
CANADA / JUDGMENT

0640453 B.C. Ltd.

2018 BCSC 384

COURT

Supreme Court of British Columbia

DECIDED

12 March 2018

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2018 BCSC 384 0640453 B.C. Ltd. v. Tristar Communities Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0640453 B.C. Ltd. v. Tristar Communities Ltd.,

2018 BCSC 384

Date: 20180312

Docket: S133693

Registry: Vancouver

Between:

0640453 B.C. Ltd.

Plaintiff

And

Tristar Communities Ltd., Cushman & Wakefield Ltd., formerly known as Cushman & Wakefield LePage Ltd., Hendrik Zessel, Donald H. Patten, and Patten Thornton, a partnership firm

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:

D. Le Dressay

Counsel for Tristar Communities Ltd.:

S. Hern

Place and Date of Hearing:

Vancouver, B.C.

November 8, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 12, 2018

- [1] The defendant Tristar Communities Ltd. brings this summary trial application to dismiss this action pursuant to Supreme Court Civil Rules, Rule 9-7. The plaintiff submits the issues are not suitable for summary trial, but in the alternative, if they are, that judgment should be granted in its favour.
- [2] The dispute between the parties revolves around an agreement they entered into in October 2007 for the transfer of shares in a company, which owned property upon which Tristar had operated a mobile-home park since 2003 (the "Contract"). After the sale completed, the plaintiff wanted to subdivide the property and in order to do so, obtained a survey. It was at that point that the plaintiff learned that some of the land the parties believed had been transferred by the share purchase agreement were not represented on the reference plan held by the Land Title Office. The land not shown on the reference plan had accreted over the years.
- [3] The plaintiff started this action seeking damages for breach of contract. It alleges the defendant failed to transfer good marketable title to all the land upon which the mobile-home park sat. At one time there were a number of other defendants, but the action has been discontinued against them.
- [4] The defendant's position is that under common law, the land in question had accreted to the adjacent property such that title properly passed to the plaintiff under the Contract. In support of that, they rely on the expert opinion of Patrick Ringwood, a former Surveyor General of British Columbia.

ISSUES

- [5] There are two issues before me:
 - (1) Is this matter suitable for summary judgment?
 - (2) Did the defendant breach the Contract?

FACTS

- [6] Most of the facts are uncontested.
- [7] In 2007, Tristar listed for sale property that it owned on the western bank of the Columbia River (the "Property").^[1] A mobile-home park was operated on the Property; that mobile-home park pre-dated Tristar's ownership of the Property.
- [8] The plaintiff wanted to buy the Property and the parties, through their respective counsel, negotiated the sale. The parties came to an agreement to enter into a share purchase agreement rather than a sale of the Property (the "Contract"). Tristar transferred its legal and beneficial interest in the Property to a subsidiary company called Whispering Pines Ventures Ltd. ("WPV"). Effective October 31, 2007, Tristar sold 100% of the shares in WPV to the plaintiff for just over \$2.7 million.
- [9] Prior to entering into the Contract, the plaintiff was advised to obtain a survey of the Property, but chose not to (para. 29 and 30 of the amended notice of civil claim). The defendant submits that decision is at the heart of the plaintiff's case, and is responsible for any and all of the losses claimed in the action.
- [10] Tristar hired Cushman & Wakefield LePage Ltd. as its real estate agent for that sale. Hendrik Zessel was director of Tristar in 2007, and also a real estate agent with Cushman & Wakefield, serving as its managing broker. On August 13, 2007, Mr. Zessel signed a document disclosing his interest in the transaction, which was given to the plaintiff. In an affidavit, he deposed that he had no dealings with or made any representations to the plaintiff or its representatives about the sale. Instead, other agents at Cushman & Wakefield dealt with the sale. He also deposed that Cushman & Wakefield only acted for Tristar and at no time acted for the plaintiff. This evidence was not contested.
- [11] The plaintiff relies on the affidavits of Donna Thoen, who is currently the president of the corporate plaintiff. She deposed that at the time of the purchase, she and her husband intended to rezone the Property to develop it. There is no evidence that the defendant was aware of that intention.
- [12] A few months after the sale, the plaintiff started the process of rezoning the Property. To do so, the plaintiff was obliged to commission a survey of the Property. It hired Jerome Hango of Hango Land Surveying Inc. Mr. Hango completed a survey and concluded that a portion of the Property was Crown land (the "New Land"). According to Mr. Hango, about 15 of the most valuable waterfront trailer pads possibly encroached on or were built entirely on Crown land.

