

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smithe Residences Ltd. v. Boffo Investment Corp.*,
2024 BCSC 1880

Date: 20241011
Docket: S1711962
Registry: Vancouver

Between:

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

Plaintiff

And

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

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Costs)

Counsel for the Plaintiff: G. Cameron

Counsel for the Defendants: D. Gruber
M. Laity

Place and Dates of Hearing: Vancouver, B.C.
August 20, 2024

Place and Date of Judgment: Vancouver, B.C.
October 11, 2024

INTRODUCTION

[1] Since late 2017, this hard-fought litigation has unfortunately seen more than its share of procedural issues arising between the parties. These procedural issues have become more pressing as time goes on, particularly given that the 28-day trial is approaching in early January 2025.

[2] On April 8, 2024, I issued reasons for judgment to address various document production issues after a two-day hearing in late January 2024: *Smithe Residences Ltd. v. Boffo Investment Corp.*, 2024 BCSC 556 [*Reasons*].

[3] In the *Reasons*, I found that the document production by the defendants (defined as the “Boffo Defendants”) was insufficient and incomplete, under both the *Supreme Court Civil Rules* [*Rules*] and a previous court order. I granted an order sought by the plaintiff (defined as “Smithe Residences”) in requiring further substantial document production by the Boffo Defendants within 10 days (the “Order”). This document production was particularly required to allow Smithe Residences to prepare its evidence for trial, including expert evidence, on the issue of what amount it alleges is owing by the Boffo Defendants under an agreement. I also dismissed the Boffo Defendants’ application for document production.

[4] The Boffo Defendants have produced some documentation after the Order was granted, although counsel for Smithe Residences cannot yet say whether it is complete as required by the Order. This application was filed to address those issues and also issues relating to examinations for discovery. Only on the eve of the hearing of this application did the Boffo Defendants produce further documents and consent to further examinations of Michael and Otto Boffo, as representatives of the Boffo Defendants.

[5] What remains to be addressed on this application is Smithe Residences’ request that it be awarded special costs against the Boffo Defendants for the post-Order pre-trial procedures.

DISCUSSION

[6] The events that followed from the January 2024 hearing – and which form the basis for Smithe Residences’ request for special costs from early April 2024 – relate to various aspects of pre-trial discovery, being the notices to admit, attempts to schedule further examinations for discovery, and document disclosure.

[7] Smithe Residences brings this application under Rule 22-7(5) of the *Rules*, which provides this Court with discretion to strike a response to civil claim and grant judgment in favour of the plaintiff where a party, refuses, without lawful excuse, to comply with their discovery obligations under the *Rules*. Under that Rule, if failure to comply is established, the party at fault bears the onus of proving a lawful excuse for the non-compliance or non-observance: *Mufford v. Lilley*, 2020 BCSC 1159 at paras. 20-24.

[8] Discovery of documents is an important aspect of pre-trial discovery and failure to disclose documents under the *Rules* can similarly be met with an application to strike the claim or response: *Eisele v. B.A. Blacktop Ltd.*, 2004 BCSC 521 at para. 15.

[9] An application under Rule 22-7(5) requires the Court to consider all of the circumstances in terms of what flows from any established non-compliance: *Schwarzinger v. Bramwell*, 2011 BCSC 304 at para. 107. Smithe Residences acknowledges that striking a response to civil claim is a harsh remedy that should only be exercised in "extreme cases": *Schwarzinger* at paras. 109-112. In all cases, it behooves the Court to consider, on the basis of proportionality, whether alternative or lesser remedies would be appropriate in securing compliance: *Schwarzinger* at paras. 118-122.

[10] One of the lesser remedies available to the Court to address non-compliance is an award of special costs: *Mufford* at para. 61 and *Schwarzinger* at para. 145.

