
CANADA / JUDGMENT

Sunstone v. Vancouver Pacific Development Corp.

2015 BCSC 261

COURT

Supreme Court of British Columbia

DECIDED

5 February 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCSC 261 Sunstone v. Vancouver Pacific Development Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sunstone v. Vancouver Pacific Development Corp.,

2015 BCSC 261

Date: 20150205

Docket: S113266

Registry: Vancouver

Between:

Sunstone (Marine Drive) Holdings Inc.

and Sunstone Opportunity (2007) Realty Trust

by its Trustee, SRAI Realty Services (2007) Inc.

Plaintiffs

And

Vancouver Pacific Development Corp.

and Darwin Construction (Canada) Ltd.

Defendants

Before: The Honourable Mr. Justice Abrioux

Oral Reasons for Judgment

Counsel for Defendant/Applicant Darwin Construction Ltd.:

D. Claassen

Counsel for Plaintiffs/Respondents:

J. Weisman

Place and Date of Hearing:

Vancouver, B.C.

January 30, 2015

Place and Date of Judgment:

Vancouver, B.C.

February 5, 2015

Table of Contents

I: INTRODUCTION. 3

II: BACKGROUND. 4

III: THE APPLICATION FOR SECURITY FOR COSTS. 6

A: The Legal Principles. 6

B: The Parties' Positions. 8

C: Discussion. 9

IV: THE APPLICATION FOR PARTICULARS. 12

V: CONCLUSIONS. 15

I: INTRODUCTION

[1] I am providing oral reasons for judgment today since examinations for discovery are scheduled for later this month and in April 2015. I shall be issuing written reasons in due course and I reserve the right to make stylistic or grammatical changes. The substance of what follows, however, will remain the same.

[2] The defendant, Darwin Construction (Canada) Ltd. ("Darwin"), applies for the following:

- (a) that the trustee for Sunstone Opportunity (2007) Realty Trust ("SRAI") be substituted as a plaintiff in place of the present named plaintiff, Sunstone Opportunity (2007) Realty Trust (the "Trust");

- (b) that the plaintiffs, Sunstone Marine Holdings Inc. ("Sunstone Marine") and SRAI, post the sum of \$115,000 in court as security for Darwin's anticipated costs as a defendant in this action or, in the alternative, that Sunstone Marine and SRAI shall post security in an amount to be determined by the court;
 - (c) that the action be stayed as against Darwin pending the posting of security by Sunstone Marine and SRAI;
 - (d) that, if the security ordered by the court is not posted by Sunstone Marine and SRAI within 30 days of the granting of this order, the applicant shall be at liberty to apply for a dismissal of this action as against Darwin;
 - (e) that Darwin be at liberty to apply for further security for costs if the security posted by Sunstone Marine and SRAI becomes inadequate in relation to Darwin's anticipated costs as a defendant in this action;
 - (f) that the plaintiffs provide further particulars of their claims against Darwin with respect to the allegations of misrepresentation, negligence, and breach of contract.
- [3] The order substituting SRAI as a plaintiff was made by consent.
- [4] For the reasons that follow:
- (a) the application for security for costs with respect to both plaintiffs is dismissed; and
 - (b) the application for particulars with respect to the allegations of misrepresentation is granted in part with liberty to re-apply for further particulars after examinations for discovery have taken place.

II: BACKGROUND

- [5] The pertinent facts are set out in the notice of application and the plaintiffs' response, excerpts of which include the following.
- [6] This action concerns claims arising from the development of a shopping centre at 845 Marine Drive in North Vancouver, British Columbia (the "Project").
- [7] The plaintiffs claim that Vancouver Pacific Development Corp. ("Van Pac"), as development manager, and Darwin, as construction manager, misrepresented the costs of the Project and were negligent in the execution of their duties in connection with the Project, causing losses to the plaintiffs.
- [8] In particular, in their amended notice of civil claim (the "Amended NOCC"), the plaintiffs allege that Darwin represented that it was capable of managing the construction of the shopping centre in accordance with the plans and specifications and for a total construction cost of less than \$13,644,675.00.

