CITATION: Country Wide Homes Upper Thornhill Estates Inc. v Chen, 2022 ONSC 1641
COURT FILE NO.: CV-18-00611181
MOTION HEARD: 20220311

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Country Wide Homes Upper Thornhill Estates Inc., Plaintiff

AND:

Hongyu Chen, Defendant

BEFORE: Associate Justice L. La Horey

COUNSEL: Natalia Sidlar and John M. Buhlman, Counsel for the Moving Party Defendant/ Plaintiff by Counterclaim

Sonja Turajlich, Counsel for the Responding Party Plaintiff/ Defendant by Counterclaim

HEARD: March 11, 2022 by videoconference

REASONS FOR DECISION

OVERVIEW

[1] The defendant, Hongyu Chen, brings this motion to compel answers to two questions refused at the examination for discovery of the representative of the plaintiff, Country Wide Homes Upper Thornhill Estates Inc. ("Country Wide"). The defendant also seeks an order requiring the plaintiff's representative to re-attend to answer follow-up questions.

[2] For the reasons that follow, I conclude that the questions are relevant and shall be answered.

BACKGROUND

[3] Country Wide commenced this action on December 19, 2018, alleging that Mr. Chen was in breach of the Agreement of Purchase and Sale dated October 3, 2016, between the plaintiff as vendor and the defendant as purchaser ("APS"), for the purchase of a five-bedroom residence to be constructed by the plaintiff on property known municipally as 144 Lady Jessica Drive, Vaughan, Ontario (the "Property"). The Property is part of a residential subdivision known as the Enclave.

[4] In his Fresh as Amended Statement of Defence and Counterclaim (the "Defence"), Mr. Chen alleges that the Plaintiff failed to disclose that the Property was contaminated and subject to a certificate of property use ("CPU") issued by a Director of the Ministry of Environment and Climate Change ("MECC") under the provisions of the *Environmental Protection Act* ("EPA"). Mr. Chen states that he was later informed by a friend who had purchased a home in the Enclave, that the Enclave was contaminated. He pleads that after learning of the contamination and CPU he refused to close the purchase of the Property scheduled for December 21, 20218, on the basis that the APS was void.

[5] The APS was introduced into evidence on this motion by the plaintiff. Attached to the APS is an acknowledgement of receipt of a Certificate of Requirement ("CR"), issued under the EPA, and the CPU together with copies of those documents. Mr. Chen signed the acknowledgement and initialled the pages of the CR and CPU. Mr. Chen pleads that he is unable to understand documents written in English, was not given an adequate opportunity to read and review the APS and the acknowledgement, and did not have the opportunity to translate the documents into Chinese.

[6] The CPU provides in part that the conditions included in it address the "Risk Management Measures in the Risk Assessment". "Risk Assessment" is defined to mean the Risk Assessment accepted by a Director of the MECC as set out in the listed documents ("Risk Assessment Documents"). Among other things, the CPU requires the owner of the property to refrain from using the groundwater for potable water (i.e. no wells are permitted) and requires the installation of vapour barriers on buildings on the property.

[7] The Defence states that because the permitted use of the Property and other parts of the Enclave was changing from industrial use to residential use, under the EPA a record of site condition ("RSC") was required to be filed with MECC. Following the examinations for discovery, the plaintiff provided the defendant with the RSC for the Property and other portions of the Enclave. The RSC references two Phase I Environmental Site Assessments and two Phase II Environmental Site Assessments (collectively, the "ESAs").

[8] Sam Balemso, a representative of Country Wide, was examined for discovery on October 18, 2021. The defendant moves to compel answers to two questions refused during that examination. At question 272, page 56, the plaintiff refused to produce the ESAs that were undertaken for properties in the Enclave completed between June 2013 and August 2014, if they could be obtained. At question 319, page 68, the plaintiff refused to produce the Risk Assessment Documents referred to in the CPU which date between July 2013 and August 2014.

LAW AND ANALYSIS

[9] Justice Perell has summarized the applicable principles on examinations for discovery in the oft-cited case of *Ontario v Rothmans*[1] at as follows:

