IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Balomenos v. Hon Towers Kerrisdale Ltd.,*
2023 BCSC 995

Date: 20230613
Docket: S197466
Registry: Vancouver

Between:

Peter Balomenos and Cascadia Pacific Realty Ltd.

Plaintiffs

And

Hon Towers Kerrisdale Ltd. and Nicholas Hon

Defendants

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for the Plaintiffs:	G. Douvelos
Counsel for the Defendants:	M. Vesely, K.C. K. Meil, Articled Student
Place and Date of Trial/Hearing:	Vancouver, B.C. May 15 to 18, 2023
Place and Date of Judgment:	Vancouver, B.C. June 13, 2023

Introduction

[1] The Plaintiff Cascadia Pacific Realty Ltd. ("Cascadia") is seeking to recover from the defendant Hon Towers Kerrisdale Ltd. ("Hon Towers") a commission for Cascadia's role in a land assembly deal in the area of Kerrisdale in Vancouver, BC. Peter Balomenos was the realtor with Cascadia who put together the deal. The amount at issue depends on how a commission agreement with respect to the sale of land from Knox United Church ("Knox Church") is interpreted.

[2] Knox Church sold Hon Towers a portion of its land on West 41st Avenue, in exchange for a cash payment plus the construction of a new building for the church (the "Annex"). The parties agree that a commission of 3% is payable on the cash portion of the transaction, being $4.6 million. However, the commission agreement states there is an additional payment of 3%, based on an estimate of $2.5 million for the cost of construction of the Annex. The parties disagree on how that portion is to be calculated. What is at issue is whether the parties intended the commission for the construction of the new building to be based on $2.5 million or some other figure.

Factual Background

[3] Mr. Balomenos testified for the plaintiff. The director of Hon Towers, Nicholas Hon, testified for the defendant.

[4] Mr. Balomenos has been a commercial real estate agent since 1984. At the relevant time, Mr. Balomenos was a realtor with Cascadia. He was familiar with James Yong, an engineer with the firm Jakin Engineering ("Jakin"), having worked on previous projects together. Mr. Balomenos had known Mr. Yong for close to 30 years.

[5] In early 2011, Mr. Yong asked Mr. Balomenos if he knew of any suitable property for Mr. Hon, who was looking to develop real estate in Vancouver. Mr. Hon testified that he first met Mr. Yong in 2010, and engaged Mr. Yong's engineering firm to work as a project manager for him in his Calgary project. Mr. Hon testified he believed the real estate market was very promising in Vancouver.

[6] Mr. Balomenos, Mr. Yong and Mr. Hon met at Jakin's office in Richmond on April 13, 2011. Mr. Balomenos testified he first pitched a project in Surrey. Mr. Hon was not interested. Then Mr. Balomenos brought up the project in Kerrisdale, in the area of West 41st Avenue and Balaclava Street. He explained that it was a land assembly deal, which comprised of four single family homes on West 41st, a portion of land from Knox Church, and a laneway owned by the City of Vancouver that ran through this site. Mr. Hon testified he was interested in this project, as he was looking to expand his residential developments from Alberta into Vancouver.

[7] The project required the three parcels to be purchased and consolidated. The four single family homes had already been purchased by a different developer, who had indicated a willingness to sell as the developer was leaving the North American market. Mr. Hon testified he was interested in the project as Mr. Balomenos had described it as "shovel ready". To Mr. Hon, that meant the site was almost ready for construction, with rezoning and permits already in place. He was interested as that would shorten the timeline for construction, maximizing profit. Mr. Balomenos had no recollection of making the "shovel ready" statement; his evidence was he had some information on this site before the meeting, but no details.

[8] Mr. Hon testified that at this initial meeting, Mr. Balomenos presented a document to him which set out the deal structure for the three parcels of land, listing the cost of construction of the Annex as estimated to be $2.5 million. Mr. Balomenos did not recall if he provided this document, but testified that he would not have come up with the $2.5 million estimate. Mr. Balomenos was not an expert in construction cost, and his view was the $2.5 million figure came from someone else, likely Mr. Yong.

[9] The plan was to build a multi-building condominium complex. Plans had already been drawn by an architectural firm in Chicago for the previous developer. Mr. Hon testified that soon after this initial meeting, he called Mr. Yong and asked him to have Mr. Balomenos put this deal together.

