# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *OTBEC3 Holdings Inc. v. Promintory Developments Limited Partnership,* 2024 BCSC 507

Date: 20240326
Docket: S223014
Registry: Vancouver

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Between:

**OTBEC3 Holdings Inc.**

Plaintiff

And

**Promintory Developments Limited Partnership, Promintory Developments Inc. and Boynton Developments (Kelowna) Ltd.**

Defendants

Before: The Honourable Justice Fitzpatrick

## Reasons for Judgment

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|---|---|
| Counsel for the Plaintiff: | J. Loeb<br>L. Buitendyk |
| Counsel for the Defendants: | J. Sapers<br>W. Chamberlain |
| Place and Date of Hearing: | Vancouver, B.C.<br>March 6, 2024 |
| Place and Date of Judgment: | Vancouver, B.C.<br>March 26, 2024 |

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## Introduction

[1] The plaintiff, OTBEC3 Holdings Inc. (“OTBEC”), and the defendants have been litigating issues concerning OTBEC’s investment in the defendants’ development business for some time. In the midst of this litigation, OTBEC filed two certificates of pending litigation (“CPL”) against the defendants’ lands on two separate occasions.

[2] Although both CPLs were eventually removed from title to the lands, the defendants later filed a counterclaim against OTBEC in relation to the second CPL, claiming that damages were incurred as a result (the “Counterclaim”).

[3] OTBEC now applies to dismiss the Counterclaim as it relates to the CPL, on the basis that the causes of action in the Counterclaim are frivolous, vexatious, prejudicial or an abuse of process.

## Background

[4] The defendant, Promintory Developments Inc. is the general partner of the defendant, Promintory Developments Limited Partnership. The partnership’s business was to undertake a residential townhome development in Kelowna, BC on lands owned in trust for the partnership by the defendant, Boynton Developments (Kelowna) Ltd. (the “Lands”). I will refer to all of the defendants collectively as “Promintory”.

[5] OTBEC is in the business of investing in real estate and development projects.

[6] In September 2019, Promintory and OTBEC entered into a subscription agreement by which OTBEC purchased limited partnership units for $1 million (the “Units”).

[7] In November 2020, OTBEC called for a redemption of the Units, at the agreed upon return of $1.25 million. Later that month, the parties agreed to amend their

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agreement to extend the redemption date to September 2021, in consideration of an increased return to OTBEC of certain interest and fees.

[8] On April 11, 2022, OTBEC filed its notice of civil claim (“NOCC”) against Promintory, claiming amounts alleged to be owed under the subscription agreement. OTBEC claimed for judgment, damages for breach of contract, restitution based on unjust enrichment and a CPL.

[9] On May 5, 2022, OTBEC amended the NOCC to include an allegation that the $1 million “loaned” by OTBEC to Promintory was used to improve the Lands (the “ANOCC”). In the ANOCC, OTBEC also amended the relief sought to include a declaration that OTBEC holds an equitable interest in the Lands under a constructive trust for the funds owing under the subscription agreement.

[10] Also, on May 5, 2022, OTBEC filed a CPL in this Court and, on May 9, 2022, it was registered against the Lands (“CPL #1”).

[11] On May 25, 2022, Promintory’s counsel wrote to OTBEC’s counsel. He alleged that CPL #1 was causing prejudice and that, in any event, the filing of CPL #1 was improper as OTBEC’s claims did not give rise to an interest in the Lands. Nevertheless, Promintory’s counsel proposed a resolution that would resolve the matter which included: an acknowledgement of the amount outstanding under the subscription agreement; payment of that amount in three installments; immediate cancellation and discharge of CPL #1 and that:

> … [OTBEC] will be at liberty to re-register its [CPL #1] if [Promintory] default on any of the above payments.

[12] On May 30, 3022, OTBEC accepted Promintory’s proposal and, on June 2, 2022, the registration of CPL #1 was cancelled from title to the Lands.

[13] In May and August 2022, Promintory made further payments to OTBEC.

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[14] In late August 2022, OTBEC alleged that Promintory had defaulted in the payment of amounts owed to it. As a result, on September 1, 2022, OTBEC filed a new CPL against the Lands ("CPL #2").

[15] Despite further negotiations between the parties, no agreement was reached to resolve the issues then extant, including the registration of CPL #2.

