IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chohan Carriers Ltd. v. City of Maple Ridge,* 2024 BCSC 2400

Date: 20241220
Docket: S182875
Registry: Vancouver

Between:

Chohan Carriers Ltd. and Chohan Investment Group Ltd.

Plaintiffs

And:

City of Maple Ridge

Defendant

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	F.R. Cabanos S.R. Shuchat
Counsel for the Defendant:	J. Krusell
Place and Date of Hearing:	Vancouver, B.C. December 16, 2024
Place and Date of Judgment:	Vancouver, B.C. December 20, 2024

[1] **THE COURT:** When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

Background

[2] The application before the court today is to adjourn a trial which is scheduled to commence on January 6, 2025, for 34 days in relation to a claim by the plaintiffs as against the defendant under various causes of actions but primarily relating to allegations of misrepresentation and misuse or misfeasance in public office with respect to property that the one plaintiffs, Chohan Investment Group Ltd. (the "HoldCo"), purchased for the purposes of the other plaintiff, Chohan Carriers Ltd. (the "OpCo", and collectively with the HoldCo, the "Plaintiffs"), running its operations from that location, primarily transloading and freight operations.

[3] The allegations include, among other things, that there were misrepresentations made by representatives of the defendant city prior to the purchase whereby it was understood that certain conditions for the property would be put in place with respect to the ability to maintain operations, as those contemplated by the OpCo. However, after the purchase of the property, there were certain actions taken, or not taken, by the city which resulted in weight restrictions with respect to traffic, which effectively eliminated the ability of the OpCo to maintain its operations, as it could not use the roads to do so.

[4] The damages as claimed are twofold: The OpCo seeks the loss of revenue from the operations that would have otherwise been undertaken had the weight restrictions not been in place and the HoldCo seeks damages given the restrictions which it says have impacted not only its ability to make use of the property in a profitable way, including in respect of rent on the property, but also the overall value of the property.

[5] The damages being claimed are significant, with the expert report served by the Plaintiffs calculating the loss at approximately $27 million between the two of

them. Specifically, the plaintiffs rely upon, and have served, an expert report in respect of that loss.

[6] The defendant's adjournment request, it says, arises as a result of a recent disclosure by the Plaintiffs of some 378 financial records that were produced on October 24, 2024, in conjunction with the delivery of a fifth amended list of documents (the "Newly Disclosed Documents"). The Newly Disclosed Documents are largely made up of deposit slips and invoices, with their precise nature and impact in dispute between the parties.

[7] The defendant's position is that they (i.e. the defendant's expert) have simply not had an opportunity to fully review and investigate the exact nature, or more importantly impact, if any, the Newly Disclosed Document may have on their defence to the issue of quantum of damages, if any the Plaintiffs are successful on their claims.

[8] The Plaintiffs argue that the Newly Disclosed Documents are largely irrelevant for a number of reasons, one of which is because the documents relate primarily to an element of the operations for which damages are not being sought. They acknowledge that an invoice here and there may include references to nominal charges in respect of their primary client, and they are content to have those nominal amounts that may otherwise be part of the operations for which they are seeking loss waived for the purposes of the claim going ahead.

[9] Further, to the extent the other documents indicate debit slips or confirmation of payment, those do not change the overall analysis or findings, they argue, of the expert reports as have been served to date.

[10] A second element that the defendant relies upon in seeking the adjournment is with respect to a revised expert report that was received from the Plaintiff's expert on November 21, 2024, being described by the Plaintiffs as a "reply expert report".

[11] That report, from the defendant's perspective, had the effect of flagging new issues as to the admissibility or reliability of the original report. Further, given the

timing, their own expert's ability to assist them, such as by providing them with instructions and/or advice as to how that opinion evidence may be challenged in court, has been frustrated.

[12] In particular, the defendant points to comments in the report that are, in its view, somewhat inconsistent with the original report in terms of the documents that were being relied upon for the purposes of arriving at the conclusions that the author did arrive at, specifically as to the financial statements. In this respect, the defendant's concern is that:

> a) The Newly Disclosed Documents indicate that there is an inconsistency between the revenue indicated on the financial statements; and
>
> b) The explanation given by the expert suggests that there are financial transactions that are carried out as a flow through to and from related companies in the overall group of companies to which the Plaintiffs are members. I am advised that some ten or so other companies operate under the overall group of companies which are related in this respect.