[11] The principles which guide the Court in awarding special costs are well-known and not in dispute. Such an award may be made in the face of reprehensible

conduct, which includes milder forms of conduct that is deserving of rebuke: *Garcia v. Crestbrook Forest Products Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.), 1994 CanLII 2570. In addition, counsel have referred to the principles stated in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73, as follows:

...

- a) the court must exercise restraint in awarding special costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of “reprehensibility” captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court’s process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and
- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a “bonus” or further compensation for that success.

[12] Smithe Residences alleges that it has endured the Boffo Defendants’ ongoing intransigence and obstruction and non-compliance of pre-trial discovery requirements and the Order. Smithe Residences say that the Boffo Defendant’s litigation approach is meant to drive up its litigation costs and impair and prejudice its ability to proceed to trial: see *Hoffman v. Percheson*, 2011 BCSC 1175 at para. 24.

[13] Smithe Residences says that the conduct of the Boffo Defendants since April 2024 is deserving of the Court’s rebuke. It says that an award of special costs is reasonable and “fits the crime” and the principles of proportionality: *Schwarzinger* at para. 118. Smithe Residences says that a message needs to be sent to the Boffo Defendants so as to save the January 2025 trial dates and remedy the information deficit arising from their refusal to disclose material and relevant documents in this action.

[14] The Boffo Defendants say that they are “doing their best” in document production and that they are simply taking valid positions in the litigation pre-discovery process in what is “hard-fought litigation”. They also say that they have not opposed the relief in respect of the examinations for discovery.

[15] I will discuss the categories below, as they relate to notices to admit, attempts to schedule further examinations for discovery and document disclosure.

A. Notices to Admit:

[16] The timeline is:

- a) In December 2023: Smithe Residences served a Notice to Admit, including with respect to the authentication of a “Gross Sales Report” (the “Report”) for the development Project and certain Land Title Office (LTO) documents;
- b) On January 12, 2024: the Boffo Defendants refused to admit the authenticity of the Report and the LTO documents, citing that they were not attached to the Notice to Admit as required by Rule 7-7(3);
- c) On February 7, 2024: Smithe Residences served a second Notice to Admit with respect to the authentication of the Report and the LTO documents; and
- d) On February 16, 2024: the Boffo Defendants again refused to admit what was requested in the second Notice to Admit, stating that they do not possess the original authentic documents against which the referenced documents could be compared. However, they indicated that would consider admitting them if Smithe Residences provided an affidavit authenticating them from a person who obtained them from the source.

[17] Smithe Residences asserts that the Boffo Defendants’ responses to the notices to admit were unreasonable since the LTO documents were uncontroversial

and that the LTO documents in fact arose as part of the sales of condominium units by the Boffo Defendants themselves.

[18] I agree with Smithe Residences that, at some level, the Boffo Defendants have displayed a distinct lack of cooperation in this litigation. However, the Boffo Defendants' position in terms of the notices to admit is well-founded under Rule 7-7 and a defensible position under the Rule. They had no obligation to agree with Smithe Residences to lesser means of proving these documents, beyond what the *Rules* provide: *I.T. Exteriors Ltd. v. E.K. Exteriors Ltd.*, 2012 BCSC 1978 at para. 24. In addition, as the Boffo defendants point out, Smithe Residences is able to obtain the necessary evidence for trial in respect of the LTO documents under the *Evidence Act*, R.S.B.C. 1996, c. 124, ss. 39 and 41.

[19] The trial judge will be best placed to determine whether the Boffo Defendants' actions in respect of the notices to admit should be characterized as hard-fought litigation or an obstructionist strategy deserving of rebuke. Given this, and for the reasons below under "Disposition", I decline to address the matter of any costs award against the Boffo Defendants in respect of the notices to admit.

B. Examinations for Discovery:

[20] In the 2022-23 timeframe, Smithe Residences conducted various examinations of Ottavio (Otto) Boffo, the representative of the Boffo Defendants. His last examination date (July 26, 2023) was adjourned given various requests for further documents.

