-1, which included privileged emails.

[48] In Mr. Chivers' Affidavit #6 affirmed October 12, 2023, he refers to seeking out additional documents relating to the ownership of the Smithe property. On that date, Smithe Residences, as the sole remaining plaintiff, completed its seventh LOD which included these documents. Mr. Chivers refers to the previous schedule to the various LODs that had been produced on behalf of Mr. Schouw, Smithe Residences and Homer Residences (who he describes as the "Schouw Parties").

[49] In his Affidavit #6, Mr. Chivers states:

7. To the best of my knowledge, information and belief, I verify that there are no other documents in my possession or in the possession of the Schouw Parties related to this matter that are not listed in the Seventh Amended List of Documents.

[50] The Boffo Defendants firstly suggest that this Court should be skeptical of the Receiver's response given the comments of Edelmann J., which referred to a "remarkable lack of diligence" in document production. Yet, my reading of the Edelmann Reasons is that this comment was directed at 4 Corners, not the Receiver. Again, Edelmann J. stated at para. 22 states that the Boffo Defendants did not suggest that the Receiver was in possession of documents not disclosed.

[51] I acknowledge that paras. 4-6 of the Receivership Order regarding Smithe Residences and Mr. Schouw require that "Persons" advise the Receiver of all documents relating to the business of the Debtors and, upon request, provide them to the Receiver or provide access to the documents. However, as Edelmann J. discussed at para. 22 of the Edelmann Reasons, how far these provisions go in terms of requiring action by the Receiver in this litigation is questionable.

[52] In any event, Mr. Chivers' Affidavit #6, quoted above, would support that the Receiver has made efforts to take possession of relevant documents from Mr. Schouw who I agree could reasonably have been expected to have those documents or know where they were.

[53] I would note in any event that the Boffo Defendants do not suggest now that the Receiver has improperly failed to exercise its powers under the Receivership Order to obtain documentation that might be produced in this litigation. Indeed, on August 1, 2023, the Boffo Defendants objected to the Receiver doing just that in relation to obtaining documents from certain third parties.

[54] Accordingly, there is nothing to suggest that the Receiver has failed in its obligation to produce documentation in its possession and control.

[55] The Boffo Defendants place great emphasis on the fact that Mr. Schouw was the driving force behind all three development projects, including the Smithe project. They say that Mr. Schouw was the former director and the only voting shareholder of Smithe Residences. They say that Mr. Schouw "needs to be held to account".

[56] The Boffo Defendants point to Mr. Schouw's conduct in this litigation. They point to Mr. Schouw's E/D from April 2023 where he was questioned by counsel extensively about his search for documentation. In particular, Mr. Schouw was questioned regarding the evidence in his Affidavit #1 dated February 23, 2023 that he had produced all documents in his possession or control as relevant to certain requests of the Boffo Defendants. The Boffo Defendants suggest that his answers show that he has not made sufficient efforts to search for relevant documents, although Smithe Residences says that he did answer adequately. Mr. Schouw also provided his Affidavit #2 sworn March 9, 2023 confirming that he had produced all records and documentation within his possession or control.

[57] As such, the Boffo Defendants say that Mr. Schouw must be part of the "mechanics" of document production, and that only Mr. Schouw can provide the affidavit verifying documents and what searches he undertook. In this respect, the Boffo Defendants' belief that documents have yet to be produced for the reasons set out above in para. 44 (including credibility) are directed at Mr. Schouw, not the Receiver.

[58] The Boffo Defendants argue that the Court has the discretion to order documentation from Smithe Residences "by way of Schouw".

[59] The difficulty with the Boffo Defendants' submission is that Mr. Schouw is no longer a party to this action. To the extent that Mr. Schouw previously participated in document production for himself, 4 Corners and Homer Residences, any issues have become moot. Mr. Schouw's production on behalf of Smithe Residences remains relevant; however, the Receiver has attested that the production for Smithe Residences has been completed, which was a process that involved Mr. Schouw.

