

CANADA / JUDGMENT

XS West Construction Group v. Brovender

2021 BCSC 917

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 917 XS West Construction Group v. Brovender

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

XS West Construction Group v. Brovender,

2021 BCSC 917

Date: 20210421

Docket: S094152

Registry: Vancouver

Between:

XS West Construction Group, being M2K Construction Limited

(formerly known as Wawryk Investments Ltd.) and Frustagli Investments Ltd.

doing business as XS West Construction Group

Plaintiffs

And

Barry Brovender, Trez Capital Corporation,

TCC Mortgage Holdings Inc., TCC II Mortgage Holdings Inc.,

ABC companies Nos. 1 to 80, John Doe Nos. 1 to 600, Jane Doe Nos. 1 to 400,

Kings Legacy Developments Inc., Anmore Ridge Limited Partnership

and Kings Legacy Capital Inc.

Defendants

And

XS West Construction Group, being M2K Construction Limited

(formerly known as Wawryk Investments Ltd.) and Frustagli Investments Ltd.

doing business as XS West Construction Group

Defendants by Counterclaim

Before: The Honourable Mr. Justice Veenstra

Oral Ruling Re Application to Substitute

a Representative for Examination for Discovery

Counsel for the Plaintiffs/Defendants by Counterclaim:

D.C. Richardson

Counsel for the Defendant/Plaintiff by Counterclaim, TCC Mortgage Holdings Inc.:

S.G. Denholm

Place and Date of Hearing:

New Westminster, B.C.

April 20, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 21, 2021

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- [1] THE COURT: The applicant, TCC Mortgage Holdings Inc. ("TCC"), seeks an order pursuant to Supreme Court Civil Rule 7-2(5) substituting Alan Davies as the representative of TCC for discovery in place of Timothy Nye.

- [2] TCC is a plaintiff by way of counterclaim. It is advancing a claim it obtained by way of an assignment pursuant to s. 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA] in the bankruptcy of Kings Legacy Capital Inc. ("Kings Legacy"). Mr. Davies was retained as a consultant in 2009 by the trustee in bankruptcy Bowra Group Inc. ("Bowra"). Mr. Nye was director of development of Kings Legacy from 2007 to 2009, during which time he provided services to Kings Legacy as an independent contractor through his own numbered company.
- [3] TCC acknowledges that Mr. Nye is a former agent of Kings Legacy and thus the defendants by counterclaim have the prima facie right pursuant to Rule 7-2(5)(c)(ii) to examine Mr. Nye. However, TCC argues that Mr. Nye has taken positions in past litigation that were contrary to the interests of TCC and that he has refused to cooperate with TCC in preparing for an examination for discovery. TCC argues that Mr. Nye's conflicting interests make him an inappropriate representative for discovery and that as a result, the court should exercise its power to "otherwise order" under Rule 7-2(5) and mandate a different representative.

Background Facts

- [4] In about 2007, Kings Legacy began to develop a site for residential homes in the Village of Anmore. The site consisted of approximately 67 acres that was heavily forested and located on steep terrain.
- [5] In order to acquire and develop the site, Kings Legacy obtained mortgage financing. TCC was a second mortgagee in respect of the project.
- [6] The principal of Kings Legacy was Mr. Gregory Rohland. In about May 2007, Kings Legacy engaged Mr. Nye as director of development for the project. Kings Legacy also engaged Compass Management as its construction manager.
- [7] Kings Legacy then retained three contractors to begin site preparation work. The defendant by counterclaim, XS West Construction Group ("XS West") was hired to construct facilities necessary for stormwater management, which included a number of culverts, ditches, head walls, and drainage retention/detention facilities.
- [8] During the course of 2008, Kings Legacy experienced financial difficulties and as a result withheld payment from a number of contractors, including XS West. Work slowed, and a stop work order was issued by the Village of Anmore. XS West left the project site in December 2008.
- [9] On January 7, 2009, there was a flood and washout at the project site. Mr. Nye was one of the first to attend the site after the flood, taking several photographs and preparing a memorandum as to his observations. He also attended a council meeting of the Village of Anmore on January 13, 2009, on behalf of Kings Legacy to discuss the situation.