> 129 The case law has developed the following principles about the scope of the questioning on an examination for discovery:
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> * The scope of the discovery is defined by the pleadings; discovery questions must be relevant to the issues as defined by the pleadings: *Playfair v. Cormack* (1913), 4 O.W.N. 817 (H.C.J.).
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> * The examining party may not go beyond the pleadings in an effort to find a claim or defence that has not been pleaded. Overbroad or speculative discovery is known colloquially as a "fishing expedition" and it is not permitted. See *Cominco Ltd. v. Westinghouse Can. Ltd.* (1979), 11 B.C.L.R. 142 (C.A.); *Allarco Broadcasting Ltd. v. Duke* (1981), 26 C.P.C. 13 (B.C.S.C.).
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> * Under the former case law, where the rules provided for questions "relating to any matter in issue," the scope of discovery was defined with wide latitude and a question would be proper if there is a semblance of relevancy: *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (H.C.J.); *Air Canada v. McConnell Douglas Corp.* (1995), 22 O.R. (3d) 140 (Master), aff'd (1995), 23 O.R. (3d) 156 (Gen. Div.). The recently amended rule changes "relating to any matter in issue" to "relevant to any matter in issue," which suggests a modest narrowing of the scope of examinations for discovery.
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> * The extent of discovery is not unlimited, and in controlling its process and to avoid discovery from being oppressive and uncontrollable, the court may keep discovery within reasonable and efficient bounds: *Graydon v. Graydon* (1921), 67 D.L.R. 116 (Ont. S.C.) at pp. 118 and 119 per Justice Middleton ("Discovery is intended to be an engine to be prudently used for the extraction of truth, but it must not be made an instrument of torture ..."); *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (H.C.J.) at p. 246; Ontario (Attorney General) v. Ballard Estate (1995), 26 O.R. (3d) 39 (C.A.) at p. 48 ("The discovery process must also be kept within reasonable bounds."); *671122 Ontario Ltd. v. Canadian Tire Corp.*, [1996] O.J. No. 2539 (Gen. Div.) at paras. 8-9; *Caputo v. Imperial*

[1] 2011 ONSC 2504

Tobacco Ltd., [2003] O.J. No. 2269 (S.C.J.). The court has the power to restrict an examination for discovery that is onerous or abusive: *Andersen v. St. Jude Medical Inc.*, [2007] O.J. No. 5383 (Master).

* The witness on an examination for discovery may be questioned for hearsay evidence because an examination for discovery requires the witness to give not only his or her knowledge but his or her information and belief about the matters in issue: Van *Horn v. Verrall* (1911), 3 O.W.N. 439 (H.C.J.); *Rubinoff v. Newton*, [1967] 1 O.R. 402 (H.C.J.); *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (H.C.J.).

* The witness on an examination for discovery may be questioned about the party's position on questions of law: *Six Nations of the Grand River Indian Band v. Canada (Attorney General)* (2000), 48 O.R. (3d) 377 (S.C.J.).

[10] The defendant submits that the documents are relevant to the issue of contamination which is pleaded in the Defence.

[11] The plaintiff argues that the documents are not relevant for a number of reasons. The plaintiff says that the approval of the change of use from industrial to residential granted by the Director of MECP is evidence that the lands are fit for use. The plaintiff also says that the motion is an attempt to challenge the decision of the Director of MECP permitting the conversion of the lands from industrial to residential use and the construction of the subdivision. These are arguments as to the merits of the action and whether the Property was in fact contaminated at the time that the plaintiff and the defendant entered into the APS. They do not speak to whether the documents are relevant to the issues raised in the pleadings.

[12] The plaintiff also argues that the documents in issue represent a snapshot in time, prior to the APS, and do not reflect the state of the Property at the time of the purchase. The plaintiff says that it has produced the documents relevant to condition of the Property at the time.

[13] Following the examinations of discovery, the plaintiff produced the RSC for the Property and other properties in the Enclave accepted by the Director of the MECC on August 21, 2014. The RSC refers to the ESAs and contains some of the information from those reports including tables of measured contaminants in the soil and groundwater.

[14] The plaintiff also produced a report by WSP Canada Inc. dated July 16, 2018 entitled Risk Management Measures Implementation Report Lot 38/ Plan 65M-4506" (the "WSP Report"). Lot 38 is the Property. The WSP Report summarizes the Risk Assessment and documents the installation of a vapour barrier system for the Property in 2016 as required by the Risk Management Plan.

[15] The plaintiff says that it has produced the documents relevant to the issue of contamination. It says that the RSC, the CPU and the WSP Report outline the state of the Property at the relevant time and documents the implementation measures required by MECC.

[16] In essence, the plaintiff argues that it has produced the "most relevant" documents to the issue of contamination. However, the defendant is entitled to all relevant documents, not just the most relevant documents. The issue of contamination is squarely raised by the pleadings and the documents requested in the two questions refused are relevant to the issue of contamination and will assist the court in determining whether the Property is contaminated.

[17] The defendant is not on a fishing expedition. The documents sought are background documents referred to in the CPU (which formed part of the APS) and the RSC. Further, the requested documents sought are limited in number (about ten documents). The plaintiff has not suggested that it would be in any way difficult or onerous to produce these documents. There is no proportionality concern.

[18] The plaintiff shall answer questions 272 and 319.

DISPOSITION AND COSTS

[19] The defendant's motion is granted. The plaintiff shall produce the documents requested at questions 272 and 319 of the examination of Mr. Balsamo within 30 days. Mr. Balsamo shall re-attend for examination for discovery at the expense of the plaintiff to answer the questions and any proper follow-up questions.

[20] At the hearing, the parties agreed that the successful party would be entitled to partial indemnity costs in the sum of $6,500 (all inclusive). Therefore, the plaintiff shall pay the defendant costs in that amount within 30 days of the release of this decision.

L. La Horey, A.J.

Date: March 14, 2022