[16] On November 14, 2022, Promintory filed its response to civil claim. In addition, Promintory filed a notice of application, seeking:

a) A declaration that the ANOCC did not adequately disclose a claim for an interest in land, as required by s. 215(1)(a) of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], such that CPL #2 could not be sustained;

b) Alternatively, an order striking the relief sought in the ANOCC where it referred to a claim for an equitable interest/constructive trust (para. 4) and a CPL (para. 5) on the basis that OTBEC has no interest in the Lands;

c) An order directing the cancellation of CPL #2 by the Land Titles Office ("LTO"); and

d) Costs.

[17] On November 22, 2022, the parties arrived at yet another resolution to avoid a hearing of Promintory's application, as above. Their agreement was later incorporated into a consent order dated December 23, 2022 (the "Consent Order").

[18] On December 6, 2022, OTBEC arranged to cancel the registration of CPL #2 from the Lands.

[19] The Consent Order provided that:

a) Contrary to the *LTA*, the ANOCC did not adequately disclose a claim for an interest in land, such that CPL #2 could not be sustained;

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b) The relief sought by OTBEC in the ANOCC for a CPL (relief sought, para. 5) was dismissed “without costs”;

c) The relief sought by Promintory in its application was adjourned generally with respect to:

i. Seeking to dismiss the relief sought by OTBEC in the ANOCC for an equitable interest/constructive trust (para. 4);

ii. Seeking an order directing the LTO to cancel the registration of CPL #2; and

iii. Promintory’s claim for costs of the application.

[20] In July 2023, OTBEC served its summary trial materials. There were various disputes relating to that application, including Promintory’s position that a summary trial was not appropriate. Nevertheless, OTBEC scheduled a hearing date for August 28, 2023.

[21] On August 23, 2023, Promintory served is response materials to the summary trial application. They also filed the Counterclaim with include claims relating to CPL #2—not CPL #1.

[22] The portions of the Counterclaim relating to CPL #2 that are the subject of OTBEC’s present application are contained in paras. 15–24 of Part 1 (statement of facts) and include various portions of Part 2 (relief sought) and Part 3 (legal basis.) The allegations in those portions of the Counterclaim are that:

a) OTBEC registered CPL #2 for an improper purpose to extract concessions from Promintory and in breach of its obligations to Promintory (statement of facts, para. 18);

b) The Consent Order was an acknowledgement by OTBEC that CPL #2 was improper (statement of facts, para. 22);

c) CPL #2 caused Promintory "to incur loss, damage and expense, including without limitation, additional fees, interest and legal costs" (statement of facts, para. 23);

d) The relief sought (paras. 1, 2 and 7) includes general and punitive damages and special costs;

e) OTBEC breached its obligations to Promintory, including by filing CPL #2 (legal basis, para. 1); and

f) Promintory is entitled to punitive damages and special costs on the basis of OTBEC's conduct, as described (legal basis, para. 6).

[23] On August 28, 2023, the parties appeared before the Court on OTBEC's summary trial application. The application did not proceed for a variety of reasons, including an insufficient time estimate and that various pre-trial procedures were outstanding.

[24] In October 2023, counsel attended a case management conference. In addition, a trial was scheduled for November 4, 2024.

[25] On November 3, 2023, OTBEC filed its response to the Counterclaim. In that pleading, in relation to CPL #2, OTBEC:

a) denies that CPL #2 was filed for an improper purpose and that the Consent Order acknowledged that;

b) alleges that, in the Consent Order, Promintory waived any claim for costs related to CPL #2 and that the Counterclaim for costs is "*res judicata* and/or a collateral attack" on the Consent Order;

c) denies that Promintory incurred any damage or expense related to CPL #2; and

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d) alleges that Promintory filed the Counterclaim on the eve of its summary trial application, knowing the allegations relating to CPL #2 were false and for the collateral purpose of attempting to delay or hinder the summary trial, representing an abuse of the Court's process justifying an award of punitive damages and/or special costs.

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**Relevant Principles**

[26] OTBEC's application to strike the above portions of the Counterclaim as they relate to CPL #2 is brought under the *Supreme Court Civil Rules*, R. 9-5(1)(b)-(d), which provides:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
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> ….
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
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> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
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> (d) it is otherwise an abuse of the process of the court,
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> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[27] In *Willow v. Chong*, 2013 BCSC 1083, Justice Fisher, as she then was, articulated the test under R. 9-5(1)(b), as follows:

> [20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.CJ. No. 2160 (SC); *Skender v. Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence..