- [10] Kings Legacy did not recover from its financial difficulties. In April 2009, TCC commenced foreclosure proceedings. In May 2009, Bowra was appointed as receiver-manager of all of the undertakings and properties of Kings Legacy. Ultimately, Kings Legacy was assigned into bankruptcy in February 2012.
- [11] Mr. Nye provided two affidavits in the foreclosure proceedings. In those affidavits, he disputed evidence from TCC's vice president Barry Brovender relating to TCC's knowledge of the financial issues the project was dealing with.
- [12] In June 2009, TCC obtained judgment against Mr. Rohland, which remains outstanding. The amount owed is over \$12.9 million.
- [13] In June 2009, XS West commenced this action alleging that TCC and related entities had become liable for the amounts owed to it by Kings Legacy. A very similar action was commenced the same day by another contractor, Anderson Creek Site Developing Ltd. ("Anderson Creek"). A number of affidavits were filed in each action, including (in the Anderson Creek action) another affidavit of Mr. Nye. Ultimately a summary trial of the claims against TCC was heard in late 2014 and early 2015. On November 13, 2015, Gray J. released reasons for judgment at 2015 BCSC 2092, by which she dismissed the claims made against TCC and related entities.
- [14] In 2016, TCC obtained leave pursuant to s. 38 of the BIA to bring a counterclaim in this action advancing claims on behalf of Kings Legacy against XS West, alleging that XS West caused the flood of January 2009 as well as a subsequent similar flood. The action has advanced slowly. TCC conducted an examination of a principal of XS West in October 2018. In March 2020, XS West advised that it wished to examine Mr. Nye as a representative of TCC.
- [15] TCC also has ongoing litigation against Mr. Rohland - see 2020 BCSC 1399. TCC made clear in its submissions that it would see Mr. Rohland as an even less appropriate discovery witness than Mr. Nye in the circumstances.

Issue

- [16] The sole issue for determination is whether the court should "otherwise order" and override the choice of XS West as to the appropriate representative for examination for discovery.

Applicable Law

- [17] The rights of parties with respect to examinations for discovery are governed by Rule 7-2. The following provisions are relevant:

Rule 7-2 -- Examinations for Discovery

Examination of parties

- (1) Subject to subrule (2), each party of record to an action must

- (a) make himself or herself available, or
- (b) if any of subrules (5) to (10) apply, make a person referred to in that subrule available,

For examinations for discovery by the parties of record to the action who are adverse in interest to the party subject to examination.

Examination of party that is not an individual

- (5) Unless the court otherwise orders, if a party to be examined for discovery is not an individual,
 - (a) the examining party may examine one representative of the party to be examined,
 - (b) the party to be examined must nominate as its representative an individual, who is knowledgeable concerning the matters in question in the action, to be examined on behalf of that party, and
 - (c) the examining party may examine
 - (i) the representative nominated under paragraph (b), or
 - (ii) any other person the examining party considers appropriate and who is or has been a director, officer, employee, agent or external auditor of the party to be examined.

Examination of assignor

- (7) If an action is brought by an assignee, the assignor may be examined for discovery.

Examination of bankrupt

- (10) If a party to be examined for discovery is a trustee in bankruptcy, the bankrupt may be examined for discovery.

[18] The parties referred me to a number of cases involving the determination of an appropriate corporate representative pursuant to Rule 7-2(5), including *Landmark Properties Ltd. v. Crown Trust Co.*, [1983] B.C.J. No. 2502 (C.A.); *MacDonald v. Roth*, 2000 BCSC 1670; *Dann v. Dhaliwal*, 2012 BCSC 1817; *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCSC 339; and *Xie v. Lai*, 2020 BCSC 295.