- [13] The reference plan filed in the Land Title Office (LTO) at the time of the sale did not show the New Land. I infer from the affidavit of Peter Herzig (who was president of Tristar at the time of the sale) that the survey of the land registered with the LTO was done in 1893. There is no dispute that no survey other than the ones commissioned after the sale included the New Land.
- [14] The defendant says Mr. Hango made an error on the survey and that he failed to recognize that the New Land had accreted to the Property, and therefore was, and has always been, part of the Property.
- [15] Based on what the defendant says was Mr. Hango's error, the plaintiff approached the Crown. The plaintiff gave the Crown a copy of Mr. Hango's survey, and asked to lease the New Land from the Crown. The Crown agreed and it and the plaintiff entered into a License of Occupation and Management Plan. The plaintiff paid rent to the Crown.
- [16] The plaintiff submits an Order in Council ("OIC") enacted on February 27, 1954 is relevant to the issues before me. It stated that pursuant to the authority of s. 93 of the Land Act, lands situated along "the Upper Arrow Lake, Lower Arrow Lake, and the lower Columbia River, South to the International Boundary, be reserved from alienation." The second paragraph of that OIC stated:

All of those lands situated in the Kootenay Land District, being more particularly described as "All those lands lying below the 1425 foot contour bounding the Upper Arrow Lake, Lower Arrow Lake and that part of the lower Columbia River lying to the North of the International Boundary and all tributaries thereof.

- [17] The plaintiff also relies on a letter from BC Hydro dated January 27, 2009 in which the Manager of the Property, Legal, Aboriginal and Support Services wrote the following:

We appreciate that Whispering Pines wishes to acquire title to the Crown lands on which certain mobile homes are located.

As set out, however, in our July/08 letter to [Ministry responsible for the property], the flooding of said Crown lands which are located in a floodplain have not been flooded due to upstream dams and other circumstances. Should those circumstances change, however, the said Crown lands may be flooded, creating a serious hazard to persons and property located on said lands.

For these reasons, we confirmed that BC Hydro's position is that the said Crown lands have not naturally accreted to Whispering Pine Ltd.'s fee simple lands and that it is not in the public interest to change the ownership of said lands.

- [18] The plaintiff claims that it has little chance of successfully subdividing the Property because of a change in zoning. It says that change was precipitated by the revelation that there may be Crown land subject to the OIC adjacent to the mobile-home park.

- [19] Both parties provided submissions on whether the applicable bylaws will negatively affect the plaintiff's desire to rezone the Property. However, the issue of the interpretation and/or applicability of the bylaws is not before me. As noted above, the plaintiff's desire to develop the Property was unknown to the defendant. Furthermore, the Contract does not address any consequences flowing from changes to bylaws after the sale closed. For those reasons, I am satisfied I do not have to make any findings on the bylaws, and I will not review them.
- [20] The defendant asserted in its June 11, 2013 response to civil claim that the New Land was part of the Property. It relied on Mr. Ringwood's opinion. Mr. Ringwood is a licensed and qualified British Columbia Land Surveyor and Canada Lands Surveyor who prepared an expert report. That report was provided to the plaintiff early in this litigation. Mr. Ringwood concluded that the New Land was not Crown land but, under the common law, had accreted to the Property.
- [21] Despite receiving Mr. Ringwood's survey, the plaintiff did not discontinue this action, which prompted Tristar to file this summary trial application in July 2014. Tristar seeks in this application a declaration that the New Land was formed by accretion and formed part of the Property at all material times. Tristar was obliged to bring this application because it no longer owned the Property and had no standing to register in the LTO a new reference plan for the Property incorporating Mr. Ringwood's survey.
- [22] Although served, the Crown did not oppose this application, but BC Hydro did. BC Hydro filed a response to the application, but Tristar successfully objected to BC Hydro's standing in this action.
- [23] Shortly before the originally scheduled hearing date in the summer of 2015, the plaintiff adjourned the hearing and decided to apply to the LTO to accept and register a new reference plan for the Property. The plaintiff included in that application, Mr. Ringwood's expert report. The Crown did not oppose that application.
- [24] In February 2017, the Surveyor General granted the plaintiff's application, and filed the reference plan therefore confirming that the Property includes the New Land.

Issue 1 - Is this Matter Suitable for Summary Judgment?