[10] Mr. Balomenos drafted a consulting fee agreement for the purchase of the four single family homes. This agreement was between Lobensamo Properties, a company owned by Mr. Balomenos and his wife, and Jakin on behalf of Hon Towers. It is dated May 22, 2011, and signed by Mr. Yong on behalf of Mr. Hon. The agreement states that the buyer would pay as a commission 3% of the purchase price for the four single family homes to Lobensamo Properties on completion. This agreement was for the commission payable to Mr. Balomenos for this portion of the deal. The purchase of the four homes closed on June 30, 2011. The parties agree Mr. Balomenos was paid his commission of approximately $270,000 for the purchase of the four single family homes.

[11] The purchase of the land from Knox Church was more complicated. As part of the purchase price, Knox Church wanted a cash amount of $4.6 million, and also wanted Hon Towers to construct the Annex, to be used as a fellowship centre and daycare. Mr. Balomenos drafted a commission agreement for this purchase, dated July 7, 2011. This agreement was between Cascadia and Hon Towers, and signed by Mr. Yong on behalf of Mr. Hon. The agreement states that upon completion, Hon Towers is to pay Cascadia 3% of the purchase price, “plus 3% of the cost of construction for the auxiliary building for the church estimated at $3 million”. The $3 million figure was crossed out by Mr. Yong, and substituted with $2.5 million. Mr. Hon testified that as he was in Calgary, he directed that Mr. Yong use the $2.5 million figure. Mr. Hon provided authority to Mr. Yong to sign this commission agreement on behalf of Hon Towers.

[12] With respect to the commission agreement for the land from Knox Church, the parties agree 3% of the purchase price refers to 3% of $4.6 million. They disagree on the amount of the commission on the construction of the Annex. Cascadia takes the position that the agreement is for 3% of the cost of construction, which was estimated at $2.5 million. Cascadia takes the view that this figure was an estimate and not intended by the parties to be binding. Cascadia argues cost of construction has increased significantly since 2011, when the agreement was signed. Cascadia argues the estimate to be used ought to be the $9 million estimate for construction prepared

by Mr. Yong in a report in 2019. Hon Towers takes the position that the commission ought to be 3% of $2.5 million, as stated in the agreement.

[13] In addition, the deal required Hon Towers to purchase a laneway from the City of Vancouver as part of the land assembly. There was no separate commission agreement for the laneway. Mr. Balomenos testified he had raised the issue about payment for the laneway, as well as other additional work he performed, with Mr. Yong and Mr. Hon in 2013. His view is Hon Towers agreed to pay him 3% commission for the laneway. Hon Towers' position is no such agreement was made.

[14] As it turned out, it took a significant amount of time to complete the purchase of land from Knox Church and from the City of Vancouver. These purchases did not close until August 17, 2017. Hon Towers needed to get a rezoning and development permit from the city to satisfy the conditions precedent. The draft purchase agreement in 2013 for the laneway listed the purchase price as $937,000. There is some evidence the laneway was bought for higher than this amount.

[15] Mr. Balomenos sent a number of invoices to Mr. Hon and Mr. Yong in his efforts to get his commission. The invoices were from Lobensamo Properties dated March 12, 2015, April 19, 2018, June 1, 2018 and June 19, 2018. Each invoice had a different amount owing. Mr. Hon testified he disagreed with the invoices, as the commission was not payable to Lobensamo Properties but to Cascadia. Mr. Hon also disputed the amount owing, as some of the invoices were calculated on more than $2.5 million. None of the invoices were paid by Hon Towers. Mr. Balomenos testified that while he sent many emails to Mr. Hon about payment, he received very few responses.

[16] As of the date of the trial, the construction of the Annex has not yet started. Mr. Hon testified he has not yet received a building permit.

Issues

[17] The issues are:

1. What is the amount of commission payable to Cascadia by Hon Towers in relation to the Knox Church purchase?

2. Was there an agreement by Hon Towers to pay commission to Cascadia for the purchase of the laneway? If so, what is the amount of commission payable?

Credibility and Reliability

[18] Both parties argue the other side's witness was not credible or reliable. Cascadia's position is Mr. Hon was argumentative with selective memory of events. For example, Cascadia argues Mr. Hon was not being forthright about his memory of the events of the initial meeting. Cascadia argues Mr. Hon is not to be believed when he testified that it was Mr. Balomenos who provided the document outlining the deal structure with the figure of $2.5 million for the cost of construction of the Annex. Cascadia argues this document did not come from Mr. Balomenos, and the $2.5 million number more likely came from Mr. Yong, who had expertise in estimating cost of construction.