[21] On October 14, 2022, a Case Plan Order was granted by Justice Skolrood, as he then was (which was amended slightly by a later June 5, 2023 consent order). In both orders, the Boffo Defendants were ordered to make Otto Boffo available for discovery for one further full day, to be scheduled at some further date following the delivery of responses to outstanding requests made at an earlier examination.

[22] I accept Smithe Residences' submission that it was always anticipated that further time would be needed to complete Otto Boffo's examination, even before the later (and substantial) document production that was required under the Order.

[23] Further events are:

- a) March 13, 2024: Smithe Residences requested an interview of Michael Boffo, another principal of the Boffo Defendants, who Smithe Residences describes as a material witness. On March 20, 2024, the reply was that Michael Boffo was prepared to provide written responses to queries;
- b) June 28, 2024: Smithe Residences filed an application to compel pre-trial examination of Michael Boffo, as a further representative of the Boffo Defendants under Rule 7-2(5) or as a non-party under Rule 7-5. The parties agreed to schedule a hearing on July 24, 2024;
- c) July 10, 2024: Boffo Defendants confirmed the availability of Otto Boffo for an examination on August 14 or 16, 2024, but emphasized that the time to do so has been spent (allegedly on the basis that a trial certificate had been filed on September 22, 2023) and that leave of the Court was therefore required;
- d) July 12, 2024: Smithe Residences served an appointment and conduct money for Otto Boffo for August 14, 2024;
- e) July 16, 2024: Otto Boffo filed his Affidavit #5 stating that he is prepared to attend a further examination, subject to the Court requiring him to do so;
- f) July 17, 2024: the Boffo Defendants and Michael Boffo filed application responses opposing an examination of Michael Boffo, stating that Smithe Residences had not met the test under either Rule 7-2(5) or Rule 7-5. In the alternative, the Boffo Defendants said that Michael Boffo was agreeable to answering questions in writing;

- g) July 24, 2024: Smithe Residences adjourned its application regarding Michael Boffo because the chambers list was too long;
- h) July 24, 2024: Boffo Defendants returned the conduct money for Otto Boffo, stating that leave is required for further examination;
- i) August 7, 2024: Smithe Residences filed this notice of application for an order requiring Otto and Michael Boffo to attend examinations for discovery and for an award of special costs;
- j) August 15, 2024: the Boffo Defendants filed their application response, consenting to the Court granting leave to Smithe Residences to conduct a further examination of Otto Boffo and an examination of Michael Boffo; and
- k) August 20, 2024: a consent order was granted by me on August 20, 2024 that Otto and Michael Boffo are to attend at examinations for discovery on October 23-24, 2024, for five hours each.

[24] The response of the Boffo Defendants in relation to Otto Boffo displays a decided lack of cooperation. Leaving aside any merit in their argument that the previous orders for a continued examination were “spent”, it seems to me that the extensive document disclosure that was required under the Order would have justified further examination of him in any event.

[25] I acknowledge that, in relation to Michael Boffo, there may have been arguments about whether Smithe Residences had complied with the *Rules* in terms of justifying a court order for his examination.

[26] In any event, the consent order of August 20, 2024 resolved these issues, and on the eve of this hearing, but only after Smithe Residences incurred considerable effort and cost to obtain what was likely an inevitable outcome.

[27] Again, for the reasons below under “Disposition”, I leave the matter of any costs award against the Boffo Defendants in respect of the scheduling of the

examinations of Otto and Michael Boffo to the trial judge. As with the notices to admit, whether this course of events can be characterized as hard-fought litigation or an obstructionist strategy on the part of the Boffo Defendants remains to be determined.

C. Document Production:

[28] The document production sought by Smithe Residences in January 2024 related to the revenues and costs of the development. In the *Reasons* at para. 104, I accepted that this further disclosure was “key” to its ability to calculate the amount that Smithe Residences alleges is owing under the relevant agreement.

[29] The *Reasons* at para. 138 could not have been clearer in terms of granting the disclosure sought by Smithe Residences “as sought”.