- [25] The essential question on the issue of suitability for summary trial is whether the court is able to find the necessary facts. It is well settled that disputes in affidavit evidence do not necessarily preclude the availability of a summary trial. Summary trial is less likely to be appropriate if those disputes cannot be resolved without an assessment of credibility, but even those types of disputes do not necessarily preclude a summary trial.
- [26] The defendant emphasizes that the Supreme Court of Canada has encouraged courts to make better use of summary judgment motions in order to address the increasing cost and delay of modern day litigation: *Hryniak v. Mauldin*, 2014 SCC 7 at para. 4. The Supreme Court of Canada's admonition repeats and is consistent with prior British Columbia jurisprudence which, unlike many jurisdictions, has had a summary trial procedure for

many years: *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502 at paras. 48 to 49; *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, [1989] 36 B.C.L.R. (2d) 202 (C.A.) at para. 37.

- [27] In *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30 to 31, the Court of Appeal summarized the factors to consider when determining whether it would be just and fair to have a matter proceed summarily. Those factors include: the amount involved; the complexity of the matter; any urgency; any prejudice likely to arise because of delay in resolving the action; costs and timing of the summary trial; whether credibility is a "critical" factor, and, whether granting the application would result in litigation in slices.
- [28] The defendant submits the issues in this case are straight-forward, primarily involving the interpretation of the Contract. The plaintiff agrees that the main legal issue on this application is the interpretation of the Contract. Notwithstanding that, it argues the matter is not suitable for summary trial because the Contract interpretation is a question of mixed fact and law, citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. In that case, however, the Supreme Court did not depart from the principle that contracts must be read as a whole, "giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (para. 47). While surrounding circumstances can be considered, they cannot "overwhelm the words" of the contract (para. 57). Moreover, the nature of the evidence that can be considered is limited to "objective evidence of the background facts at the time of the execution of the contract" (para. 58). Thus, even if there are circumstances outside the contract that will aid in its interpretation in the case, the defendant contends the material facts are not in dispute. I agree.
- [29] The plaintiff submits the case is complex and not suitable for summary trial. It submits the Property is unique because it is adjacent to the Columbia River, which is subject to a treaty between the United States and Canada. I do not agree that adds complexity to the case.
- [30] Further, if the OIC has any effect on the Property, that effect would flow from the OIC and not from the sale of shares. If the plaintiff's point is that being aware of the possible impact of the OIC at the time it bought the shares may have changed the terms of the Contract, I do not find that persuasive either. As noted above, it is undisputed that the plaintiff chose not to follow legal advice to obtain a survey before the sale closed. The plaintiff has not pointed to anything in the Contract that required the defendant to update the reference plan in the LTO. Any impact on the Property from the OIC is not something that the defendant was contractually responsible for. Accordingly, I am not convinced the OIC is relevant to the action.

- [31] The plaintiff submits interpreting the Contract requires the court to look at facts external to it, and that creates complexity because factual disputes should not be resolved by affidavit. I do not agree that refraining from the use of affidavit evidence to resolve factual disputes is an inflexible rule. Even if it was, however, the plaintiff did not point to any dispute in the affidavit evidence on a material point. Nor did the plaintiff identify any factual dispute in the affidavit material, the resolution of which would require an assessment of credibility.
- [32] Moreover, I do not agree that external facts can be examined to properly interpret the Contract. Clause 9.11 of the Contract is clear on that point. It states:

9.11 Entire Agreement

This Agreement contains the whole agreement between the Vendor and the Purchaser pertaining to the subject matter hereof and supersedes all prior agreements, undertakings, negotiations and discussions between the parties and there are no representations, warranties, covenants, conditions or other terms other than expressly contained in this Agreement.

- [33] For those reasons, I do not find resolving the primary issue in this case involves factually complex issues. This also favours a summary trial proceeding.
- [34] The plaintiff also submits that issuing a decision on this summary trial would result in "litigating in slices" in two ways. It combines this submission with the assertion that the action is at too early a stage for this Court to consider dismissing the claim.
- [35] Firstly, the plaintiff asserts that if the defendant is not successful, further hearings may be necessary to determine resulting issues including damages. The plaintiff also contends expert opinion evidence would be needed to assess damages and therefore those two issues should not be litigated separately.
- [36] However, the plaintiff admits that the issue of title is intrinsically tied to all the other issues. Thus, a decision on title would save time in any subsequent application, or at trial. Moreover, if the defendant succeeds, the litigation will end, which would result in a significant saving in court time. In my view, this factor favours a summary trial because there is significant possibility the summary application will save time and expense.
- [37] Secondly, the plaintiff submits there is an "outstanding" application by BC Hydro for intervener status. In its response to this application, BC Hydro objected to the relief sought by the defendant in this application. The plaintiff submits there is no evidence before me that BC Hydro has withdrawn or abandoned its position.
- [38] However, counsel for the defendant advised me that it was successful in having BC Hydro's application for intervener status dismissed. More importantly, BC Hydro confirmed in an email that since "the boundary changed has occurred" (referring to updated reference plan in the LTO consistent with Mr. Ringwood's opinion), it had no further instructions. The plaintiff relies on the lack of instructions to suggest further instructions could arise later. I disagree. It is clear BC Hydro had recognized its opposition to the change in boundary was

not accepted by the LTO.