[19] Hon Towers argues Mr. Balomenos is not to be believed. The defendant submits Mr. Balomenos was argumentative and verbose in his responses. Instead of answering the question, Mr. Balomenos frequently gave a speech. Hon Towers argues Mr. Balomenos had a poor memory of events, and admitted it at various points in his evidence.

[20] In my view, there are no issues with credibility or reliability with either Mr. Balomenos or Mr. Hon. While there were some variances in recollection as to how events unfolded, for the most part, there were no clear contradictions between their evidence. I accept both of these witnesses were truthful and tried their best to recollect events. What divides these two parties are their interpretations of the commission agreement for the church land and their emails from 2013 about the laneway.

Analysis

(a) Commission for the purchase of land from Knox Church

[21] As stated earlier, the parties agree that commission is payable at 3% of the purchase price for the cash portion of the deal with Knox Church, which was $4.6 million. The issue to be determined is what is the commission payable for the construction of the Annex.

[22] Cascadia's position is the commission agreement did not intend the estimate of $2.5 million for the cost of construction of the Annex to be binding. This is made clear by the use of the word "estimate", representing only an approximate cost. If $2.5 million was intended to be the amount to be used to calculate the commission, there would have been no need to use the word "estimate". Cascadia argues the best evidence for arriving at the cost of construction is the 2019 Jakin report, which provides a cost of $9.48 million.

[23] The position of Hon Towers is the commission is to be calculated on $2.5 million. The defendant argues the plaintiff's interpretation would render the commission agreement impossible to perform, as the commission is due on completion. As of August 2017, when the purchase was completed, the Annex had not been constructed. The parties cannot have intended the commission to be calculated on the actual cost of construction, as that would be unknown on closing. Thus, the parties must have intended the commission be calculated on an estimate of the cost of construction, written in the contract as $2.5 million. The parties cannot have intended the commission to be based on a future estimate, as the agreement is silent on who, when or how that future estimate is to be prepared. Specifically, the defendant argues the parties could not have intended the commission be payable on the 2019 Jakin report, as that report could not have been in the contemplation of the parties at the time the commission agreement was made in 2011.

[24] The proper approach to interpretation of contracts is set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*]:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line* [*v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).] at p. 574, *per* Lord Wilberforce)

[25] The role and nature of surrounding circumstances in contractual interpretation was set out in *Sattva*:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services* [*Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31] at para. 14; and [G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012)] at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King* [*v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80] at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the

> way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme* [*Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.)] at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[26] Applying these principles of contract interpretation to the commission agreement, in my view, the commission agreement states the commission for the construction of the Annex is calculated as 3% of $2.5 million. The $3 million figure was expressly changed to $2.5 million on the insistence of the defendant; that supports the view that the figure provided has significance. If it were truly intended to be an estimate, there would have been no need to change it to $2.5 million. The $3 million figure could have simply been crossed out, or left in. As the evidence is this change was requested by Hon Tower, and agreed to by Cascadia, this supports the view that this figure is intended to be the basis for the calculation of the commission for the construction of the Annex.

[27] In my view, the use of the word "estimate" is intended to be descriptive of the $2.5 million, and not intended to be a statement of approximation of cost only. That is, the phrase "plus 3% of the cost of construction for the auxiliary building for the church estimated at $2.5 million", is intended to mean the commission is calculated as 3% of $2.5 million, which is an estimate of the cost of construction. It was not intended by the parties to say the commission is payable on 3% of an estimate of the cost of construction to be determined at a later date, or 3% of the actual cost of construction.

[28] This interpretation is consistent with the surrounding circumstances, as the evidence is clear that the figure of $2.5 million was the only change Hon Towers negotiated on the agreement before it was signed. If the parties intended this not to be a fixed number, but an estimate which is subject to variation, there would have been no reason to have included it. In my view, this interpretation gives effect to all the words in the agreement.

[29] With respect, I do not find Cascadia's argument on how the agreement is to be interpreted persuasive. Cascadia focuses its argument entirely on the word "estimate"

and ignores the figure $2.5 million. Further, I agree with the defendant that the interpretation Cascadia urges upon the Court would make the agreement impossible to perform, as the actual cost of construction is unknown on closing. The Court ought to interpret the contract in such a way as to avoid an impossibility or absurdity: *Skoko v. Chychrun Construction Ltd.* (1980), 25 B.C.L.R. 141, 1980 CanLII 482 (S.C.) at para. 12.