[19] From these cases, I derive the following guiding principles which govern this application:

- a) While the corporate party to be examined is to provide the name of its nominee, the examining party has the *prima facie* right to examine the representative of its choice providing that representative "is or has been a director, officer, employee, agent, or external auditor of the party being examined."
- b) That right is not absolute, being circumscribed by the opening words of Rule 7-2 that give the court the power to otherwise order.

- c) However, in the absence of overwhelming prejudice, the court should defer to the choice of the examining party. This recognizes that "serious injustice might be done if the right of examination for discovery was in any way to be regulated by the adverse party.
- d) The party seeking to displace the examining party's choice of witness must therefore demonstrate that the choice of witness gives rise to overwhelming prejudice. It is not enough for the opposing party to simply say that there is someone with more or better knowledge of the matters in issue.
- e) This approach recognizes that the examining party is best placed to decide who is and is not appropriate, as that party must live with the consequences of its choice (including the difficulty inherent in obtaining a second discovery).
- f) The most common ground for an application for substitution is a demonstration of a conflict of interest between the chosen representative and the corporate party. Standing alone, this is not a sufficient ground, but it may be taken into consideration by the court in determining whether the balance of prejudice favours substitution.
- g) Interpretation and application of Rule 7-2(5) are informed by the purposes of an examination for discovery - that is, to obtain the evidence of the party being discovered and to obtain binding admissions on behalf of the party being discovered.
- h) If the person chosen by the examining party is a past officer or director, that could also affect the extent to which the company will be bound by admissions made by the witness: *Dillingham Construction Ltd. v. British Columbia Hydro & Power Authority* (1990) 44 B.C.L.R. (2d) 243 (S.C.).

[20] In *Pioneer Distributors Ltd. v. Bank of Montreal*, [1992] B.C.J. No. 968 (B.C.C.A.) [*Pioneer*], the plaintiff had obtained an assignment of a cause of action from the trustee in bankruptcy of *Citation Industries Ltd.* pursuant to s. 38 of the BIA. The defendant bank sought to examine for discovery the former president of *Citation*, Mr. Gardner-Evans. *Pioneer* objected, arguing that the bank should instead have examined the president of *Pioneer*. The chambers judge declined to order substitution of the discovery witness, and the bank sought leave to appeal. Justice E.E. Hinkson declined to grant leave. He commented that the effect of the rules was that:

... the defendants can examine Mr. Gardner-Evans as a former officer of the bankrupt on the basis that the present action is seeking to raise rights and obtain a favourable decision with respect to them which could have been raised by *Citation*, which could have been raised by the Trustee in Bankruptcy, and which are now raised by the assignee of the Trustee in Bankruptcy.

[21] He then turned to the question of whether the choice of witness should be displaced, noting that:

I must say that it seems to me to be somewhat anomalous at first blush that Mr. Gardner-Evans can be examined by the defendants for discovery in this action. He has declined to participate up to this point in the proceeding on one side or the other but of all the individuals who might be examined for discovery on behalf of the plaintiff it seems to me that he is the logical person to be so examined.

The plaintiff is apprehensive of what kind of answers and what kind of evidence he will furnish on the examination for discovery and contends that on a reasonable basis the plaintiff feels that Mr. Gardner-Evans because of a number of considerations may turn out to be an unfavourable witness from the point of view of the plaintiff

[22] Hinkson J.A. noted that the chambers judge referred to a line of cases as to the use to which discovery evidence might be put, including Dillingham, and commented that the chambers judge:

... was alive to the problems of permitting the defendants to examine Mr. Gardner-Evans for discovery on behalf of the plaintiff but having regard to those authorities he concluded that the extent to which the answers will constitute admissions on behalf of the plaintiff or evidence that can be used against the plaintiff will be for the trial judge. He said the use of the answers at trial will be for the trial judge to consider. In that way he attempted to off-set any prejudice that might otherwise arise from putting Mr. Gardner-Evans forth as a former officer of Citation to be examined on behalf of the plaintiff in this action.