[39] In my view, no other fact or circumstance presented supports the plaintiff's position. I conclude the matter is suitable for summary trial.

Issue 2 - Did Tristar Breach the Contract?

[40] The plaintiff submits that Tristar breached clauses 3.3(a) and (d) of the Contract because it did not have "good and marketable title" and was not the "legal and beneficial owner" of the New Land at the time of the sale. The defendant says the New Land at all times was part of the Property so there was no breach of the Contract.

[41] Clause 3.3 states:

3.3 Property Representations

- (a) [WPV] has good and marketable title to all its assets, subject to no mortgage, pledge, deed of trust, lien, claim, encumbrance or charge, and all of such assets are in good order and repair except the Mortgage , Assignment of Rents and PPSA Security Interest all to be discharged by [Tristar] on Closing.
- (b) The Property consists of 104 manufactured home pads (the "Pads"), of which 85 are rented out
- (c) Effective Oct. 31, 2007, the beneficial interest in the Property, the Pads, the Manufactured Homes...will have been transferred to [WPV] by [Tristar] at the fair market value of \$2,775,000.00.
- (d) [WPV] is the legal and beneficial owner of the Property, subject to no mortgage, pledge, deed to trust, lien, claim, encumbrance or charge that is not disclosed in Schedule 2.

[Underlining added]

[42] Property is a defined term in the Contract, and the representations with regard to it are set out in clauses (b), (c) and (d). The definition of the Property in the Contract matches exactly the Property's P.I.D.

[43] The plaintiff says the reference plan registered in the LTO did not show the New Land being part of the Property on the date the Contract was signed. On that basis, the plaintiff argues the defendant failed to deliver "good and marketable" title to the whole of the Property. It also argues that WPV (as owned by the defendant before the sale) was never the legal and beneficial owner to the whole of the Property, and therefore, it did not get transferred in the sale.

- [44] The point is the reference plan did not show the New Land at all. Put simply, a complete answer to the plaintiff's claim is that it enjoys indefeasible title of the Property, including the New Land, as registered in the LTO. Based on the evidence before me, Tristar owned the Property before the plaintiff, including the New Land. How can there be a breach of the Contract in those circumstances?
- [45] The plaintiff relies on a discrepancy that existed, until recently, between the depiction of the boundary between the Property and a body of water on the reference plan registered in the LTO, and the actual boundary.
- [46] That discrepancy arises from the nature of boundaries between water and land, which often change because of erosion, accretion and other natural processes. The boundaries are ascertained by mapping. The defendant says that shifting boundaries can result in plans registered in the LTO not being an accurate reflection of the boundary on the ground. The defendant submits that updating boundaries does not affect who has title to the Property. Title is determined by whatever plan is registered with the LTO, not by unfiled maps or surveys.
- [47] When the plaintiff wanted to proceed with developing the Property, it was obliged to obtain plans prepared by a licensed surveyor, acceptable for filing in the LTO. That is to ensure boundaries are updated so that the process to review a proposed subdivision will be based on a plan that matches the natural land boundaries at that point and time. The plaintiff obtained a survey that the defendant contends erroneously concluded the New Land was Crown land.
- [48] The defendant's position that it owned the New Land before the sale is consistent with the common law. At common law, a riparian owner is the owner of land that forms by accretion, which is the natural and gradual buildup of land from a river bank.
- [49] The defendant's submission is sound. A property owner also owns accreted land as and when it has accreted. A regularly cited definition of accretion comes from Justice Dickson's dissenting judgment in *Chuckry v. Manitoba (Minister of Public Works)* (1972), 27 D.L.R. (3d) 164 at paras. 37-38:

For accretion to have occurred it must be the result of a well-understood mechanism operating in a definite way. This mechanism can take one of two forms or be a combination of both. These are: the retreating of the high-water line away from its former position, thus exposing land that was until then submerged; or the build up of land through the process of alluvium, thus pushing back the highwater line: *Attorney General for B.C. v. Neilson* [1956] S.C.R. 819, per Rand, J. at 827; *re Bulman's Petition* (1966), 56 W.W.R., 225, per Ruttan, J. at, 200.