[30] Cascadia argues the parties must have intended to base the calculation of the cost of construction on a later more accurate estimate of the cost of construction. However, at the time when the commission agreement was signed, it was unknown when the purchase would complete. The agreement is silent as to how the parties would agree on a later estimate. Neither witness testified to any discussion about how a future estimate would be obtained. I find there was no such intention to base the commission on a later estimate.

[31] In July 2011, when the agreement was signed, the parties did not have plans to obtain a report on the cost of construction from Jakin in 2019. In fact, Mr. Hon testified the Jakin report was not commissioned by him, but undertaken by Jakin on its own initiative. There is no basis to find the commission agreement in 2011 intended to base the calculation of commission on a report not in existence nor contemplated by the parties at the time.

[32] I find the commission agreement is clear and not ambiguous. There is no need to look outside the agreement for other estimates of cost of construction. Cascadia is entitled to be paid 3% of $4.6 million and 3% of $2.5 million for the purchase of Knox Church lands.

(b) Commission on the purchase of the laneway

[33] Mr. Balomenos testified that in 2013, as the deal was dragging on, he wrote to the defendant through Mr. Yong inquiring about his fees. He believed that he was doing a lot of additional work not usually required of real estate agents and he wished to be compensated. He testified that he was taking notes at meetings with the church committee, negotiating with the former architectural firm from Chicago, negotiating

with the city for the purchase of the laneway, doing presentations to attract joint venture partners and other tasks.

[34] He sent an email to Mr. Yong and Mr. Hon on July 18, 2013 entitled "41st and Balaclava – Fee review". In the email, Mr. Balomenos listed a number of tasks that he had performed that he believed were additional to his role as realtor, including the negotiations with the city for the purchase of the laneway.

[35] An email was sent shortly after on July 18, 2013 from Mr. Yong to Mr. Hon, where Mr. Yong indicated he was not happy with this and that they needed to talk.

[36] The next email is from Mr. Balomenos to Mr. Yong and Mr. Hon. It was sent on July 19, 2013 and reads in part:

> Hello James and Nicholas
>
> My proposal
>
> James I agree with you we should stick with 3% on the lane acquisition. I accept your suggestion and will invoice Hon Towers (Kerrisdale) 3% of the purchase price prior to closing of the lane. Thank you.
>
> Another item which we did not discuss and the reason for my lengthy e-mail was in addition to the commission on the lane acquisition was a fee for additional services over the past 2 years and for the balance of the rezoning period. I believe $25,000 per annum is very fair for the time and effort as per the explanation in my email…
>
> …Look forward to your approval.
>
> Regards
>
> Peter Balomenos

[37] Approximately an hour later on July 19, 2013, Mr. Yong responded to Mr. Balomenos, copied to Mr. Hon:

> Hi Peter:
>
> I am NOT going to support your request. This is going to be something you need to convince us that you have done work above and beyond the call of a realtor.
>
> Yours truly,
>
> James Yong, P.Eng.

[38] On July 22, 2013, Mr. Balomenos responded to Mr. Yong, copied to Mr. Hon. Mr. Balomenos listed in the email his various services provided and explained how these were outside his role as realtor. He provided five items on the list.

[39] Within a few minutes of this email, Mr. Hon responded to Mr. Yong. Mr. Hon wrote he did not feel it was necessary for Mr. Balomenos to remain on board for the design/marketing process and that Mr. Hon was comfortable having Mr. Balomenos' continuing role be limited to dealing with Knox Church and the city on the purchase of land.

[40] Later that evening on July 22, 2013, Mr. Yong responded to Mr. Balomenos by email which reads in part:

> Hi Peter:
>
> …Your original email about the fees was because you thought you would not be paid for the purchase of the lane and you gave us the list of work that you had to do to justify for a fee. When we indicated to you that we would honor the 3% commission, you were pleasantly surprised. Now, you are sending the same list but asking more fees in addition to the 3% commission. At the end of the day, you are asking 3% commission+$25K per annum…
>
> Call me after you have a chance to review our comments.
>
> Yours truly,
>
> James Yong, P.Eng.

[41] The email then included Mr. Balomenos' earlier email of July 22, 2013 with his list of five services, and Mr. Yong's comments on those services. Mr. Yong's comments were calling into question the contributions made by Mr. Balomenos.

