IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ecoasis Developments LLP v. Sanovest Holdings Ltd.,* 2024 BCSC 635

Date: 20240418
Docket: S234047
Registry: Vancouver

Between:

Ecoasis Developments LLP, Ecoasis Resort and Golf LLP and 599315 B.C. Ltd.

Plaintiffs

And

Sanovest Holdings Ltd., Tian Kusumoto, TRK Investments Corporation and Ecoasis Bear Mountain Developments Ltd.

Defendants

- and -

Docket: S223937
Registry: Vancouver

Between:

Sanovest Holdings Ltd.

Plaintiff

And

Daniel Matthews, Tomoson (Tom) Kusumoto, Ecoasis Bear Mountain Developments Ltd. and BM Mountain Gold Course Ltd.

Defendants

And

Tomoson (Tom) Kusumoto

Third Party

And

Sanovest Holdings Ltd., Tomoson (Tom) Kusumoto and Tian Kusumoto

Defendants by way of counterclaim

- and -

Docket: S226218
Registry: Vancouver

Between:

Tom Kusumoto

Plaintiff

And

Daniel Matthews

Defendant

- and -

Docket: S234048
Registry: Vancouver

Between:

599315 B.C. Ltd. and Daniel Matthews

Plaintiffs

And

Ecoasis Bear Mountain Developments Ltd., Ecoasis Developments LPP, and Ecoasis Resort and Golf LLP, Tian Kusumoto, and Sanovest Holdings Ltd.

Defendants

Before: Associate Judge Nielsen

Reasons for Judgment

Counsel for the Plaintiffs in Action No: S234047:	G. Brandt D. Bains, Articled Student
Counsel for the Defendant, Tomoson (Tom) Kusumoto in Action No: S223937:	W.E. Pedersen

Counsel for the Defendants, Sanovest Holdings Ltd., Tian Kusumoto and TRK Investments Corporation in Action No: S234047 Defendants by way of counterclaim Sanovest Holdings Ltd., and Tian Kusumoto in Action No: S223937:	D. Byma
No other appearances	
Place and Dates of Hearing:	New Westminster, B.C. January 29 and April 12, 2024
Place and Date of Judgment:	Vancouver, B.C. April 18, 2024

[1] This is an application pursuant to *Supreme Court Civil Rule* 22-5(8) by 599315 B.C. Ltd. and Daniel Matthews to join three actions which I will refer to as the ("Oppression petition"), the ("Partnership action") and the ("Sanovest action") to be tried and heard together.

[2] The application also seeks to convert the Oppression petition into an action. As all parties agree, that order will go by consent.

[3] There is a further action, which I will refer to as the ("Debt action"), which the applicant also seeks to have joined to the other three actions. This latter application is not specifically enumerated as an order sought in the applications, but was made orally during the course of argument. The plaintiff in the Debt action opposes the applications to consolidate. The other parties agree.

[4] The application also seeks an order that the evidence arising in the Debt action be admissible in the three afore mentioned actions. This application is opposed by the plaintiffs in both the Debt action, and the Sanovest action.

Background facts

[5] The four actions all arise from a common factual matrix relating to the ownership, financing, development, sale, and management of the Bear Mountain project located near Victoria BC, on Vancouver Island.

[6] In October 2013, 599315 B.C. Ltd. and Sanovest Holdings Ltd. went into business together to obtain assets associated with the Bear Mountain project. At the time, 599315 was represented by Mr. Daniel Matthews, and Sanovest by Mr. Tom Kusumoto. The Bear Mountain assets were acquired by two limited liability partnerships involving both Daniel Matthews and Tom Kusumoto. Ecoasis Bear Mountain Developments Ltd. ("EMBD") was created to be the managing partner of the resort, and Mr. Daniel Matthews and Mr. Tom Kusumoto were appointed as EBMD's directors. The parties did not prepare a formal written business plan, but did allegedly have a verbal business plan with the terms it would embody.

[7] From October 2013 to June 2021 the partnerships developed the project, and eventually sought the global sale of the project's assets. This was halted when Tom Kusumoto was replaced as Sanovest's nominee, and director, to EBMD's board by his son, Tien Kusumoto.