[13] The Plaintiffs argue that many of these issues being raised are, in their submission, red herrings in that they are easily explainable and have been explained in the reply report itself.

Legal Framework

[14] The parties do not disagree as to the test on an application for an adjournment. The test as set out in paras. 20 to 24 of *Navarro v. Doig River First Nation*, 2015 BCSC 2173 is well known:

> [20] Other factors or considerations include (in no particular order of priority):
>
> - the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); *Sidoroff* at para. 10);
> - the reasonableness of the request (*Dhillon* at para. 16);
> - the grounds or explanation for the adjournment (*Dhillon* at para. 16; *Toronto-Dominion Bank* at para. 38);
> - the timeliness of the request (*Dhillon* at para. 16);

- the potential prejudice to each party (*Dhillon* at paras. 16-17);
- the right to a fair trial (*Dhillon* at para. 16);
- the proper administration of justice (*Dhillon* at paras. 16 and 39; *Toronto-Dominion Bank* at para. 36);
- the history of the matter, including deliberate delay or misuse of the court process (*Toronto-Dominion Bank* at para. 38); and
- the fact of a self-represented litigant (*Toronto-Dominion Bank* at para. 39).

[21] Securing a fair trial on the merits of the action is the ultimate goal. This requires consideration of the nature of the claim. If the claim is novel, then the prospect for success is one factor to consider (*Sangha v. Azevedo*, 2005 BCCA 184 at para. 15 (*Sangha*)). However, the prospect for substantive success should not be the sole basis for refusal of an adjournment (*Toronto-Dominion Bank* at para. 41).

[22] The expeditious and speedy resolution of a matter raises the question of whether there has been a previous adjournment and, if so, the reasons for that prior adjournment. If the circumstances have not changed, a subsequent application will likely not be successful (*Kendall v. Sirard*, 2007 ONCA 468 at para. 46).

[23] Timeliness of the request is a factor. An application made at the opening of trial on the grounds that a party cannot be present will be carefully scrutinized as to the effect upon other parties, whether the party's evidence is crucial, and what other recourse was available (*Warner v. Graham* (1945), 1945 CanLII 655 (BC SC), 62 B.C.R. 273 at 277-278 (S.C.)). If the trial is already underway and an adjournment may be indefinite, the court will want to consider whether it is certain that granting an adjournment would resolve the issue that was the cause of the adjournment request (*Dhillon* at para. 11).

[24] The explanation for the need of an adjournment is an important consideration. It has been said that simple neglect to get properly ready for a hearing, while irksome for the other party, will still usually lead to an adjournment on the theory that the prejudice to the person denied the adjournment will be greater than prejudice to the person who is forced to accept an adjournment (*Michel v. Lafrentz*, 1998 ABCA 224 at para. 12). It would be unjust to decide, without more, that a party who has been less than diligent will be forced to go to trial unprepared (*Trumbley v. Belanger*, [1994] B.C.J. No. 2178 at para. 4 (S.C.)). Failure of a party's lawyer to take appropriate and/or timely steps should not irrevocably jeopardize the client under the "often applied principle that the sins of the lawyer should not be visited upon the client" provided that relief can be given on terms that protect the innocent adversary as to costs thrown away and as to the security of the legal position he has gained (*Graham* at para. 10). However, counsel's simple statement that he is not ready for trial may not be sufficient (*W. Thomson & Co. v. British America Assurance Co.* (1930), 43 B.C.R. 194 at 196 (C.A.)). The fact of a medical condition that may impair a party's ability to

> conduct his case as well as he might does not, in itself, mandate an adjournment, but it is a serious consideration (*Sangha* at para. 15).

[15] In addition, the plaintiffs rely on the general statement at para. 19 that courts are to be generous rather than overly strict in granting adjournments, particularly where an adjournment will promote a fair decision on the merits. In this respect, the reasonable frustration of judicial officials and opposing parties over delays in processing civil cases must be weighed as against the interests of justice, which favours the parties having their day in court and a fair chance to make out their case.

[16] Any prejudice suffered by either side if an adjournment is granted, or is not granted, must be weighed. However, as noted at para. 25, it is generally non-compensable prejudice that is pivotal to that balancing.

