# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Matthews v. Stikeman Elliott LLP*, 2020 BCSC 878

Date: 20200612
Docket: S1711714
Registry: Vancouver

Between:

**Daniel Matthews, Ecoasis Developments LLP, Ecoasis Properties Limited, Ecoasis Bear Mountain Developments Ltd., BM Clubhouse 40 Ltd., BM Mountain Golf Course Ltd., BM 81/82 Lands Ltd., BM 83 Lands Ltd., BM 84 Lands Ltd., BM Capella Golf Course Ltd., BM Highlander Development Ltd., BM Highlands Golf Course Ltd., and BM Highlands Lands Ltd.**

Clients

And

**Stikeman Elliott LLP**

Law Firm

Before: The Honourable Mr. Justice Schultes

## Reasons for Judgment

**In Chambers**

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|---|---|
| Counsel for the Clients: | P.K. Sandhu |
| Counsel for the Law Firm: | H. Poulus, Q.C.<br>J.R. Buysen |
| Place and Date of Hearing: | Vancouver, B.C.<br>September 28, 2018 |
| Place and Date of Judgment: | Vancouver, B.C.<br>June 12, 2020 |

## Introduction

[1] These applications arose from *Legal Profession Act* ("*LPA*") proceedings before a registrar.

[2] The law firm alleged that the clients had wilfully failed to comply with an order by the registrar governing the delivery of expert reports. They sought to have the clients found in contempt of that order and to have judgment granted in their favour on the substantive issues before the registrar.

[3] The clients argued that the order was permissive rather than mandatory, and brought a cross-application, claiming, in their application materials at least, that the contempt application was an abuse of process and seeking special costs to address the manner in which it was brought and pursued.

## Relevant Facts

[4] The law firm represented the clients in a commercial dispute relating to property developments. It delivered over $400,000 in bills for its services, and ultimately terminated the retainer for non-payment of fees in December 2017. It alleged that $123,023.48 remained unpaid and sought to collect that amount in the *LPA* proceeding. For their part, the clients sought to have all of the bills reviewed. The two applications were heard together.

[5] A pre-hearing conference took place before the registrar on February 19, 2018. A point of dispute arose between counsel about whether the clients should be required to specify what aspects of the bills they were challenging. The clients' counsel took the position that they would be unable to do so until they received an expert opinion, including a review by their expert, of the law firm's file.

[6] The registrar ordered that the clients would have 30 days in which to either produce an expert report or apply for another prehearing conference to ask for an extension of time.

[7] On March 13, 2018, a second pre-hearing conference was convened by the clients' counsel. The purpose was to seek confirmation from the law firm that its entire file had been disclosed, and an extension of 45 days in which to either produce an expert report or seek a further extension.

[8] At the conclusion of the hearing, the registrar ordered that the clients would "have 15 days" to attend at the law firm's office to view the file. They would then "have [a further] 30 days" from the earlier of the date of their attendance at the law firm, or the expiry of the 15 days they had been allotted to do so, to deliver an expert report. The law firm's expert report in response, and any reply on behalf of the clients, were to be provided in a prescribed sequence following the delivery of the clients' initial report. "Has" and "have" were used in relation to the time limits for those subsequent steps as well.

[9] The clients did not attend at the law firm's office within the 15-day period, which made the deadline for delivering their report under the registrar's order April 27, 2018.

[10] The clients did not deliver the report by that deadline. Instead, their counsel wrote to the law firm's counsel advising that they would not be serving a report, but would instead await any report that the law firm intended to rely on before deciding whether to serve a response report. Their counsel expressed the view that this approach made procedural sense, because the law firm bore the onus of justifying its fees and would be presenting its evidence first at the hearing.

[11] The law firm then brought this contempt application. *LPA* proceedings are a creature of statute, so the registrar is only able to punish for contempt committed in the face of the court. As a result, the law firm was required to make its contempt and related applications in this Court.

[12] The clients obtained an adjournment of the first application date, on the basis that their counsel needed to cross-examine one of the counsel for the law firm on his

affidavits. In addition, the time set aside for the application was said to be inadequate.

[13] On June 6, 2018, the clients made an application for, among other things, the order for cross-examination described above and a finding that the law firm's appointment to have its bills reviewed was a nullity because of the date on which it was delivered. During the hearing they also sought a finding that the contempt proceedings were an abuse of process, as well as special costs against the law firm and its counsel personally. Their counsel had only advised of the abuse of process application two days before the hearing and had not filed any materials in support of it.