- [9] Darwin's response to the Amended NOCC is to the effect that it made no such representations to the plaintiffs. Instead, Darwin alleges that it entered into four contracts with Sunstone Marine for the construction of the Project, the initial value of the contracts being approximately \$16 million.
- [10] Darwin also alleges that it completed the Project in accordance with those contracts, including various extras and additions that were approved by Sunstone Marine during the course of construction. As a result of the approved changes, the final price payable to Darwin for the work was \$21,166,219.70, all of which was approved in writing by Sunstone Marine during the course of construction.
- [11] According to the plaintiffs' website, the Project was sold in August 2010 for a profit of \$8,500,000.
- [12] This action was commenced on May 19, 2011. The parties have exchanged lists of documents, but no other substantive steps have been taken in the litigation. Examinations for discovery are scheduled for later this month and no trial date has been set.
- [13] Darwin says that searches of the land title office in British Columbia indicate that neither SRAI nor Sunstone Marine own any real property in British Columbia.
- [14] SRAI says that this action was commenced by it in its capacity as trustee for the Trust.
- [15] It also alleges that Darwin has not disputed that the Trust was the beneficial owner of the Project and that the Trust invested in and benefitted from the Project, including through its landholdings in Sunstone Marine.
- [16] In her affidavit, sworn January 23, 2015, Ms. Samantha Adams, Senior Manager and Vice President of SRAI deposes that the Trust has assets in British Columbia which exceed \$7 million, including \$4.7 million in cash holdings and real property with an unencumbered value of nearly \$3 million. The Trust has further real estate assets outside of British Columbia with an unencumbered value of over \$15 million.
- [17] Ms. Adams also deposes that:
- the Trust's interest in its real estate properties is held through a number of holding companies; and
 - the Trust earns rental income from its real property. The Trust is solvent and has never missed a payment to creditors or suppliers. Its ongoing expenses are paid from its net rental income. The Trust's cash in hand and on deposit in banks in British Columbia has never been less than \$700,000. The Trust also has immediate access to \$2,250,000 through a revolving credit facility, on which the present balance is \$850,000.

- [18] SRAI's rights and obligations as trustee regarding the Trust are set out, in part, in a Declaration of Trust, dated September 4, 2007. It provides SRAI with a broad right of indemnification "out of the Trust property, from and against all liabilities, losses, claims, damages including legal expenses and including amounts paid to settle an action or satisfy a judgment".
- [19] By letter dated November 25, 2014, counsel for Darwin made written demand for further particulars of the plaintiffs' claims and production of documents. The plaintiffs provided a draft amended notice of civil claim purporting to respond to the request for particulars on January 9, 2015. The Amended NOCC was filed on January 16, 2015 pursuant to Rule 6-1(a)(i).
- [20] Darwin's position is that the Amended NOCC does not adequately respond to the request for particulars.

III: THE APPLICATION FOR SECURITY FOR COSTS

A: The Legal Principles

- [21] The legal principles concerning an application for security for costs are conveniently summarized by Madam Justice Gerow in *Culp Investments LLC v. KPMG Inc. (sub nom IC Creative Homes Inc. (Trustee of) v. KPMG Inc.)*, 2007 BCSC 451 at paras. 3-7:
- [3] The court has authority to make an order for security for costs against a foreign corporation either under s. 236 of the Business Corporation[s] Act, S.B.C. 2002, c. 75, or under its inherent jurisdiction: *International Container Terminal Services Inc. v. British Columbia Railway Co.*, 2003 BCSC 863; *Shiell v. Coach House Hotel Ltd.* (1982), 37 B.C.L.R. 254 (C.A.).
- [4] Section 236 of the Business Corporations Act provides:

If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

- [5] The making of an order for security for costs either under the court's inherent jurisdiction or s. 236 is discretionary: *Shiell*, supra; *Kropp (c.o.b. Canadian Resort Development Corp.) v. Swaneset Bay Golf Course Ltd.*, 4 W.W.R. 306 (B.C.C.A.).
- [6] The principles considered by the courts in determining whether an award for security for costs are summarized in *Kropp*, supra, at [para.] 17:

1

The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;

2

The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;

3

The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;

4

The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;

5

The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;

6

Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and

7

The lateness of the application for security is a circumstance which can properly be taken into account.

[7] The courts have always drawn a distinction between corporate and individual plaintiffs for the purposes of determining whether an order for security for costs should be made. The courts do not treat corporate defendants with the same flexibility and generosity as individual plaintiffs: *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 76 B.C.L.R. (2d) 231 at [para.] 27 (C.A.).