[28] In *Sahyoun v. Ho*, 2015 BCSC 392, Justice Voith, as he then was, discussed R. 9-5(1)(c) and (d) and the interplay between the various subsections of R. 9-5:

> [59] An "embarrassing" pleading, as contemplated by R. 9-5(1)(c), is one that is so irrelevant that to allow it to stand would involve useless expense and would also prejudice the trial of the action by involving the parties in a dispute apart from the issues; *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 at 147 (C.A.).
>
> [60] The abuse of process standard under R. 9-5(1)(d) derives from a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-37.
>
> [61] Though subsections (a)-(d) of R. 9-5(1) address different concerns and different wrongs, there is also some overlap between these subsections. Thus, for example, a pleading that discloses no cause of action, contrary to R. 9-5(1)(a), can also be unnecessary, frivolous or vexatious within the meaning of R. 9-5(1)(b); see e.g. *Virk v. Brar*, 2012 BCSC 1004 at paras. 69-70.
>
> [62] A pleading can be embarrassing if it does not state the real issue in an intelligible form. It can also be embarrassing if it is prolix, includes irrelevant facts, argument or evidence. It can be prejudicial if it is designed to or has the effect of confusing the defendant, making it difficult, if not impossible, to answer; *Virk* at para. 75.
>
> [63] These same concerns can constitute an abuse of the court if a litigant has been expressly told that there are aspects of its pleadings that are deficient or defective, and if that litigant persists, in its amended claim, to advance the same claims or issues in the same way.

[29] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, 36 C.P.C. (4th) 266, 1999 CanLII 5860 (B.C.S.C.), Justice Romilly further described aspects where abuse of process may arise under R. 9-5(1)(d):

> [52] The ambit of abuse of process is very broad. Abuse of process may be found where proceedings involve a deception of the court or constitute a mere sham; where process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose: *Babavic v. Babowech* (3 September 1993) Vancouver Registry C931968 (B.C.S.C.). In the case at bar, I am unable to find that the plaintiff's pleadings in paragraphs 9 and 10 of the Statement of Claim are vexatious and without merit, brought with the sole motive and intent to harass the defendants and to interfere with their ability to defend the action.

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**Discussion**

[30] Having considered the totality of the circumstances, I see no merit in OTBEC's application to strike the portions of the Counterclaim described above under R. 9-5(1)(b)-(d).

[31] In addition to the issues between the parties relating to the subscription agreement, there are certain issues raised in the pleadings that remain with respect to CPL #2 and/or the Lands.

[32] OTBEC makes certain allegations as to the effect of the Consent Order in relation to CPL #2. As stated in *Yu v. Jordan*, 2012 BCCA 367, orders are not to be interpreted in a vacuum:

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

[33] I accept that the doctrine of *res judicata* can apply to consent orders: *Spender (Guardian of) v. Spender*, 36 C.P.C. (4th) 266, 1999 CanLII 6548 (B.C.S.C.) at paras. 18–19.

[34] The main relief resulting from the Consent Order was that OTBEC's pleadings were not sufficient to sustain the registration of CPL #2. This relief was sought pursuant to s. 215(1) of the *LTA* which requires that the person claim an "estate or interest in land": see discussion in *1119727 B.C. Ltd. v. Bold and Cypress (Grange) GP,* 2020 BCSC 1435 at paras. 29–32.

[35] As such, para. 1 of the Consent Order only determined the inadequacy of the pleading (i.e., the ANOCC) for the registration of a CPL and did not address or determine OTBEC's substantive claim for an equitable interest in the Lands pursuant to a constructive trust: see *G.P.I. Greenfield Pioneer Inc. v. Moore*, 58 OR (3d) 87,

2002 CanLII 6832 (O.N.C.A.) at para. 24, citing *Mormick Investments Inc. v. Khoury*, [1985] O.J. No. 1072 (S.C.) at para. 37.

[36] Accordingly, OTBEC's claim for a constructive trust to the Lands remains an issue, since Promintory's application to dismiss that claim was adjourned generally in the Consent Order.

[37] In the Counterclaim, Promintory alleges that CPL #2 was filed improperly. The law is clear that, in order to recover damages for the wrongful filing of a CPL, a landowner must follow two possible routes: firstly, a statutory cause of action under ss. 256–257 of the *LTA*; and secondly, a common law cause of action. Here, Promintory advances a common law cause of action, which requires that it establish that OTBEC had a malicious or unlawful purpose in filing CPL #2 which amounts to an abuse of process: *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141 at paras. 23–24; see other authorities discussed in *Taylor v. Banicevic*, 2017 BCSC 1538 at paras. 245–248.

[38] As Promintory argues, damages caused by the filing of a CPL in this context could include increased cost of funds, construction delay costs and other costs, including legal fees to address the consequences of the filing, such as dealing with builders' liens or negotiations for construction financing.