[60] The only "party of record" who can be compelled to produce documents under R. 1-7(13) or (14) of the Rules is Smithe Residences. Mr. Schouw is no longer a party of record. The fact that he was the former director (to 2017) and controlling mind of Smithe Residences does not change that.

[61] The Boffo Defendants acknowledge that Mr. Schouw could be considered a "non-party". In that event, they acknowledge that it is open to them to seek further documentation from Mr. Schouw that may be in his possession or control under R. 7-1(18) of the Rules. Such an order may be appropriate given the Receiver/Smithe Residences' response that they do not have any further documents: Nikolic v. Olson, 2011 BCSC 125 at para. 34. In that event, the Boffo Defendants argue that such an order should be granted now.

[62] However, Mr. Schouw has not been served with any application and it would be entirely inappropriate to grant such an order in those circumstances. The same goes for the Boffo Defendants' argument that this same relief should be granted with respect to the Trustee of Hornby Residences, although the Trustee has responded as to what happened to those documents it held.

[63] Finally, there is also the matter of proportionality. I agree with Smithe Residences' counsel that the scope of the January 2023 Document Demand, even initially slimmed down to 81 (and later 69) demands, is massive and amounts to a forensic examination of all of Mr. Schouw's business dealings. Essentially, the Boffo Defendants wish to obtain practically the entirety of all communications and documents created by or on behalf of Mr. Schouw, whether personally, or on behalf of the "Consultant Team" or Hornby Residences, Homer Residences or Smithe Residences, dating back over a decade. This appears to be in aid of attempting to document Mr. Schouw's misdeeds, which the Boffo Defendants put forward as the basis for the Repudiation Letter. They also say that these types of documents will establish which "services" were provided under the Smithe Consulting Agreement.

[64] I agree with counsel for Smithe Residences that, even if such documents still exist, of which there is no proof or even suggestion in the evidence, it would be a monumental task to assemble these documents.

[65] There are substantial questions regarding the relevance of many of these documents, when viewed in the context of the pleadings. As I noted above, the Boffo Defendants' January 2023 Document Demand was very general and has, over the course of this hearing, been a moving target. As noted in Ackert v. At Nature's Door Owners' Association, 2021 BCSC 778 at paras. 18-21, fairness to the party receiving these demands requires the "reasonable specificity" and reason for disclosure (i.e. relevance to the issues) to be stated in the demand under R. 7-1(11), as opposed to being asserted only in the application materials or at the hearing.

[66] Despite claims that these numerous documents are "relevant" based on the allegations in the response to civil claim, I have serious doubts in that respect. For example, I fail to see how documentation regarding the Consultant Team's services provided for the Artemesia project has any relevance or "relate to" to the Smithe Consulting Agreement or the services provided under it. Other obvious examples include the demand for appraisals and valuations relating to the Hornby and Homer properties and the costs to complete "Artemesia".

[67] Counsel for Smithe Residences does not dispute the various findings, fines and court orders that were granted against Mr. Schouw that seem to underpin the Boffo Defendants' argument that he was a bad actor and had financial difficulties. Smithe Residences takes the position that the real issue in the litigation is whether those circumstances justified the repudiation of the Smithe Consulting Agreement by the Boffo Defendants.

[68] It is also apparent that the Boffo Defendants already have substantial information regarding Mr. Schouw's activities, including from even before 2013 when they entered into the Smithe Consulting Agreement. The Boffo Defendants have already contacted many third parties who dealt with Mr. Schouw. In their Further Amended Trial Brief dated January 2, 2024, they list some 16 witnesses in that respect.

[69] In conclusion, I see no merit in the Boffo Defendants' application to compel further document production from Smithe Residences. The evidence establishes that no further documents are in the Receiver's possession, power and control. In any event, and even assuming these further documents exist somewhere, I would have my discretion to refuse any document production order, given the Boffo Defendants' state of disarray in terms of framing their document requests.

[70] In addition, there is no merit in the Boffo Defendants' argument that the claims of privilege in Smithe Residences' LODs lack specificity.