[22] A profitable business with a positive cash position whose funds are available to the plaintiff is sufficient to establish that it will have the funds to satisfy an order of costs: *WestCorp Solutions Ltd. v. Collins*, 2014 BCSC 1606.

B: The Parties' Positions

[23] Darwin's position includes:

- while the granting of such an order is discretionary once the applicant who seeks security has shown that the plaintiff will not be able to pay costs should the claim fail, security is generally ordered unless the court is satisfied that there is no arguable defence: *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 76 B.C.L.R. (2d) 231 at 235 (C.A.);

- the plaintiffs concede that Darwin has an arguable defence;
- if there is no duty on a trustee to commence an action, but only the power to litigate, the normal rules of costs apply, including an order for security for costs if appropriate: Culp Investments at para. 17;
- the plaintiffs lack sufficient assets to pay a costs award since neither Sunstone Marine nor SRAI own any real property in British Columbia. In fact, the Trust is not a legal entity that can own property. Rather, it is a relationship in which the trustee holds property for the benefit of the beneficiaries;
- if an award of costs was made against SRAI, it has the discretion not to seek indemnification from the Trust. Darwin is thus at risk in having an unsatisfied costs judgment;
- SRAI is a defendant by counterclaim in unrelated proceedings where a judgment for rent due and owing in the amount of \$146,764.37 is sought, along with damages for other heads of damage;
- in so far as the quantum of security is concerned, projections of anticipated costs and disbursements are often uncertain and the court is in no better position to make projections than the parties as to the potential costs and quantum of security to be awarded: Culp Investments at para. 26; and
- in this case, estimating a trial length of 30 days, Darwin estimates its total taxable costs to be \$116,974.20. As a result, it seeks security for costs in the amount of \$115,000 as a reasonable estimate of its anticipated costs and disbursements.

[24] Sunstone Marine and SRAI concede that the defendants have an arguable case. Sunstone Marine also concedes that it has no assets with which to pay a costs award were one to be made against it.

[25] SRAI's position includes:

- the Trust has assets of approximately \$22 million;
- SRAI has the ability, pursuant to the trust declaration, to seek indemnification for any costs award which could be made against it. The trust declaration specifically governs such a situation;
- while a trust can only commence and maintain proceedings in the name of the trustee, the estate or trust assets are a relevant consideration which can be taken into account by the court in the exercise of its discretion; and
- if the court is disposed to ordering security, an amount of approximately \$50,000 is more appropriate in the circumstances of this case taking into account the value of the Trust's assets and the cash that SRAI regularly has at its disposal.

C: Discussion

- [26] The threshold issue on an application for security for costs is whether the applicant/defendant(s) have established that the plaintiff corporation(s) will be unable to pay the defendants' costs if it is successful in its defence.
- [27] I have concluded that Darwin has failed to meet this initial threshold and that its claim for security for costs against SRAI should be dismissed.
- [28] In the particular circumstances of this case, notwithstanding the fact it has no assets, I have also concluded that the application with respect to Sunstone Marine should be dismissed.
- [29] It is evident from Ms. Adams' affidavit that SRAI, in its capacity as trustee, will have the funds to pay any award of costs that could be made against it. The Trust has more than sufficient assets to pay the costs sought by Darwin. These assets are available to SRAI for that purpose in that the Declaration of Trust explicitly provides that SRAI is to be indemnified from the Trust for all costs, including legal expenses and judgments against it.
- [30] I agree with SRAI's argument as set out in its response that the authorities relating to an order regarding security for costs governing trustees in bankruptcy are of assistance on this application.
- [31] In particular, security may be ordered against trustees in bankruptcy where that trustee has no duty to sue and where the trust has no assets. That is not the case in this proceeding.
- [32] In a bankruptcy proceeding, the bankrupt estate's assets are properly considered in determining whether the trustee will be able to satisfy a cost order: *Vancouver Trade Mart Inc. (Trustee of) v. Creative Prosperity Capital Corp.*, [1999] 7 C.B.R. (4th) 3 (B.C.S.C.); *Mancini Estate (Trustee of) v. Falconi (sub nom Clarkson, Gordon Inc. v. Falconi)*, [1990] 70 O.R. (2d) 171 (H.C.).
- [33] A trust's assets can also be considered on an application for security for costs against a trustee who sues for the benefit of the trust. That is because, at law, a trustee is entitled to indemnification from the trust funds which it holds for all costs, including legal costs, which the trustee reasonably incurs for the trust's benefit. See *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 390; *Royal Trust Corp. of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 at 86 (C.A.); *Blueberry Interim Trust (Re)*, 2012 BCSC 254 at para. 26.
- [34] In any event, as I have noted, the Declaration of Trust in this case contains a specific provision to this effect.
- [35] In addition, were Darwin to become SRAI's creditor to an award of costs in its favour then it would be subrogated to SRAI's right to charge and lien Trust assets. See *DeLorenzo v. Beresh*, 2010 ONSC 5655; *McLennan v. McLennan* (2000), [2000] O.J. No. 3286, 36 E.T.R. (2d) 145 (S.C.J.); *G. Solway & Sons Ltd. v. Pearlman and Ezrin*, [1964] 1 O.R. 1 (H.C.J.); *Re Johnson* (1880), 15 Ch. D. 548.