[8] Mr. Matthews and 599315 allege that since Tien Kusomoto assumed the role of director of EBMD, Sanovest has prevented and interfered with the operation of the Bear Mountain project, wrongfully prevented sales, and withheld funding. Tien Kusumoto and Sanovest allege various self-interested transactions on the part of Mr. Matthews and Tom Kusumoto. And finally, Mr. Tom Kusumoto alleges that he lent Mr. Matthews money on terms that provide payment is past due. From these various allegations, the four law suits have arisen.

Consolidation

[9] *SCCR* 22-5(8) allows the court to consolidate proceedings so they may be ordered tried at the same time. The legal test which applies in relation to *SCCR* 22-5(8) is canvassed by the Chief Justice in *Callan v. Cooke*, 2020 BCSC 290 at paras. 122 to 124 where the court states:

> [122] An order under Rule 22-5(8) engages the discretion of the court. The order is discretionary and regard must be given to the administration of justice when considering an application to consolidate actions.
>
> [123] The law to be applied in applications under Rule 22-5(8) is well-settled, and ably set out by Master Kirkpatrick in *Merritt v. Imasco Enterprises Inc.,* (1992) 2 C.P.C. (3d) 275. There are two questions that must be addressed. The first question is: do common claims, disputes and relationships exist between the parties? That determination is made on a review of the pleadings. The second question is: are the actions so interwoven that separate trials at different times before different judges would be undesirable and fraught with problems and expense? This question involves a consideration of factors beyond the pleadings.
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> [124] The factors to consider when making a determination on consolidation or ordering that actions be heard together include whether the consolidation will:
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> 1) create a saving in pre-trial procedures;
>
> 2) reduce the number of trial days taken up by the actions heard together;

> 3) avoid serious inconvenience to a party being required to attend a trial in which they only have a marginal interest;
>
> 4) save the time and witness fees of experts;
>
> 5) dispose of all actions at the same time due to common issues of fact or law;
>
> 6) avoid a multiplicity of proceedings; and
>
> 7) whether the degree of commonality and intertwining of issues outweighs the prejudicial factors raised by the party opposing consolidation;
>
> bearing in mind:
>
> 8) the relative stages of the actions;
>
> 9) whether the trial will be delayed and prejudice one or some of the parties; and
>
> 10) whether the refusal to consolidate risks inconsistent results.
>
> (See: *Merritt*; *Insurance Corporation of British Columbia v. Sam* (1998), 24 C.P.C. (4th) 338; *Liu v. Tsai*, 2017 BCSC 221 (Master))

[10] The issue of whether multiple proceedings should be ordered tried together involves a two-step test. The first issue is whether the proceedings involve common claims, disputes and relationships. This issue is determined on a review of the pleadings.

[11] The four actions have an interconnected relationship. Several have common parties, and in the actions where the parties are not common, those actions will require the testimony by key witness's who are parties in the other actions. In other words, the parties are involved in each of the four actions, one way or another. I find the first step of the test is met.

[12] The second issue to be addressed is whether the proceedings are so interwoven as to make separate trials at different times, before different judges undesirable and potentially fraught with problems and expense. On the application before me, all parties, with the exception of Tom Kusumoto, agree that consolidation is appropriate. They agree there will be a saving in pre-trial procedures, that there will be a reduction in the number of trial days needed, that there will be a savings in time and witness fees, that each of the four actions are at relatively the same stage

with examinations for discoveries having not yet to taken place, and that there would be the risk of conflicting findings if the actions proceeded before different judges.

[13] The objection of Tom Kusomoto is essentially that he is not a party to two of the three actions for which consolidation is sought, and therefore, being forced to participate in all three would be financially detrimental and prejudicial to him. In response, the other parties submit that he will be a critical witness in each action, whether or not he is a party, and he will be required to participate in each action in any event.