[71] Finally, the Boffo Defendants seek an affidavit verifying documents. In Araya v. Nevsun Resources Ltd., 2019 BCSC 262 at para. 19, Justice Abrioux, as he then was, outlined the principles by which such an application will be considered. Broadly speaking, any application must be based on deficient production, a less than diligent search history or unwarranted delay. For the reasons stated above, none of those circumstances exist here that would suggest that an affidavit is required.

[72] As stated above, the Receiver, an officer of this Court, who is conducting this litigation on behalf of Smithe Residences, has provided an affidavit attesting to having made enquiries and having produced all documentation as required under the Rules. This was the same situation regarding the Receiver's document production as was considered by Edelmann J., with no issues arising.

[73] To the extent that the Boffo Defendants wish to continue to question and test Mr. Schouw's document production or the existence of further documents that he has, their solution lies in potentially obtaining an order under R. 7-1(18) of the Rules after proper service of the application materials. For obvious reasons, I made no comment in the appropriateness of any such order.

SMITHE RESIDENCES' APPLICATION

[74] As stated above, the main issue in the litigation is Smithe Residences' claim for a share of the profits achieved in respect to the Smithe development pursuant to the JVA and the Smithe Consulting Agreement.

[75] Schedule "B" to the Smithe Consulting Agreement sets out certain "consulting fees", which Boffo Smithe was to pay to Smithe Residences. Paragraph 1 of Schedule "B" requires that the aggregate gross sales revenue be at least $63 million, net of credits (which appears to have been achieved). Schedule "B" then sets out a sharing formula that is: firstly, tied to Boffo Smithe's "total project costs" with 15% allocated to Boffo Smithe and 5% to Smithe Residences; secondly, allocates $2 million to each party; and thirdly, provides for a split of the balance with 60% payable to Boffo Smithe and 40% to Smithe Residences.

[76] Further provisions are contained in Schedule "B" as relevant to a calculation of profits. These state that the "fixed land cost" was $14.6 million and the remainder would be "project costs" and that mortgage costs are to be accrued and paid before any profit distribution to the parties.

[77] As Smithe Residences argues, its claim to amounts owing under the Smithe Consulting Agreement depends on their ability to prove the amounts owed based on what revenue was obtained and what expenses were incurred by Boffo Smithe in respect of the development.

History of Listing and Production

[78] In May 2019, the Boffo Defendants filed their first LOD.

[79] On February 2, 2022, on application by Smithe Residences, Associate Judge Bilawich granted an order that required the listing and production by the Boffo Defendants of communications between them and various persons, including Mr. Schouw and his various companies (the "Order"). Paragraph 1(c) of the Order also required listing of the following documents:

Up to date financial and accounting records for each of the developments on the Smithe Property (as defined in the Boffo Defendants' Further Amended Response to Civil Claim [filed January 4, 2022] showing the sources and uses of any and all revenues for these developments, and any other document or record relevant to the calculation of profit for the purposes of the profit sharing/splitting formulas set out in Schedule "C" of the 2011 Joint Venture Agreement or Schedule "B" of the Smithe Consulting Agreement.

[80] Later, in February 2022, the Boffo Defendants filed their amended LOD. In March 2022, counsel for Smithe Residences took the position that the production was deficient, identified deficiencies and demanded compliance with the Order. Later in March 2022, the Boffo Defendants filed their second amended LOD; yet a later and third amended LOD was delivered in June 2022.

[81] In April 2023, following the E/D of Ottavio Boffo in March 2023, Smithe Residences' counsel wrote to opposing counsel taking the position that the Boffo Defendants' document production was deficient. He identified many categories of documents that were expected, including a long list of financial records including those sought now.

[82] In addition, in April 2023, Mr. Chivers also demanded that the Boffo Defendants produce a long listing of financial, accounting and business records relating to the Smithe development, pursuant to paras. 4-6 of the Receivership Order.

[83] In June 2023, the Boffo Defendants' counsel replied to the April 2023 demands with specifics responses. Broadly speaking, he refused further production, taking the position that the documents were not relevant, were privileged, or that the scope of production would "violate the principle of proportionality".