[30] It appears that, by oversight, the Order did not include the requirement in the *Reasons* that document production was to be given within 10 days of the date of the Order, which was the relief sought. However, even in the absence of a slip rule application and order, the Order must be interpreted as requiring disclosure within a reasonable time.

[31] As above, the hearing before me took place in late January 2024 and the *Reasons* were issued on April 8, 2024. As relevant to the Boffo Defendants’ previous positions in terms of document discovery (which I rejected), I awarded costs in favour of Smithe Residence in any event of the cause, stating in the *Reasons*:

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

[32] It is significant that the Order was to compel compliance by the Boffo Defendants with an earlier order of Associate Judge Bilawich dated March 2, 2022 (the “Bilawich Order”).

[33] The timeline is:

- a) April 8-June 4, 2024: the parties settled the terms of the Order. Some objections to the proposed form of order lodged by the Boffo Defendants' counsel had no basis whatsoever, to the extent that they asserted that the order "shifted" from the application and that some of the relief was adjourned, which was not the case;
- b) May 29, 2024: the Boffo Defendants delivered their 10th Amended List of Documents (some seven weeks after the *Reasons* are issued). The Boffo Defendants' document production under the Order is incomplete;
- c) June 14, 2024: counsel for Smithe Residences points out deficiencies in document production per the Order;
- d) June 28, 2024: the Boffo Defendants delivered their 11th Amended List of Documents (some ten weeks after the *Reasons* are issued). The Boffo Defendants explained that they had "conducted additional searches" in response to the correspondence of June 14, 2024 which "resulted in additional documents being identified for disclosure which were overlooked in their previous searches". The Boffo Defendants' document production under the Order is still incomplete;
- e) July 8, 2024: counsel for Smithe Residences again points out deficiencies in document production. No response is received to this letter and is followed up with further requests dated July 17, 22, 24 and August 1, 2024;
- f) July 10, 2024: Smithe Residences submits a request to appear before me for further application regarding document production; and
- g) August 7, 2024: this prompted a lengthy response from the Boffo Defendants, again challenging the breadth of the document disclosure ordered under the Order and also enclosing some further documents;

- h) August 7, 2024: Smithe Residences filed this notice of application referring to the production under the 10th and 11th Amended Lists of Documents as being incomplete. The noted deficiencies include financial and accounting records for a joint venture, financial and accounting records for Bassano Land Corp., documents relating to the construction mortgages and financial and accounting records of various options to lease (paras. 2(c)-(f) and (h) of the Order); and
- i) August 15, 2024: Smithe Residences receives yet further disclosure. On the eve of this application, the Boffo Defendants delivered their 12th Amended List of Documents (over two months and some seventeen weeks after the *Reasons* are issued), which included the documents delivered August 7, 2024 and other documents. By the time of this hearing, Smithe Residences' counsel has not had sufficient time to review these further documents to determine if this represented the remaining document production under the Order.

[34] Smithe Residences state that the Boffo Defendants have not complied with the Bilawich Order and the Order. They say that the Boffo Defendants' asserted compliance had only been in dribs and drabs since the Order was granted on April 8, 2024. Further, Smithe Residences say that it has repeatedly and persistently put the Boffo Defendants on notice of their deficient document production, which notices have been repeatedly ignored or not addressed completely.

[35] Smithe Residences' says that the Boffo Defendants have had ample opportunity to comply or provide a reasonable explanation for their non-compliance and that they have done neither.

[36] A response from the Boffo Defendants to this state of affairs is contained in Otto Boffo's Affidavit #6 sworn August 15, 2024. Otto Boffo's response to the inadequate document production by the Boffo Defendants is consistent with his counsel's submissions in January 2024 to me, which were rejected. He says that they have at all times "intended" to comply and have "tried our best" to be

responsive. He cites the commercial sensitivity of the documentation such that they are being “very careful” in their disclosure. He cites the “lean staffing” of the companies and that the disclosure has taken a great deal of time and effort.