[14] On July 20, 2018, Justice Funt dismissed the application for cross-examination, and found that the nullity application was moot and ultimately unrelated to the issue of whether the clients were in contempt. He declined to consider the abuse of process claim in the absence of proper notice and supporting material.

[15] The clients then scheduled their abuse of process application, but ultimately agreed to adjourn it to be dealt with as part of this hearing.

[16] While this decision was on reserve, the parties' *LPA* applications were heard on the merits and decided by a registrar (2020 BCSC 581). Each party provided an expert opinion during the hearing. I mention that for the sake of completeness but it plays no part in my reasoning.

## Positions

[17] The law firm cast its submissions in the context of the elements of civil contempt that were set out in *Carey v. Laiken*, [2015] 2 S.C.R. 79 at paras. 33-35. A successful application requires: (1) an order with clear and unequivocal terms (2) actual knowledge of the order by the alleged contemnor; and (3) intentionally doing or failing to do an act in breach of the order.

[18] The law firm pointed out that the terms of the order in this case were for the clients to deliver a report by a certain date – there was no qualifying language that would make the order permissive rather than mandatory, and no ambiguity in the way that its requirements were expressed.

[19] Significantly, in the law firm's view, the indication by the clients' counsel that they would not be complying with it was based on her new position that the correct procedure was for the law firm to provide their report first, not on any belief that it was purely permissive.

[20] The law firm also submitted that the order as a whole set out a complete schedule for the exchange of reports that was dependent on the clients complying with their initial required step.

[21] The clients posed the key question as being whether there was a "mandatory injunction" for them to deliver a report. They argued that the specific language of the order – that they "have 30 days" to produce the report – clearly denoted a situation in which they were permitted, but not required to do so.

[22] They also asked me to look at the context within which the order was made – a request by them for confirmation that the entire file was available, with the first step of the examination of the file by the expert being separated from their decision to proceed with the production of his report. This, plus the fact that the order was not sought from the outset of the clients' submissions, shows that no commitment was being made by them to provide a report – they were only being given time to do so. The most that could be said, according to their submissions, was that the law firm was "expecting" a report and that expectation was not met.

[23] The clients pointed out that Rule 14-(32) allows up to two expert reports to be submitted by each party to a fee review. This sub-rule always allowed the clients to deliver a further expert, quite apart from any order of the registrar. They raised this point to illustrate that the registrar could not have been purporting to amend the sub-rule to restrict the number of reports available to them. In this regard there was

never a mandated sequence of events to which the clients were required to adhere. In fact, they had sought time in which to obtain a report only at the initial stages of the applications, when the law firm was pushing aggressively for a hearing.

[24] On a more technical point, the clients argued that a "specific unbroken chain of evidence" is required for each named individual against whom contempt is alleged and they must be named in the application. Reliance was made on *Granger v. Brydon-Jack*, [1918] B.C.J. No. 125 (C.A.) at para. 3, in which a contempt application that purported to substitute an unnamed party for a named one was dismissed. Given the nature of this application and the type of relief that was being sought, strict compliance with such requirements was said to be necessary. Instead, the notice of application only named one individual client specifically - Mr. Mathews - and the affidavits failed to provide the required "unbroken chain" with respect to him.

[25] Finally, in the event that a contempt finding is made, the clients submitted that the additional relief sought by the law firm under Rule 22-7 of granting it judgment before the registrar on its application and dismissing the clients' review were not available remedies. That sub-rule deals with failures to comply with the *Rules*, not orders made under a different statute. The *LPA* proceeding would ultimately result only in a certificate as to fees being issued – judgment or dismissal are not available outcomes under that statutory scheme.

[26] The clients made no explicit oral submissions on their abuse of process cross-application, and focused only on the issue of special costs. The essence of those submissions was that it is highly unusual to bring contempt proceedings in these circumstances, and that in doing so, the law firm utilized the heaviest tool available in litigation, against former clients no less, and sought remedies that are not properly available pursuant to it. This includes the overall illogic of seeking to compel the clients to provide a report that will only assist the clients themselves. In such circumstances it is open to the Court, the clients argued, to distance itself from such behaviour by an increased costs award.