[84] On June 21, 2023, the plaintiffs filed a notice of application seeking production of various documents. They also sought compliance with the Order and specifically, para. 1(c), and demanded production of purchase and sale agreements for the residential units and copies of financial and accounting records showing sources and uses of any and all revenue and costs.

[85] In July 2023, the Boffo Defendants provided their fourth and fifth amended LOD.

[86] On July 27, 2023, the plaintiffs' application came on for hearing before Associate Judge Vos. He dismissed certain aspects of the application, which are not before me; in addition, he adjourned generally the relief sought relating to the financial and accounting records.

[87] In October 2023, the Boffo Defendants provided their sixth, seventh and eight amended LOD.

[88] In December 2023, Smithe Residences' new counsel delivered another demand for documents under the Order. This demand was also initially refused by the Boffo Defendants but, after further discussion between counsel, on December 15, 2023, the Boffo Defendants agreed to provide some additional documents.

[89] On December 20, 2023, the Boffo Defendants delivered their ninth LOD which included over 60 new financial and accounting documents dating from 2012 to 2023, including those which Smithe Residences describes as:

a) A document purporting to be the general ledger of Boffo Smithe dated January to December 2023;

b) Corporate CRA filings for Boffo Smithe dated 2021 to 2023;

c) Financial statements for Boffo Smithe for years-ended 2012 to 2023;

d) GST filings for Boffo Smithe dated August 2011 to October 2023;

e) Thirty-nine Project Monitoring Claim Reports prepared regarding the Smithe Project development by BTY Group, construction cost consultants, for Canadian Western Bank (collectively, the "Claims Reports").

[90] In late December 2023, Smithe Residences' counsel yet again asserted that there were still material documents yet to be produced pursuant to the Order.

[91] In total, the Boffo Defendants have listed and produced 806 documents.

Smithe Residences' Application

[92] As with the Boffo Defendants' application addressed above, this application is also very much contested.

[93] On January 9, 2024, Smithe Residences filed a notice of application to compel the Boffo Defendants to comply with the Order (the "January 2024 NOA"). Smithe Residences seeks the following categories of documents that it says are required to comply with para. 1(c) of the Order:

a) All lease agreements regarding the commercial space which occupies the lower floors of the Smithe Project development;

b) All contracts of purchase and sale entered into for the residential units of the Smithe Project development;

c) Up-to-date financial and accounting records for Boffo Developments (Smithe) Joint Arrangement;

d) Up-to-date financial and accounting records for Bassano Land Corp;

e) Documents relating to the mortgage advanced by Canadian Western Bank pursuant to the Credit Agreement between Canadian Western Bank, Boffo Developments (Smithe) Ltd., Ottavio Boffo, and Bassano Land Corp. dated for reference August 22, 2017 (the "Construction Mortgage");

f) Documents relating to the mortgage advanced by Canadian Western Bank pursuant to the Credit Agreement between Canadian Western Bank, Boffo Developments (Smithe) Ltd., Ottavio Boffo and Bassano Land Corp. dated for reference June 23, 2021 (the "Post-construction Mortgage");

g) Details of the summary entries that are listed throughout the general ledgers of Boffo Smithe;

h) Financial and account records regarding the Option to Lease between Boffo Smithe and Boffo Developments Parking Corp. dated March 3, 2021; and

i) Financial and accounting records related to the costs associated with the acquisition of the Smithe Project development lands.

(collectively, the "Requested Documents").

[94] The Boffo Defendants say that they have complied with the Order. Specifically, they say that the Requested Documents do not exist, are not encompassed within the Order, are disproportionate requests, have already been produced and/or "will not provide any new information", or are records of non-parties.

Abuse of Process

[95] In the spirit of "the best defence is a good offence", the Boffo Defendants have filed a cross-application to dismiss Smithe Residences' application on the basis that it is an abuse of process, pursuant to R. 9-5(1)(d) of the Rules.