[37] In the application response, counsel states that the Boffo Defendants have “substantially complied” with their obligations under the Order, although the specifics as to why it is only “substantially” complete is not stated. Counsel also say that the production was been voluminous which, accepting to be the case, does not address completeness in the face of the broad disclosure under the Bilawich Order and the Order. In addition, the Boffo Defendants’ counsel continues to describe the document disclosure as a “fishing expedition”, another recycled assertion that I expressly rejected in the *Reasons* in ordering the broad scope of production sought by Smithe Residences.

[38] Finally, counsel for the Boffo Defendants complain that some documents are irrelevant based on a legal argument about when damages are to be assessed (if they are payable), an argument that will only be determined at trial and which does not displace legitimate document disclosure now.

[39] In my view, Otto Boffo’s vague and inadequate explanation for the slow and incomplete disclosure by the Boffo Defendants is wholly without merit. These documents should have been produced back in 2022 arising from the Bilawich Order. Further, leaving aside the 10-day limit that was required in the *Reasons*, the Boffo Defendants’ efforts were minimal in then taking weeks, if not months, to provide some further disclosure after April 2024, and then only after much effort by counsel for Smithe Residences.

[40] I accept that the Boffo Defendants have legitimately objected to some documents, such as the personal net worth statement of Otto Boffo and a share register of Bassano Land Corp. However, the bulk of the documents which were outstanding for some time after April 8, 2024 do not fall within this category.

[41] It is apparent that the Boffo Defendants are only really prompted to reasonably and completely comply with document disclosure, even under the Order, when faced with a court application and possible costs consequences.

[42] For example, on August 15, 2024, when its 12th List of Documents was delivered, the Boffo Defendants counsel noted that the list included yet again newly disclosed documents – adjusting journal entries and trial balances – which had specifically been mentioned in Smithe Residences’ application. Incredibly, in its counsel’s letter, the Boffo Defendants stated that:

... [the Boffo Defendants] were not aware that [the documents] was something [Smithe Residences] considered missing from the Financial Statements until reviewing [Smithe Residences’] Notice of Application.

Yet, this deficiency was clearly noted well before - in the *Reasons* (paras. 118-119) and by Smithe Residences’ counsel in his June 14, 2024 letter.

[43] I agree with Smithe Residences that this incredulous response displays the true attitude and approach of the Boffo Defendants in terms of deliberately obstructing document production so as to prejudice Smithe Residences in prosecuting this claim, including in terms of delay and costs. Such an approach goes beyond “hard-fought litigation” and evinces a litigation strategy meant to frustrate and delay the proceedings and prejudice Smithe Residences. This is conduct deserving of the Court’s rebuke and is, in my view, necessary to attempt to secure the Boffo Defendants’ compliance with the *Rules* and court orders, including the Order.

[44] I agree with Smithe Residences that a special costs award is appropriate to send a message to the Boffo Defendants that such an approach is not acceptable. That message must be received to allow the litigation to go forward without such litigation strategies causing delay and undue cost, given the upcoming trial date on January 5, 2025 for 28-days.

DISPOSITION

[45] I award special costs in favour of Smithe Residences in respect of Smithe Residences' enforcement actions and procedures to compel document disclosure under the Order from April 8, 2024. Those costs will be assessed by the Registrar.

[46] I decline to address any other costs award, special costs or otherwise, in respect of the other pre-trial conduct of the Boffo Defendants that was raised before me (notices to admit and the examinations).

[47] In my view, those matters are best addressed by the trial judge at the end of the day. Only then will the outcome of the proceedings be known; also, the trial judge will have a more fulsome perspective of the matter and be able to reflect upon the entire pre-trial history of the matter, including relating to the notices to admit and the discovery process. The trial judge will be better placed to address the appropriate costs award in all of the circumstances: *Hoffman* at para. 27.

“Fitzpatrick J.”