- [36] While it is the case that Sunstone Marine has no assets, that does not necessarily result in an order for security being made against it.
- [37] As I have noted, while security for costs will "generally" be ordered against a plaintiff that has no exigible assets, the court retains the discretion not to make such an order in appropriate circumstances.
- [38] Taking into account the principles to which I have referred, I am of the view that an order for security for costs as against Sunstone Marine is not required in this case.
- [39] That is because the claims of both plaintiffs against Darwin are based on identical allegations. The plaintiffs also seek the same relief against Darwin.
- [40] Darwin, for its part, has not yet filed a response to the Amended NOCC. In its response filed July 22, 2011, it denies owing a duty of care to SRAI. It also raises as a defence that Sunstone Marine waived and released Darwin from any claims arising from the project.
- [41] However, Darwin has not established on this application that there is any real likelihood that Sunstone Marine's claims against it could be dismissed, but not those of SRAI. In light of the relationship between Sunstone Marine and SRAI, even if that were to be the result following a trial, the court would have a broad discretion to take this into account in making an appropriate award of costs based on which of the parties were successful or not.
- [42] Quite apart from my conclusion that Darwin has failed to establish that SRAI does not have the ability to pay an award of costs made against it, I am of the view, based on Ms. Adams' affidavit, that SRAI, in fact, does have the financial means to do so.
- [43] That being the case, Darwin should have the ability to collect the entirety of its costs from SRAI in the event the action brought against it is dismissed. That would include those costs arising from a successful defence to Sunstone Marine's claims.

IV: THE APPLICATION FOR PARTICULARS

- [44] By letter dated November 25, 2014, Darwin's counsel sought particulars pertaining to certain of the plaintiffs' claims. The plaintiffs responded to the demand by filing the Amended NOCC.
- [45] Darwin's position is that the Amended NOCC remains deficient in so far as the claims for misrepresentation are concerned.
- [46] Paragraphs 19 and 20 of the Amended NOCC provide:
19. The aforesaid advice and representations made by Darwin Construction (the "Darwin Advice and Misrepresentations"[I]) were made, to the best of Sunstone's knowledge, both orally and in writing, including in:
- a. An October 30, 2008 email from Oliver Webbe, Vice-President of Darwin, to Doug Wark:

- b. Darwin Construction's website between November, 2008 and March, 2009;
 - c. A pro forma delivered on November 26, 2008 by email from Ron Dedesko to Steve Evans;
 - d. Budgets and cost information delivered by email on December 15 and 16, 2008 from Oliver Webbe to Doug Wark;
 - e. A bid package delivered by Darwin to VanPac on or about December 16, 2008;
 - f. Pro formas, an executive summary, a corporate summary of VanPac, and a location information package delivered on December 18, 2008 by email from Doug Wark to Steve Evans; and
 - g. Negotiations between Darwin and VanPac as agent for Sunstone leading to the March 2, 2009 Construction Contract.
20. Darwin Construction authorized VanPac to use the Darwin Advice and Misrepresentations in order to market the Shopping Centre project to Sunstone and other potential investors, knowing that, or having ought to have known that:
- a. The Darwin Advice and Misrepresentations which it made to VanPac were being used by VanPac to induce Sunstone and other investors to invest in the Shopping Centre;
 - b. VanPac was representing Darwin Construction as having reviewed and being satisfied with the budgeted cost numbers included in VanPac's representations to Sunstone and other investors; and
 - c. That VanPac had represented the budgeted cost numbers as the entire cost of completing the Shopping Centre.