[96] The Boffo Defendants raise three arguments. All can be disposed of briefly.

[97] Firstly, they say that the plaintiffs' counsel (who is not Smithe Residences' present counsel) raised no objections to their document production between March 2022 and June 2023. They further say that the litigation proceeded over that time based on the "understanding" that the Boffo Defendants' document production was satisfactory. I agree that there is no evidence of any communication from counsel in that time period asserting non-compliance with the Order until April 2023; however, I cannot conclude that this silence amounts to a representation, express or implied, that the Boffo Defendants' production was accepted as satisfactory.

[98] Secondly, they say that litigation steps have taken place on the basis of the "understanding" that Boffo Defendants' production was satisfactory. They point to Ottavio Boffo's E/Ds in March and June 2023. However, it is blatantly the case that document production, by both sides, have been a moving target over the many years since 2017. Even the Boffo Defendants' latest LOD was only served in December 2023. I see no prejudice to the Boffo Defendants in requiring compliance with the Order, which was not appealed or set aside or varied in any way and remains extant. Further E/D of their representatives is still likely required and can take place well before the trial.

[99] Thirdly, they argue that Smithe Residences' former counsel brought the June 2023 application for the same or similar relief as what was ordered in para. 1(c) of the Order. However, Associate Judge Vos did not address this relief on its merits and it was adjourned generally. I do not consider Smithe Residences' current application in terms of compliance with the requirements of the Order as "re-litigating" that issue such that this application is an abuse of process.

Discussion

[100] Smithe Residences' application is supported by Mr. Chivers' Affidavit #7 affirmed January 9, 2024. Mr. Chivers states that he is a chartered professional accountant and licensed trustee in bankruptcy. He states that he routinely reviews financial and accounting documentation to conduct financial assessments and analysis of the performance of projects and companies.

[101] Further, Mr. Chivers states that he has reviewed the documents listed by the Boffo Defendants and that many documents which are necessary to assess the financial performance of the Smithe project as relevant to the amounts owed under the Smithe Consulting Agreement are not listed.

[102] The Boffo Defendants object to Mr. Chivers' Affidavit evidence, asserting that it is opinion evidence and not tendered through a properly qualified expert report.

[103] In my view, the Boffo Defendants' argument is without merit. Mr. Chivers' evidence is drawn from his experience in the field of residential and commercial real estate developments and the documentation that is typically produced in that context is well understood in the field. It is not a matter upon which the Court requires expert evidence.

[104] As an initial observation, I agree with Smithe Residences that the document production of the Boffo Defendants is insufficient. The Smithe project was a multi-million dollar residential and commercial development that took place over many years, if not a decade. The bare facts of this development would indicate that there was some complexity involved. The financial records relating to the development - including all revenues and all costs - are obviously key to the ability of Smithe Residences to calculate the amount alleged to be owing to it under the Smithe Consulting Agreement. The amounts involved are substantial, in that Smithe Residences' claim is in the millions of dollars.

[105] In this respect at least, the Boffo Defendants seems to agree. Michael Boffo states in his Affidavit #1 sworn July 18, 2023 that searching, compiling and producing all financial and accounting records for the Smithe project would be a "massive undertaking". He states that it would take weeks to review and produce such records, including potentially redacting commercially sensitive, irrelevant and third-party information. Instead, he proposes that production of the general ledger ("G/L") is sufficient in that is provides all necessary information for the calculation of profit under the Smithe Consulting Agreement.

[106] The inherent difficulty that arises is that only the Boffo Defendants who are in possession of such documents. Given the limited disclosure to date, Smithe Residences places no trust in the ability or willingness of the Boffo Defendants to fully disclose all of the relevant information, so as to allow the Receiver to consider whether transactions or costs asserted by them are valid or reasonable. In short, Smithe Residences considers that it must independently review the documentation rather than rely on the Boffo Defendants own "summaries" of revenues and expenses.

[107] Generally speaking, I consider that Smithe Residences' position or lack of trust has some merit. Ideally, counsel would have worked cooperatively to fashion document disclosure and/or production in an efficient manner that addresses the concerns of both parties, given the breadth of the task. That ideal appears to be unachievable in light of the present situation.