Analysis

[17] I will address the factors taken from the above, as are relevant to today's application.

Speedy Resolution of Matters, Delay and Conduct of the Parties

[18] The primary factors that the plaintiff relies upon in opposing the adjournment are the delay and conduct of the defendant in the prosecution of this matter, under the backdrop of their right to a speedy and expeditious resolution of the matter.

[19] This criticism arises to some extent as a result of previous adjournments of the trial which have been granted, although necessarily with any opposition in that regard but as a result of, among other things, the lack of availability of the court and of the parties in terms of the amount of time that had been set aside and the need to add hearing dates.

[20] Nonetheless, there was a trial that was set originally in May 2022. The parties agreed to reschedule that to June 2023. The plaintiffs argue that since that June 2023 date did not proceed, albeit as a result of a determination that there was insufficient time set aside, the defendant has done nothing to prosecute this matter in a diligent way. To the extent there are investigations that are needed to be done in

respect of the Newly Disclosed Documents, they quite simply would have been dealt with, determined and resolved if the defendant had acted promptly, including among other things by setting and conducting its examinations for discovery of the Plaintiffs in a timely way.

[21] Of course, it is notable that the defence does not have the obligation to move a matter forward. Further, the obligation to disclose documents is an ongoing one, such that the Plaintiffs' could have met that obligation and listed the Newly Disclosed Documents at any time. In this respect, they primarily relate to the 2016 or 2017 time period which, the defendant notes, is the basis on which a "base line" of earnings is to be set for the comparison in determining the quantum of the Plaintiffs' alleged loss. As such they have been in existence for many years. There is no explanation as to why they were not previously listed.

[22] Further, while the Plaintiffs argue that the Newly Disclosed Documents are irrelevant, one must then ask why then were they disclosed on October 24, 2024? Either they are irrelevant and were disclosed for no purpose, or they are relevant and should have been disclosed as part of the Plaintiff's disclosure obligation, likely at the time of its initial disclosure.

[23] As such, the argument that the Newly Disclosed Documents would have been disclosed earlier if the defendant was conducting its own discoveries is not particularly persuasive.

[24] I am not satisfied that the conduct of the defendants constitutes a delay for the purposes of consideration as set out in *Navarro, supra*. In other words, it is not the lack of action by the defendant that resulted in the last-minute disclosure of the Newly Disclosed Documents by the Plaintiffs.

[25] In addition, the Plaintiffs note that there was also a delay as a result of the informal critique by the defendant's expert being delivered late in the day, which lead to the "reply" report the Plaintiffs then served to address that critique. However, if the Newly Disclosed Documents had been disclosed earlier, then these issues

would likely have been included in the defendant's initial expert report which was delivered on time. That delay does not necessarily lie at the defendant's feet.

Timeliness of the Request

[26] In terms of the timeliness of the request, in my view this application was brought as quickly as could be reasonably done given, first, the October 24, 2024 delivery date of documents, and secondly the need of the defendant's counsel to then discuss the impact of that disclosure with its expert in terms of whether or not the information contained in those documents could be reconciled or had any effect on its critique of the Plaintiff's expert's opinion. It was reasonable to first see if the expert was able to determine if the Newly Disclosed Documents had any impact in that respect. Then, when issues were raised, some time was given to determine if the explanation then given was satisfactory.

[27] This application was then filed on November 29, 2024.

Interests of Justice, Weighing of Prejudice and Right to a Fair Trial

[28] As noted, it is only non-compensable prejudice that is generally considered when balancing the prejudices.

[29] Nonetheless, HoldCo points to the prejudice that they are suffering as a result of being unable to use the property in the way that they intended, which includes a rental to a freight or similar loading/trans-loading company as their OpCo.

[30] As to the OpCo, it has the property and started using another location for its operations such that its loss in that respect is not being hampered by the alleged inability to make use of the property.

[31] However, the HoldCo's expert evidence is that there is a quantifiable loss of rent, based on fair market value rent rates for property of they type they expected this property to be, at $1 million per year. Of course, such quantum is subject to whatever arguments may be made as to mitigation etc. In any event, that is the type

of compensable loss that the court generally does not consider on adjournment applications.