[14] In my view consolidation of the three actions as sought is appropriate. The underlying factual matrix is common to each action. The alleged underlying business arrangements will impact each action depending on the court's findings. Each of the actions are at the same stage of proceeding, where examinations for discovery have not taken place. There will undoubtedly be a reduction in time for trial when they are viewed globally, rather than individually. The common use of oral and documentary discoveries would also save time and expense. There would also be a serious risk of conflicting findings if the matters were heard by different judges.

[15] I agree there would be an element of prejudice to Mr. Tom Kusumoto as he is not a party in two of the three actions, however, I consider this prejudice to be outweighed by the factors in favor of consolidation.

[16] The Oppression petition, the Partnership action, and the Sanovest action are ordered consolidated in the form sought.

[17] As stated above, there is no application to consolidate the Debt action enumerated in the applications before me. Although argument was presented in that regard, in the absence of a proper application, which affords the opportunity of a formal response, and in the face of the objection of the plaintiff within the Debt action, I decline to address the issue of consolidating the Debt action. The issue can be addressed when, and if, a proper application is brought.

Relief from the Implied Undertaking in the Debt Action

[18] The remaining issue in dispute is whether evidence from the Debt action ought to be allowed in the three joined actions. The applicants submit that permitting the common use of documents and oral discovery evidence in each of the Bear Mountain proceedings will result in significant savings in trial procedures.

[19] The respondents object on a number of grounds. Both the respondents Mr. Tom Kusumoto and Sanovest submit that the lifting of an implied undertaking requires the applicant to demonstrate, on the balance of probabilities, that there exists a public interest of greater weight than the values that the implied undertaking is intended to protect, namely privacy and the efficient conduct of civil litigation. Further, the court must balance the mix of competing values in order to reach this determination, keeping in mind that relief from the implied undertaking is not the norm, and should only be set aside in exceptional circumstances. See *Nuchatlaht v. British Columbia*, 2021 BCCA 351, at paras. 19 to 23, and *Juman v. Doucette*, 2008 SCC 8 at paras. 32, 34, and 38.

[20] Specifically, Mr. Tom Kusumoto submits that it is not necessary or in the interests of justice to relieve the implied undertaking because the Debt action is a collections matter with written promissory notes which are admitted, and the remaining issue being whether the monies are due or not. He further submits the debt claim relates to events before June 21, 2021, and therefore, would have limited relevance, and the applicants have not shown any necessity to lift the implied undertaking. Finally, he submits relief from the implied undertaking will add delay, expense, and further complexity.

[21] The Respondent Sanovest also objects to the use of oral and documentary evidence from the Debt action, unless the Debt action is also consolidated. Otherwise, they submit they will be prejudiced as it would allow only the parties to the Debt action to transmit evidence across the four proceedings at their discretion, while Sanovest would have no right to participate in, or otherwise test the evidence in the Debt action to which they are not a party. Further, they submit this would allow

the applicants to create an asymmetrical access to evidence in the Debt action for the determination of the other three related proceedings.

[22] Sanovest also submits there is no independent rule or jurisprudence which allows a party to import evidence wholesale from one action into another, and the applicants have not provided authority for their request to mix and match their evidence across separate actions not being tried together. They further caution that evidence from a witness in a prior proceeding, *prima facie*, raises a hearsay danger because the trier of fact cannot examine the demeanor of the witness at trial. See *R. v. Hawkins*, [1996] 3 R.C.S. 1043 at para. 60.

[23] I agree with the respondents that to allow the application to import the evidence from the Debt action would result in prejudice to the respondents as they would not have equal access to evidence, including participatory rights in the discovery process, or the ability to test the evidence sought to be used at trial. In my view, this would be a significant prejudice which is not otherwise outweighed by the interests of justice.

[24] In the circumstances, the application to grant relief from the implied undertaking in the Debt action is denied.

Summary

1. The Oppression petition is converted to an action by consent;

2. The Oppression petition, the Partnership action, and the Sanovest action are ordered consolidated in the form sought;

3. The issue of whether the Debt action is to be consolidated is adjourned pending an application in the proper form;

4. The application to grant relief from the implied undertaking in the Debt action is denied.

"Associate Judge Nielsen"