[108] As such, it appears that the matter can only be addressed by a court order, now and possibly in the future.

[109] I will address the specific document requests separately, as follows.

a) Lease agreements for Commercial space and parking, etc.

[110] The Boffo Defendants have produced one lease agreement for part of the commercial space dated June 10, 2021.

[111] In Michael Boffo's Affidavit #4 sworn January 19, 2024, he states that there are no lease agreements for the lower floor of the commercial space to which the Boffo Defendants are parties. However, this evidence appears to have been inaccurately stated.

[112] Significantly, this statement ignores references in other documents produced that other Boffo companies - Bassano Land Corp. and Boffo Developments Parking Corp. - seem to have acquired interests in or rights to the commercial space and some or all of the parking and storage spaces in the development. There is no suggestion from the Boffo Defendants that they do not have any documents evidencing such transactions, as may be relevant to what revenues and profits were achieved or should have been achieved through such related transactions. The potential issue that arises from Smithe Residences' point of view is that profits from the project may have been diverted to other Boffo entitles so as to avoid including those revenues in the profit calculation.

[113] I disagree with the Boffo Defendants' counsel that these documents relating to the disposition of the commercial space and parking spaces are not relevant.

[114] These documents requested are relevant and producible as sought under paras. 1(a) and (h) of the January 2024 NOA.

b) Contracts of purchase and sale for Residential Units

[115] The Boffo Defendants produced a Sales Report for the Smithe development dated September 30, 2021. That Report refers to over 90 contracts of purchase and sale that were entered into for the residential units of the development. Yet, the Boffo Defendants have only produced only about four of them, which they refer to as "Boffo-related".

[116] Michael Boffo states that it would be a time-consuming and overwhelming task to produce the other contracts. The Boffo Defendants' counsel submits that her clients would produce them, but only if they are compensated for their expenses.

[117] In my view, these further contracts of purchase and sale are relevant and producible as relevant to the calculation of revenue and profit. Any costs arising from that production can be addressed at the conclusion of the trial.

c) Financial / accounting records for Boffo (Smithe) Joint Arrangement

[118] The Boffo Defendants have disclosed certain documents which are financial documents relating to Boffo Developments (Smithe) Joint Arrangement for the year- ended May 31, 2021. The Boffo Defendants have not provided financial statements, or other financial and accounting records, regarding Boffo Developments (Smithe) Joint Arrangement for the years preceding that year and following the 2021 year-end.

[119] In my view, these further financial and accounting records are relevant and producible as relevant to the calculation of revenue and profit.

d) Financial / accounting records for Bassano Land Corp.

[120] The Boffo Defendants have disclosed the financial statements for Bassano Land Corp. for year-ended December 31, 2022. The Boffo Defendants have not provided financial statements of Bassano Land Corp. for the preceding and following years, nor other relevant financial and accounting records of Bassano Land Corp.

[121] The documents indicate that Bassano Land Corp. was involved in the Smithe project. Consistent with my comment under subheading (a) above, there is no suggestion from the Boffo Defendants that they do not have the power or control to obtain such documents, as may be relevant to what revenues and profits were achieved or should have been achieved for the Smithe project.

[122] In my view, these further financial and accounting records of Bassano Land Corp., are relevant to the Smithe project, and are relevant and producible as relevant to the calculation of revenue and profit under the Smithe Consulting Agreement.

e) Documents relating to Canadian Western Bank Mortgages

[123] As evidenced by Schedule "B" to the Smithe Consulting Agreement, the costs of the Smithe development, as relevant to what profit was generated would include the costs of the financing obtained by the Boffo Defendants.

[124] The materials refer to financing having been obtained from Canadian Western Bank ("CWB") pursuant to a Credit Agreement between CWB, Boffo (Smithe), Ottavio Boffo, and Bassano Land Corp. dated August 22, 2017 (the "Construction Mortgage") and pursuant to the Credit Agreement between CWB, Boffo (Smithe) Ltd., Ottavio Boffo and Bassano Land Corp. dated June 23, 2021 (the "Post-Construction Mortgage").