[47] Darwin seeks the following particulars with respect to the allegations of misrepresentation:

- i. exactly what representations are alleged to have been made;
- ii. to whom it is alleged Darwin made those representations;
- iii. when Darwin is alleged to have made those representations;
- iv. whether the representations were oral or in writing;
- v. whether or not each representation was untrue; and
- vi. how it was relied upon by the plaintiffs to their detriment.

[48] The purpose of particulars was set out by Lambert J.A. in *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 at para. 15 (C.A.):

[T]he function of particulars is as applicable in British Columbia as it is under the English practice, and six points are set out there in this way:

- (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
- (2) to prevent the other side from being taken by surprise at the trial;
- (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
- (4) to limit the generality of the pleadings;
- (5) to limit and decide the issues to be tried, and as to which discovery is required[;] and
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included.

[49] And, in addition, at paragraph 11:

At the heart of the distinction between [a demand for particulars and a demand for discovery] lies the question whether the material demanded is intended to, and does, delineate the issues between the parties, or whether it requests material relating to the way in which the issues will be proved.

[50] Darwin's position is that the particulars of the claim for misrepresentation as set out in the Amended NOCC do not provide it with adequate notice of the basis of this allegation.

[51] It relies on Rule 3-7(18) of the British Columbia Supreme Court Civil Rules, which provides:

- (18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

[52] The plaintiffs' position is that Rule 3-7(20) applies:

- (20) Particulars need only be pleaded to the extent that they are known at the date of pleading, but further particulars
 - (a) may be served after they become known, and
 - (b) must be served within 10 days after a demand is made in writing.

[53] The plaintiffs submit that full particulars are within the knowledge of the defendants. Accordingly, they do not need to be particularized until examinations have been completed. See *Swiss Reinsurance Co. v. Camarin Ltd.*, 2005 BCSC 95 at para. 15.

- [54] In my view, there is merit to the positions of both Darwin and the plaintiffs. From Darwin's perspective, to the extent the plaintiffs allege there are any misrepresentations which go beyond what is alleged to have transpired between the defendants, then those should be particularized in accordance with paragraph 47 above. This would include what is alleged in paragraph 21 of the Amended NOCC. See Bilfinger-Berger (Canada) Inc. v. Greater Vancouver Water District, 2013 BCSC 2324 at paras. 25-31.
- [55] While the order for particulars in Bilfinger-Berger was made in the course of trial management after examinations for discovery had been completed, I do not accept the plaintiffs' submission that this is a materially distinguishing feature from the circumstances in this case. Rule 3-7(18) governs with respect to any alleged misrepresentations to have been made directly from Darwin to the plaintiffs.
- [56] To the extent the alleged misrepresentations are said to have arisen as a result of the dealings between the defendants themselves, then they are, at least at the present time, in the exclusive knowledge of the defendants and there is no application for particulars in so far as Van Pac is concerned. Accordingly, no further particulars are required at this time. The details are the proper subject of questioning at examinations for discovery.

V: CONCLUSIONS

- [57] The application for security for costs with respect to both plaintiffs is dismissed.
- [58] The application for particulars with respect to the allegations of misrepresentation is granted to the extent that the plaintiffs are to provide, within seven days of this order, particulars of the alleged misrepresentations made by Darwin directly to it in accordance with paragraph 47 above.
- [59] It may be the case that there were no alleged misrepresentations made directly by Darwin to the plaintiffs. If that is the case, this needs to be confirmed by them in writing to Darwin.
- [60] In my view, the plaintiffs have been substantially successful on this application. They are awarded 75% of their costs of the application at Scale B in any event of the cause, not payable forthwith.

"Abrioux J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/15/02/2015BCSC0261.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/sunstone-v-vancouver-pacific-development-corp-2015>

Prepared on 29 October 2026 · Esheria