

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ridley Island Energy Export Facility Limited Partnership v. Trigon Pacific Terminals Limited*,
2024 BCCA 398

Date: 20241203
Docket: CA49993

Between:

**Ridley Island Energy Export Facility Limited Partnership,
by its General Partner, Ridley Island Energy Export Facility GP Inc.**

Appellant
(Non-Party)

And

Trigon Pacific Terminals Limited

Respondent
(Plaintiff)

And

Prince Rupert Port Authority

Respondent
(Defendant)

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer
The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated
June 25, 2024 (*Trigon Pacific Terminals Limited v. Prince Rupert
Port Authority*, 2024 BCSC 1298, Vancouver Docket S237527).

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Place and Date of Hearing:

Vancouver, British Columbia
October 21, 2024

Place and Date of Judgment:

Vancouver, British Columbia
December 3, 2024

Written Reasons by:

The Honourable Justice Iyer

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

Summary:

The chambers judge dismissed an appeal from an associate judge who refused the appellant's application to be added as a defendant to the underlying action. On appeal, the appellant argues that its contractual rights with a defendant in the underlying action will be affected by the outcome of the underlying litigation. Held: Appeal allowed. Rule 6-(7)(c) permits the addition of a party if there may be a connection between the applicant and a party to the litigation and it is just and convenient to do so. The connection between the appellant and the defendant in the underlying litigation was sufficient to satisfy the first condition, and it is just and convenient to add the appellant as a defendant to the action.

Reasons for Judgment of the Honourable Justice Iyer:

Overview

[1] This appeal requires the court to consider when it is appropriate to add a defendant to an action over the plaintiff's objection under R. 6-2(7)(c) of the *Supreme Court Civil Rules*.

Background

Events Leading to the Proceedings

[2] The respondent, Prince Rupert Port Authority ("Port"), operates commercial port facilities in Prince Rupert. Among other things, it leases land and facilities to commercial marine terminals. The respondent, Trigon Pacific Terminals Inc. ("Trigon"), operates a bulk commodities marine terminal under a lease with the Port ("Trigon Lease"). The Trigon Lease was first entered into by the predecessors of both respondents in 1981. It has been amended a number of times.

[3] In 2009, Trigon and the Port amended the Trigon Lease to add more permitted uses of the premises. The parties also agreed that Trigon could ask the Port to authorize uses not set out in the Trigon Lease:

... [Trigon] shall use the designated premises for no other purpose save with the written consent of the [Port] and upon such terms and conditions as may be stipulated by the [Port], such approval not to be unreasonably withheld or delayed.

[4] In 2015, the Port entered into a project development agreement with Vopak, the predecessor of the appellant, Ridley Island Energy Export Facility Limited Partnership (“REEF LP”), for the construction and operation of a marine terminal for liquefied petroleum gas (“LPG”) (“Vopak Agreement”). Importantly, the Vopak Agreement granted REEF LP the exclusive rights to deliver, unload, store, process, transport, load, and export LPG from the Port (“Exclusivity Rights”).

[5] In September 2023, Trigon wrote to the Port asking for its consent under the Trigon Lease for Trigon to use its leased premises to handle and ship bulk LPGs (“LPG Request”). The Port denied the LPG Request saying it would conflict with the Exclusivity Rights in the Vopak Agreement.

[6] Trigon commenced the underlying action against the Port in November 2023. In its notice of civil claim (“NOCC”), Trigon alleged the Port had breached the Trigon Lease by not consenting to the LPG Request.

[7] The NOCC expressly refers to the Vopak Agreement and the Exclusivity Rights granted under it to REEF LP. Trigon pleads:

- the Port breached the Trigon Lease by entering into the Vopak Agreement and granting the Exclusivity Rights;
- by entering into the Vopak Agreement after concluding the Trigon Lease, the Port engaged in post-contractual conduct meant to deprive Trigon of its rights under the Trigon Lease; and
- the Port’s refusal to consent to the LPG Request was unreasonable.

[8] By way of remedy, Trigon seeks specific performance of the Trigon Lease, compelling the Port to permit Trigon to handle and ship bulk LPGs.

Decisions Below

[9] In February 2024, REEF LP applied under R. 6-2(7)(b) and (c) to be added as a defendant in the action.

[10] An associate judge heard the application and issued his reasons, indexed as 2024 BCSC 539 [AJ Reasons], dismissing the application on March 20, 2024. With respect to R. 6-2(7)(b), the associate judge held that REEF LP had not satisfied the narrow grounds for adding a party under that subrule.