[125] The Boffo Defendants have listed and disclosed Claims Report No. 39 provided to CWB in support of requests for advances under the Construction Mortgage. However, they have not produced the application materials by which that advance was requested. They have not

produced any of the other 38 Claims Reports by which advances were requested from CWB, including all of the "Construction Breakdowns" and "Completion Reports" that were provided to CWB (#1-39) in the Claims Reports, such as was referenced in Claim Report No. 39.

[126] The Boffo Defendants have also not produced (a) the commitment letter from CWB for the Construction Mortgage; (b) the August 22, 2017 Credit Agreement; or (c) whatever appraisals or valuation documents they provided to CWB when they applied for the construction financing.

[127] Similarly, the Boffo Defendants have not listed or produced any documents relating to the Post-Construction Mortgage with CWB.

[128] These documents requested are relevant and producible as sought under paras. 1(e) and (f) of the January 2024 NOA.

g) The General Ledgers (G/Ls)

[129] The Boffo Defendants have produced G/Ls, which are said by Michael Boffo to accurately show revenue and expenses.

[130] However, Mr. Chivers has reviewed those G/Ls. He refers to the usual process by which the accountants would have working papers that would summarize the allocation of these G/L accounts in terms of how the financial statements were prepared (which have been produced). None of these working papers have been produced which would allow the Receiver to understand how the G/L entries were translated into the financial statements.

[131] In addition, Mr. Chivers indicates that the G/Ls contain numerous summary entries without specific line items. As such, he is unable to confirm the amounts entered as accurate.

[132] I agree that the documentation relating to the G/Ls is incomplete and does not allow Smithe Residences to confirm the accuracy of the amounts entered. In my view, these further accounting records are relevant and producible as relevant to the calculation of revenue and profit. This production does not amount to ordering that the Boffo Defendants create documents, only produce what already must exist.

h) Financial / accounting records related to Costs of Acquisition

[133] Needless to say, the acquisition costs of the development property are a key part of the calculation as to what profits were achieved for the Smithe project. These would include the costs of the Boffo Defendants to purchase the land from Smithe Residences.

[134] In Claims Report No. 39, there is a reference to the cost of the Smithe development lands as being $61,905,000. Yet, in the August 2011 transfer of the lands, the sale price is $11.6 million. The financial statements also refer to different figures for the value of the Smithe project lands, ranging from about $14.8 million (2012) to $31.6 million (2017). I can only presume that the Boffo Defendants will assert this higher cost of the lands as part of the profit calculation.

[135] The Boffo Defendants have not listed or produced any documents which may exist to support the calculation of the higher amount in the Claims Report which they represented to CWB as being the "cost" of the project lands.

[136] In my view, if the Boffo Defendants have documentation in their possession that explains the calculation of this cost at $61,905,000, it is relevant and producible as relevant to the calculation of revenue and profit under the Smithe Consulting Agreement.

CONCLUSION

[137] The Boffo Defendants' application is dismissed.

[138] Smithe Residences' application is granted as sought.

[139] I would add that, in addressing Smithe Residences' document requests, I acknowledge that Smithe Residences may later identify other documents that would have been created throughout the course of this development, as may be relevant to a determination of what profits were generated and what is the proper allocation under the Smithe Consulting Agreement. For that reason, Smithe Residences has liberty to request any further documents from the Boffo Defendants in that respect pursuant to the Rules which, if not resolved between the parties and counsel, may be the subject of a further court application.

[140] Needless to say, the Boffo Defendants may have further document requests also.

[141] Smithe Residences has been successful in all respects on these applications. The Boffo Defendants' application was ill-conceived and Smithe Residences' application was brought in circumstances that should otherwise have been resolved through a more cooperative approach to document production.

[142] Costs are awarded to Smithe Residences for this two-day hearing in any event of the cause.

"Fitzpatrick J."

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