[32] In addition, the Plaintiffs rely heavily on the amount of time that has passed since the incidents that give rise to these allegations arose primarily in the pre-purchase period, that being around 2016 such that by the time of this currently scheduled trial date, eight years will have passed.

[33] The fact that there is fading memories with respect to the witnesses is already evident and was shown during the examination for discovery of the defendant's representative who attended many of the meetings and hearings involving the city with respect to, among other things, road use. Her discovery showed a lack of memory absent being able to review the contemporaneous records.

[34] The Plaintiffs point specifically to a letter this witness had written on September 20, 2024 in response to an application for production of documents which, they say, shows a clear memory. Within months, by the time of the discovery, she indicated that she needed to refresh her memory and had little direct memory of the incidents. I note, however, that it is not clear on the face of the letter how the statements being made therein have been formed. It is not clear at all that she wrote the letter based on her memory and not with the benefit of review of her own notes or file materials when it was written.

[35] The loss of the memory of a witness is a significant consideration, particularly in a case such as this where the liability and specifically the representations that may or may not have been made by the city will be crucial to the final disposition. When the allegations are based on verbal representations, credibility may be in issue. When witnesses memories are faded due to the passage of time, credibility is all the more difficult to assess.

[36] The defendant argues that, in this respect, the prejudice to them is more significant given that it will be their witness whose credibility may be impaired. As to their overall prejudice, they also argue that it is more significant given the quantum in

issue if they are not afforded the opportunity to fully investigate the impact, if any, of the Newly Disclosed Documents and, specifically, whether or not the damages as quantified at $27 million can be called into question on the basis of information being now revealed, including inconsistencies, potential or otherwise, with the Plaintiffs' expert's conclusions.

[37] While the Plaintiffs did make compelling arguments that the importance, or the impact of the Newly Disclosed Document may be nominal at the end of the day, as I cannot make that determination. My concern is that there has simply been insufficient time for the defendant to make that determination.

[38] On an application such as this, to simply accept that the evidence has no bearing on the defendant's defence as to quantum is akin to this court determining a portion of the quantum itself. In other words, it is not open for an associate judge sitting on an interlocutory application of this nature to determine definitively whether or not Newly Disclosed Documents, and a reply expert report delivered shortly before the trial, from which there is some indication that a potential inconsistency has been revealed, that any further investigation should be frustrated by causing a trial to proceed. That is the definition of trial by ambush. Any issue as to the relevance, or impact, of these Newly Disclosed Documents is for the trial judge to determine.

[39] Having regard to the overall interests of justice and the need for a fair trial on the matters the prejudice, albeit only slightly, favours the defendant in respect of an adjournment of the trial.

Conclusion and Orders Made

[40] I grant the application to adjourn the trial.

[41] To the extent that there is an increase in damages as a result of a delay of the trial, those can be addressed at trial. It is compensable. With respect to the concern of the loss of memory, given the comments and evidence under oath at the examination for discovery, what is evident is that any loss has already occurred such

that the disposition will have to rely largely on the supporting documents. As such, it is important that the documents be complete and fully investigated.

[42] I will hear quick submissions with respect to costs, including as to costs for trial preparation thrown away in any event of the cause. As you are on the eve of trial, there may be trial preparation that has been undertaken, and the parties did not have a full opportunity to argue the consequences of an order being made for an adjournment of the trial.

(SUBMISSIONS ON COSTS)

[43] THE COURT: Thank you. I agree that the Newly Disclosed Documents are documents that, all things being equal, would be expected to need to be referred to experts for analysis and are therefore of a slightly different character in that the need to provide those documents in a prompt manner is also guided by the Rules in terms of the timing for delivery of expert reports, and are not in the same category as the defendant's documents, which the Plaintiffs point to as also being delivered in less that a timely way.

[44] Given my findings, neither party ought to be entitled to costs for trial preparation thrown away. However, with respect to the application itself, given that there has been some dilatory production of documents by the defendant, albeit ones that the plaintiff was willing hold their nose to, and proceed with the trial rather than lose it, it is appropriate that the costs of this application, that each party bear their own costs.

[45] In summary, the trial that has been scheduled for January 6, 2025, is adjourned generally to a date to be fixed by the parties. Each party will bear their own costs of this application, and any costs thrown away in respect of trial preparation.

"Associate Judge Robertson"