[23] Hinkson J.A. therefore concluded that the chambers judge had "exercised his discretion on a proper consideration of the relevant circumstances" and had not committed any error with respect thereto.

The Positions of the Parties

[24] TCC argues that there have been conflicts as between it and Mr. Nye, who gave affidavits on behalf of Kings Legacy and adverse to TCC in the foreclosure proceeding, and who also gave an affidavit in the Anderson Creek action in support of Anderson Creek and adverse to TCC. It notes that in the foreclosure affidavits, Mr. Nye directly contradicted evidence of TCC's representative Mr. Brovender. Since Mr. Brovender has since died, it will be difficult for TCC to rebut statements or actions attributed by Mr. Nye to Mr. Brovender.

[25] As well, TCC says that Mr. Nye has refused to meet with TCC's lawyers to prepare to be examined for discovery and has told TCC's lawyers that he may not be a friendly witness.

[26] TCC argues that Pioneer can and should be distinguished, as in that case there was no evidence of actual conflicts as between Pioneer and Mr. Gardner-Evans. It says that there are such conflicts in this case.

- [27] TCC argues that if Mr. Nye becomes its discovery witness, it will be at risk of being bound by evidence provided by a representative who is uninformed of the issues to be decided in this litigation, the circumstances and facts of significant relevance, and whose evidence may be unreliable. It says that rather than examine Mr. Nye for discovery, XS West could instead take steps toward examining Mr. Nye as a witness pursuant to Rule 7-5.
- [28] TCC argues that Mr. Davies, who was a consultant retained by Bowra, initially in its capacity as receiver-manager in the spring of 2009 and later in its capacity as trustee in bankruptcy, was involved in remediation of the flood issues and has knowledge obtained through that involvement.
- [29] XS West argues that TCC, by taking an assignment of Kings Legacy's cause of action, steps into the shoes of Kings Legacy. XS West is entitled to obtain evidence from a representative of Kings Legacy who was actively involved in the project. XS West says that it had regular contact with Mr. Nye at the most material times on matters including performance of work on the project, invoicing and payment. It notes that Mr. Nye was directly involved in investigating the flood on behalf of Kings Legacy, prepared a memo with respect to his investigation, and dealt with the Village of Anmore on behalf of Kings Legacy with respect to the flood.
- [30] XS West argues that Mr. Nye's affidavits in the foreclosure proceedings were appropriately reflective of the positions and interests of Kings Legacy. While in the foreclosure proceeding TCC and Kings Legacy were adverse, they are not adverse with respect to the outstanding issues in the present action. Mr. Nye's affidavit in the Anderson Creek action (to which XS West was not a party) stated that Anderson Creek was not responsible for the flood, and to the extent that fingers are to be pointed, seemed to direct them toward XS West.
- [31] XS West argues that based on the pleadings, the remaining issues in this action are as follows:
- A. whether the work XS West performed for Kings Legacy on the project caused the flood;
 - B. whether the work XS West performed for Kings Legacy on the project caused organic and inorganic materials to be mixed on the project, and whether XS West was in breach of contract or negligent for mixed materials;
 - C. the scope of work that XS West was contracted to provide to Kings Legacy for the project, and whether XS West was negligent or in breach of contract to Kings Legacy in performance of its scope of work;
 - D. whether Kings Legacy is in breach of its contract for the unpaid work and materials provided to XS West;
 - E. damages owing by XS West for the alleged breach of contract or negligent work performed by XS West for Kings Legacy on the project; and

F. damages owing to XS West by Kings Legacy for breach of contract and outstanding amounts for work and materials supplied by XS West to the project for the purposes of the setoff claim.

[32] Item E from this list would include consideration of various steps taken to mitigate or remediate losses from the flood. XS West asserts that Mr. Davies' knowledge would be limited to item E, an area as to which there is already extensive documentation. XS West asserts that it wants to examine Mr. Nye because he is the most knowledgeable representative of Kings Legacy with respect to items A, B, C, D and F from the list.