[39] When the Consent Order is viewed in context, I see nothing to support OTBEC's contention that, in that document, Promintory "waived" any claim for damages arising from the filing of CPL #2.

[40] No issue of *res judicata* or issue estoppel arises from the Consent Order since it clearly dealt with questions or issues that were different from what is now raised in the Counterclaim: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paras. 24–25. There is no mention of any damage claim in relation to CPL #2 at all in the Consent Order; indeed, Promintory's cause of action in relation to CPL #2 in its Counterclaim had not even been advanced at the date of the Consent Order and there had been no adjudication of that claim at that time (or since): *Meszaros v.*

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*Hendry, Swinton, McKenzie Insurance Services*, 2014 BCSC 2087 at paras. 9–11. There is nothing in the Consent Order to indicate any intention on the part of Promintory to more generally release any claims that it might have had in relation to CPL #2: *Provident Properties Inc. v. Tinley Properties Ltd.*, [1991] B.C.J. No. 166,1991 CanLII 437 (B.C.C.A.) at 8–9, and *Spender* at paras. 20–25.

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[41] In addition, there is no merit in OTBEC's contention on this application that Promontory has not provided any evidence or sufficient evidence to establish that they incurred damages or expense arising from CPL #2. This is not a summary judgment or summary trial application where Promintory is required to respond with evidence to support its claim.

[42] Similarly, there is nothing in the Consent Order that specifically addresses OTBEC's motivations in filing CPL #2, as may be relevant to whether it had an improper motive or collateral purpose in doing so. The only express acknowledgement is found in para. 1 of the Consent Order by which OTBEC agreed that the ANOCC did not disclose a claim for an interest in the Lands, which could sustain the registration under the *LTA*. If and how this agreement or acknowledgement factors into Promintory's claim for damages in relation to CPL #2 remains to be seen.

[43] I agree that the Consent Order does represent an agreement between the parties that OTBEC's claim for a CPL in the ANOCC was dismissed "without costs". These costs are separate and distinct from Promintory's damage claims: *Basha Sales Co. Ltd. v. Adera Equities Inc.*, 2017 BCSC 1715 at para. 9. Arguably, these costs that were waived would include any Court costs relating to Promintory's defence to OTBEC's claim to a CPL in this action as may have been otherwise claimed to that time, including a portion of Promintory's November 2022 application as it related to CPL #2 (but reserving the costs in relation to the remainder of the application which was adjourned generally). In my view, however, this waiver of costs would not prevent Promintory from seeking "special costs" or ordinary costs in

respect of the damage claims advanced in the Counterclaim arising from CPL #2, which is of course would only be considered once the outcome is known.

[44] Finally, I see no merit in OTBEC's argument that Promintory only filed the Counterclaim to delay the summary trial or "cloud" the issues between the parties and that it was, therefore, an abuse of process.

[45] There were obviously many disagreements between counsel concerning the timing and the suitability and length of any summary trial. It is also manifestly the case that the matter was not ready to proceed on August 28, 2023, as determined by Justice Wilkinson on that date. This was particularly so given the state of readiness of the parties, including that OTBEC only served its amended list of documents on Promintory's counsel after Court hours on Friday, August 25, 2023, just before the summary trial was to proceed the following Monday, August 28, 2023.

[46] Leaving that issue aside, the Counterclaim advances many claims against OTBEC, including Promintory's claims relating to the subscription agreements and the Units and allegations of misrepresentation. Promintory seeks damages, judgment, an order for the transfer of Units and declarations of trust over the Units. Promintory's claims in the Counterclaim are not confined to CPL #2.

[47] In that event, I fail to see the logic in OTBEC alleging that the filing of the Counterclaim was an abuse of process, yet it only seeks to dismiss the *portions* of the Counterclaim that relate to CPL #2. Logic would dictate that It must be all or nothing.

## Conclusion

[48] I am unable to conclude that there is any basis to strike the portions of the Counterclaim relating to CPL #2 under R. 9-5(1).

[49] Promintory's claim for damages relating to CPL #2 is not frivolous, vexatious or prejudicial and it remains to be determined on its merits. The claim is not barred by the doctrine of *res judicata* by reason of the Consent Order. I am also unable to

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conclude that the advance of this claim is an abuse of process. While there have certainly been twists and turns in this litigation, OTBEC has failed to establish that the timing of Promintory advancing this claim satisfies this criteria.

[50] OTBEC's application is dismissed with costs payable in any event of the cause.

"Fitzpatrick J."

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