**Discussion**

[27] Two essential aspects of the so-called *strictissimi juris* approach to contempt proceedings are that "[t]he applicants bear the onus of proving the elements of contempt on the criminal standard, *viz*. beyond a reasonable doubt ..." and "[i]f the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction…": *Jackson v. Honey*, 2009 BCCA 112 at para. 12.

[28] The required elements of contempt and the heightened standard of proof "help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases": *Carey* at para. 32.

[29] As the law firm argued in its reply, I can find no merit in a number of the clients' submissions on the availability of a contempt finding.

[30] The fact that more than one expert report could have been ordered under the *Rules* does not blunt the effect of a specific order by the registrar that that report be produced within a specified time, if the order is otherwise valid.

[31] *Granger* is a case of criminal contempt and the flaw in the proceedings that it dealt with was the complete failure to name the party who was intended to be the subject of the contempt finding. The proposed subjects of a finding of contempt in this application are synonymous with the named clients in the *LPA* proceeding, and the notice of application names them all. The chain of evidence linking the clients to the alleged contempt lies in the actions of their counsel, who self-evidently acted on their behalf in declining to deliver the expert report.

[32] Finally, the structure of the submissions by the clients' counsel at the pre-hearing conference in which the order was made does not undermine a potential inference that they were committing to obtain a report.

[33] The clients' main submission is more challenging – did the use of the words "will have" condition the obligation that was imposed on them by the order?

[34] The law firm submitted in its reply that those words relate only to the length of time within which the obligation imposed by the order is to be exercised, not to the obligation itself. One must also read the entire order in context – where it was intended to be permissive it said so explicitly.

[35] There is no question that the order was intended to facilitate the position of the clients in the *LPA* proceedings, at that time, that they needed an expert report. In that sense it was an order that they, through their counsel, understood and initially intended to comply with.

[36] Despite this, a vital distinction must be drawn between the understanding that might well have been attached to an order by the parties, and proof to the criminal standard, in a contempt proceeding based on noncompliance with it, of its clear and unequivocal nature.

[37] In my opinion the unfortunate use of the words “will have” in relation to the time limits of their performance of the steps to obtain their expert report introduces at least a reasonable doubt that the order only established a period within which it was open to them to obtain it. Absent additional language confirming that an obligation must be fulfilled, providing a party with time within which to perform an act, standing alone, does not necessarily direct its performance. The identical words were used in relation to the clients’ preceding obligation to attend the law firm to view the file, and the time limit for the producing of a report ran whether or not they took that step.

[38] As for the argument that the subsequent obligations imposed by the order depended on the fulfillment of the clients’ obligation to deliver a report, it is meaningful that the law firm’s report was described as a “response” report and any subsequent report by the clients as a “reply”. Such reports would only be necessary if the clients delivered a report first, which is equally consistent with a permissive term as a mandatory one.

[39] Even if the construction urged by the law firm is a more probable one, especially in light of the context in which the order was obtained, in a proceeding of

this nature the clients are entitled to the benefit of the doubt that arises from any ambiguity in the wording itself. The nature of these proceedings and the potential consequences in the event of a finding against them require no less.

[40] Terms like “will deliver” or “must deliver” are easy enough to seek, and would convey the level of clarity and certainty about the obligation that has been imposed that the *strictissimi juris* approach requires.

[41] Accordingly, the contempt application must be dismissed. This conclusion makes it unnecessary to consider what additional orders would be open to me in relation to the *LPA* proceeding itself if contempt had been found.

[42] To be clear, this outcome is purely a function of the standard of proof – it is not an endorsement of the clients’ unilateral decision not to take the steps set out in the order.

[43] The clients wisely did not directly pursue the position that the conduct of the law firm in bringing this application amounted to an abuse of process in their oral submissions. While it was certainly an aggressive tactic compared to simply seeking further directions from the registrar, that in itself does not make it abusive. Obtaining compliance with the underlying order is a valid objective of a contempt application, and I accept that the value to the law firm of the clients obtaining an expert report was that it would move the *LPA* proceeding forward. Nor can I identify any aspect of the law firm’s conduct that the Court needs to distance itself from, or fully indemnify the clients for, by an award of special costs. The cross-application is also dismissed.

[44] I have concluded that the parties should each bear their own costs of these applications. Their respective applications did not succeed, and I see no benefit to awarding offsetting costs to them as the successful respondents in each other’s applications.

“Schultes J.”