[11] With respect to R. 6-2(7)(c), the associate judge concluded REEF LP did not meet the requirements of the subrule:

[27] Rule 6-2(7)(c) is interpreted more broadly than subrule (b). It firstly obliges REEF LP to identify a question or issue relating to or connected with any of the relief claimed in this action or the subject matter of this action. In this case, its efforts to identify such a question or issue is hampered by its failure to tender a proposed pleading which sets out a viable claim, issue or cause of action it has with either of the existing parties. It does not assert that Trigon or PRPA have breached any particular legal or equitable obligation owed to it. It simply asserts in general terms that its exclusivity rights would be adversely affected if certain relief Trigon is seeking were to be granted. In my view, the lack of a proper pleading or sufficient affidavit evidence establishing an arguable cause of action in relation to either of the existing parties is problematic on this application.

[28] A further requirement is that REEF LP establish that it would be just and convenient to determine the question or issue it seeks to address with either or both of the existing parties. Again, its failure to put forward a properly pled question or issue means that its proposed role, if it were to be added as a party to this proceeding, is vague and ill-defined. I am concerned that the uncertainty would lead to otherwise unnecessary proceedings and expense for the parties to try and navigate these uncertainties.

[29] It appears that REEF LP's goal with this application is to inject itself into, monitor and selectively intervene in a private contractual dispute between a lessee/potential competitor and its lessor. It has no standing to litigate the Trigon Lease directly. It has not identified any alleged breach of contractual, statutory or equitable duty that either of the existing parties owe to REEF LP. Its proposed role appears more closely associated with what one might expect of an intervenor.

[12] REEF LP appealed to a justice of the Supreme Court. In reasons released June 25, 2024, indexed as 2024 BCSC 1298 [CJ Reasons], the chambers judge dismissed the appeal.

[13] The chambers judge noted that the parties disagreed on the applicable standard of review but did not address it because he determined there was no merit

to the appeal on any standard. He adopted the associate judge's reasons on R. 6-2(7)(c): CJ Reasons at para. 20.

[14] The chambers judge rejected REEF LP's submission that the associate judge "had required a pleading or cause of action as a precondition" for an application under the subrule: CJ Reasons at para. 18. He found that, in the context of a contractual claim, it was a reasonable exercise of discretion for the associate judge to find REEF LP had not satisfied the first condition: CJ Reasons at para. 20.

[15] With respect to the second condition, the chambers judge agreed with the associate judge's conclusion that it was not just and convenient to add REEF LP as a party because it is neither a party to the Trigon Lease nor a third-party beneficiary under it. He characterized REEF LP's interest in the current litigation as amounting to no more than a potential "knock-on effect" on its rights "under an unrelated contract": CJ Reasons at para. 21.

Issues

[16] REEF LP only appeals the dismissal of its application under R. 6-2(7)(c). It identifies two issues. First, is the impact of the action on REEF LP's Exclusivity Rights a sufficient connection for adding a party under R. 6-2(7)(c)? Second, is it just and convenient to add REEF LP as a party in the circumstances of this case?

Standard of Review

[17] In an appeal from a decision of a chambers judge on appeal from a decision of an associate judge, the role of this Court is to determine whether the chambers judge identified and applied the appropriate standard of review: *Waldmann v. Kuo*, 2023 BCCA 123 at para. 55, citing *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at para. 33.

[18] As I have noted, the chambers judge did not find it necessary to identify the applicable standard of review because he agreed with, and adopted, the reasons of the associate judge.

[19] The parties agree that adding a party under R. 6-2(7)(c) is a discretionary decision attracting deference on appeal. As this Court stated in *Madadi v. Nichols*, 2021 BCCA 10 at para. 41:

... This court may interfere only where the chambers judge misdirected herself, erred in law or principle, failed to give weight, or sufficient weight, to relevant considerations, or if the result is so plainly wrong on the facts as to result in an injustice: *Neilson Architects* at para. 41; *Byrd v. Cariboo (Regional District)* at para. 33; and *Smithe Residences* at para. 54.

Applicable Legal Principles

[20] Rule 6-2(7)(c) provides:

(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

...

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[21] In *Smithe Residences Ltd. v. 4 Corners Properties Ltd.*, 2020 BCCA 227, this Court summarized the two conditions that must be met for a judge to exercise the discretion in R. 6-2(7)(c):

[49] The judge may order a person be added as a party if two conditions are met: first, there may exist between the person and any party to the proceeding a question or issue relating to or connected with (i) any relief claimed in the proceeding or (ii) the subject matter of the proceeding; and second, that in the opinion of the court, it would be just and convenient to determine that question or issue.

[Emphasis in original].

[22] The threshold for the first condition is low: *Smithe Residences* at para. 50. It is confined to determining that the question or issue is real, rather than frivolous. There is no assessment of the merits of the claim: *Madadi* at para. 45.