[33] XS West argues that Mr. Nye's lack of willingness to cooperate with TCC is not unusual in the case of any former employee or consultant. Many people are less than enthusiastic to voluntarily participate in litigation with respect to matters that they have no further involvement or interest in. It argues that a Rule 7-5 examination is no substitute for an examination for discovery given the limitations and challenges in obtaining such an examination.

[34] In *MacDonald v. Roth*, Justice Wong quoted from an oft cited Ontario case, *Trinity College v. Levinter*, [1924] 2 D.L.R. 584 at 586 (Ont. S.C.):

I think the defendant has the right to select the officer whom he will examine. If the plaintiff corporation tells him that he is making a mistake, and that he could get fuller information from another officer suggested by it, and he persists in his choice, and on examination finds that he has not got the right man, he will perhaps be in difficulty as regards obtaining leave to examine a second officer. But that is his look-out; for some reason he desires to examine the chancellor, and I think he is entitled to do so.

[35] XS West acknowledges the difficulty it might face seeking a second discovery witness, and while it does not waive any ability to make such application in the future, it is firm in its view that Mr. Nye is the appropriate witness and willing to take that risk.

Analysis

[36] Analysis of this application must begin with the nature of TCC's status as plaintiff. It has taken an assignment and transfer of all of the rights of the trustee in bankruptcy of Kings Legacy pursuant to s. 38 of the BIA. Although it is authorized pursuant to s. 38 to bring the action in its own name, it is in effect an assignee who steps into the shoes of Kings Legacy.

[37] In such circumstances Rules 7-2(7) and (10) make clear that the opposing party "may" examine a representative of the bankrupt assignor company. The intent of these provisions seems clear: to enable the opposing party to obtain the evidence of someone who is knowledgeable as to the matters in issue in the litigation.

- [38] I have reviewed the affidavits that Mr. Nye gave in other proceedings as well as his memorandum with respect to the flood and the transcript of the Anmore council meeting. His words in all three seem to be reflective of a knowledgeable representative of Kings Legacy looking out for the interests of that company. The issues as to which he differed with Mr. Brovender do not appear to be key in the remaining litigation in this matter.
- [39] While TCC acknowledges that Mr. Nye has no conflict with and is not adverse or hostile to Kings Legacy, it argues that in the unique circumstances of this case, the court must also consider his relationship to TCC, which is the party actually advancing the claim at present.
- [40] I am sympathetic to the concerns of TCC arising from Mr. Nye's refusal to cooperate and his suggestion that he may not be a friendly witness. However, I am also very concerned that neither Mr. Davies nor any other potential witness proposed by TCC has the sort of direct knowledge of the bulk of the matters in issue in the action that Mr. Nye does.
- [41] XS West should be able to access the evidence of a knowledgeable witness, and given the nature of the matters in issue and the limited extent to which anyone connected with Bowra will be able to give such evidence, I would agree that XS West will be significantly prejudiced should it be required to examine Mr. Davies.
- [42] The potential prejudice against TCC must be considered in light of the discretion that the trial judge will have to carefully consider the extent to which evidence obtained on a discovery of Mr. Nye can be used at trial against TCC.
- [43] The cases make clear that applications such as this involve balancing of prejudice, and that the court should intervene only where overwhelming prejudice to the party being examined is shown. I conclude that the balance of prejudice in the circumstances of this case falls in favour of XS West, and that it should be permitted to examine its choice of corporate representative, being Mr. Nye.
- [44] The application is dismissed.

[SUBMISSIONS ON COSTS]

- [45] THE COURT: I would agree that there were difficult issues in this application, and it was a reasonable application to have brought. I see no reason to depart from the usual rule as to costs, which is that provided in Rule 14-1(12)(b).

"Veenstra J."

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