[42] Later on July 23, 2013, Mr. Balomenos responded to Mr. Yong and Mr. Hon:

> Hello James,
>
> I am not here to argue with you. I have voiced my opinion if you do not think I am deserving or in anyway trying to misrepresent my involvement in this transaction. It should be a win win relationship. I am grateful for the business and will leave it to your and Nicholas discretion for any payment for additional services.
>
> Kind Regards
>
> Peter Balomenos

[43] Cascadia argues the emails prove Hon Towers agreed to pay 3% commission on the purchase of the laneway. Cascadia agrees there was no agreement to pay additional fees, and is no longer pursuing a claim for the extra $25,000 per year.

[44] Hon Towers argues it made an offer to Mr. Balomenos to pay 3% commission on the laneway to settle all his outstanding complaints for extra fees. Hon Towers argues this offer was rejected by Mr. Balomenos by his email dated July 19, 2013 with the opening words “My proposal”. Cascadia made a counter-offer in that email, wanting the 3% commission for the laneway plus an extra $25,000 per year. Hon Tower argues this counter-offer was rejected, and no further offers were made. Thus, Hon Tower argues there was no agreement on payment of commission to Cascadia for the laneway.

[45] In my view, the plaintiff has proven on a balance of probabilities an agreement for Hon Towers to pay 3% commission on the purchase of the laneway. Read together, the emails show an agreement to pay commission on the laneway, but a rejection of any further fees.

[46] The significant email is the July 19, 2013 email from Mr. Balomenos where he starts with “My proposal”. The email states Mr. Balomenos accepted the offer of 3% commission for the laneway, as the parties discussed. I infer from this there was a telephone call on either July 18 or 19, 2013 between Mr. Balomenos and Mr. Yong. I find this email shows there was an offer by Hon Towers to pay commission on the laneway, which the plaintiff accepted.

[47] In my view, there is no evidence that the offer to pay the commission on the laneway was dependent on the other requests for extra fees being dropped. While Mr. Hon testified that was his intention, there is no evidence this was communicated to Mr. Balomenos. Mr. Hon did not deal directly with Mr. Balomenos on this issue. As such, I do not find this July 19, 2013 email to be a counter-offer from Mr. Balomenos.

[48] With that finding, I would then characterize this as essentially two separate issues. The first issue is the payment of commission for the laneway, and I find there

was an agreement reached to pay 3%. The second issue is the payment for the extra services, which I find there was no agreement to pay. Cascadia is no longer claiming the fee for extra services, as it agrees on the evidence there was no agreement reached. Mr. Balomenos clearly stated in his email of July 19, 2013, that he was leaving this payment to the discretion of Mr. Hon.

[49] This interpretation is consistent with the actions of the parties. The emails following the July 19, 2013 email from Mr. Balomenos was focussed on Mr. Balomenos' justification for extra fees, and Mr. Yong's responses to those justifications. The commission for the laneway was no longer listed as one of the items by Mr. Balomenos. In Mr. Yong's responses to the list, Mr. Yong does not list as a reason for not granting the additional fees that Hon Tower had agreed to pay commission for the laneway in satisfaction of all claims.

[50] Further, Cascadia included a commission for the laneway in the invoices it sent to Hon Tower. The only substantive response Mr. Hon sent was an email on June 19, 2018, where he disputed the figure used to calculate commission on the Annex and insisted it be corrected to $2.5 million. Importantly, he did not dispute the commission for the laneway.

[51] In my view, there was an agreement between the parties to pay 3% commission on the laneway.

[52] I find the purchase price to calculate the commission should be based on $937,000, which was the price in the draft sales agreement. I acknowledge there was evidence the price had increased; however, the plaintiff has not proven on a balance of probabilities the increased price. Cascadia suggested to Mr. Hon during cross-examination it had increased to a certain amount; Mr. Hon's response was he was not certain. That is insufficient evidence to prove a new price and the $937,000 is the best evidence of the sales price of the laneway.

Conclusion

[53] Hon Towers is to pay Cascadia a commission for the sale of Knox Church land based on 3% of $4.6 million (which equals $138,000), plus 3% of $2.5 million (which equals $75,000), plus GST.

[54] Hon Towers is to pay Cascadia a commission on the sale of the laneway, based on 3% of $937,000 (which equals $28,110) plus GST.

[55] If there are further issues the parties wish to address, they are to contact the registry within 30 days of the receipt of this ruling to arrange a date.

"Chan J."