[23] The second condition, which requires assessment of justice and convenience, is a fact-specific inquiry. In my view, the following non-exhaustive list of factors can be distilled from the authorities:

- The extent of, reasons for, and any prejudice caused by delay in bringing the application;
- The extent of the connection between the existing claims and the party seeking to be added;
- The nature of the proceeding;
- The plaintiff's position on the proposed addition; and
- The impact on the action of adding the proposed party, including uncertainty, expense, and delay.

See generally: *Madadi; Smithe Residences; Le Soleil Hotel & Suites Ltd. v. Nomani*, 2007 BCCA 545; *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562; *Giesbrecht v. British Columbia (Attorney General)*, 2020 BCSC 174; *Rastad v. Cienciala*, [1956] 19 W.W.R. 623, 1956 CanLII 595 (B.C.S.C.).

Discussion

[24] Both courts below found REEF LP had failed to satisfy the first condition but nevertheless went on to apply the just and convenient analysis under the second condition. They did not do so in the alternative, on the basis that even if there was a sufficient connection between REEF LP and Trigon or the Port, it would not be just and convenient to add REEF LP as a party. Rather, the reasons of both the associate judge and the chambers judge on the second condition were driven by their conclusions on the first: see for example AJ Reasons para. 28, CJ Reasons para. 21.

[25] In my view, this was an error. The first condition establishes a threshold. If an applicant cannot cross it, there is no need to consider the second condition. In other

words, if the applicant cannot establish a sufficient connection to the litigation, it necessarily follows that it cannot be just and convenient to add the applicant as a party.

[26] Where there is a sufficient connection between the applicant and the litigation, the assessment of justice and convenience focuses the court's attention on whether, in all of the circumstances, the applicant should be added as a party. This includes a more detailed analysis of the connection of the applicant to the litigation, but it also includes other factors, such as prejudice, delay, and expense.

[27] With respect to the first condition, the associate judge explained why REEF LP had not met the threshold requirement at para. 27 of his reasons:

... [REEF LP] does not assert that Trigon or [the Port] have breached any particular legal or equitable obligation owed to it. It simply asserts in general terms that its exclusivity rights would be adversely affected if certain relief Trigon is seeking were to be granted. In my view, the lack of a proper pleading or sufficient affidavit evidence establishing an arguable cause of action in relation to either of the existing parties is problematic on this application.

[28] On appeal, the chambers judge rejected REEF LP's submission that the associate judge had required REEF LP to provide a pleading or cause of action in order to satisfy the first condition: CJ Reasons at para. 18. He found REEF LP did not satisfy the first condition because it was not a party to the contract or a beneficiary under it: at CJ Reasons at para. 21.

[29] In my view, the courts below erred in law in their interpretation of the first condition because they imposed a more onerous standard than that established by this court in *Smithe Residences*. It was not necessary for REEF LP to demonstrate that it was a party to the Trigon Lease or a beneficiary under it, or to claim that Trigon or the Port had breached an obligation owed to it. The first condition only required REEF LP to identify that there may exist between it and either Trigon or the Port a non-frivolous question or issue that is either connected with the subject matter of that litigation or the relief sought.

[30] It is evident from the pleadings that the Exclusivity Rights contained in the Vopak Agreement are central to Trigon's and the Port's defence. Trigon characterizes the Vopak Agreement as a breach of the Trigon Lease and the Port says that the existence of the Vopak Agreement constitutes a reasonable basis for denying the LPG Request. A trial court cannot resolve the dispute between the Port and Trigon without interpreting the Vopak Agreement and the Exclusivity Rights. Doing so will necessarily affect REEF LP's contractual rights.

[31] This establishes a real and non-frivolous connection or relationship between REEF LP and the present litigation sufficient to satisfy the first condition in R. 6-2(7)(c).

[32] Turning to the second condition, in my view, the nature and extent of the connection between REEF LP and the underlying litigation makes it just and convenient to add REEF LP as a party, despite Trigon's objection.

[33] It is clear from the pleadings that the interpretation and effect of the Vopak Agreement, in particular the Exclusivity Rights, are central to the underlying litigation. If REEF LP is not added as a party and the interpretation of the Vopak Agreement goes against its interests, it will have no right of appeal and its only recourse would be to sue the Port for damages. In these circumstances, adding REEF LP as a party ensures fairness and avoids the inefficiency of multiple proceedings.

Conclusion

[34] I would allow the appeal, set aside the order of the chambers judge dated June 25, 2024, and add REEF LP as a defendant to the action between Trigon and the Port, Vancouver Registry Court File No. S237527.

“The Honourable Justice Iyer”

I agree:

“The Honourable Mr. Justice Abrioux”

I agree:

“The Honourable Mr. Justice Grauer”