The second requirement is the process operate slowly and gradually so the land growth is imperceptible. If any additions are made as a result of flooding they must be those that would occur in the natural course of events .

- [50] This passage was affirmed by the Supreme Court of Canada upon appeal: [1973] S.C.R. 694.
- [51] Thus, the defendant says at no time did the New Land belong to the Crown, contrary to the opinion obtained by the plaintiff from Mr. Hango. Accretion does not involve any transfer or disposition. Land simply adheres to the shore as it accretes: *Wolfe v. BC Electric Railway Company Limited*, [1949] B.C.J. No. 90 (S.C.) at paras. 2 to 8 and *Secretary of State for India v. Foucar Co. Ltd.* (1933), 50 T.L.R. 241 (Privy Council) at pp. 242 and 243.
- [52] The defendant's position is that the plaintiff is the author of its own misfortune by relying on Mr. Hango's error. They say there is no evidence that the Crown previously or independently claimed title to the New Land until the plaintiff supplied it with Mr. Hango's survey. The defendant had no connection with Mr. Hango's survey, and I agree, cannot be held liable for his mistake.
- [53] The plaintiff submits that position is unreasonable because the existence of the agreements it entered into with the Crown prove that the Crown "asserted" its title of the New Land. That does not answer the defendant's point. I do not see a reasonable basis upon which I can find, or infer, that but for the plaintiff's supplying the Crown with the erroneous survey, the Crown would have asserted title over the New Land.
- [54] Counsel advised me that the plaintiff has started an action against the Crown for a refund of all the rent money the plaintiff paid for leasing the New Land. The plaintiff says it has done so in order to fulfil its obligation to mitigate its damages, but the existence of that action should not prejudice its claim in this action. I agree that that action should not and will not influence my decision on this application. But similarly, no evidence contradicted or questioned two key facts that support the defendant's position. The plaintiff chose not to obtain a survey prior to the sale closing, and the plaintiff decided to supply Mr. Hango's survey to the Crown.
- [55] The plaintiff argues that I should assume that had the plaintiff obtained a survey before the sale closed, it would have been in a position to negotiate a better deal with the defendant by reducing the purchase price, or insisting the defendant update the reference plans. Not only is there no evidentiary basis upon which I can assume that, it would be inappropriate to do so. As a matter of fact and law, Mr. Hango's opinion is wrong. The reference plan in the LTO shows the New Land is part of the Property. It is not reasonable for me to speculate what might have happened if the plaintiff had obtained a survey before the sale closed. Certainly it is untoward to base legal conclusions on the further assumption that the legal survey would have made the same error.
- [56] However, the plaintiff submits such an assumption is reasonable because it is consistent with BC Hydro's position in this case. In response to this application, BC Hydro filed the affidavit of David Bruce, Manager of Reservoir Rights, Services, Properties and Security, dated August 1, 2014. At paragraph 17, Mr. Bruce deposed that BC Hydro has "a significant interest in discouraging development in low-lying levels of the Columbia valley, even in those areas which now appear, based upon physical erosion and vegetation growth patterns

to be above the natural high water mark." He then referred to an OIC that he believed included language preventing the alienation of land below a contour line at an elevation of 1425 feet; the New Land is below that contour line.

- [57] Several problems arise. The first is Mr. Bruce's letter is inadmissible for its truth. Second, the statement is inadmissible opinion evidence. Third, BC Hydro has no standing to put its position before me on this application. Fourth, if the plaintiff is arguing its reliance on Mr. Hango's opinion was reasonable (which does not strike me as a relevant issue in any event), Mr. Bruce's statement was made after the litigation began and is not something the plaintiff actually relied upon before the sale closed. Finally, and most importantly, the LTO apparently did not agree with BC Hydro's position because it allowed the reference plan to be updated showing the New Land as having accreted to the Property.
- [58] In my view, the above discussion is determinative. I conclude there is no evidence, or inferences I can draw from the evidence, which supports the plaintiff's position, and thus, it has not proven the defendant breached the Contract.
- [59] Although I find it unnecessary to do so to resolve this application, I will consider the plaintiff's arguments based on the wording of the Contract.

Good and Marketable Title

- [60] I agree with the defendant that clause 3.3(a) does not apply to the facts in this case. The law is clear that a contract must be read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47. Clause 3.3(a) states that WPV had good and marketable title to all its assets. Property is a defined term in the Contract, and it is explicitly mentioned in clauses other than clause 3. Logic dictates that if "assets" included the Property, that would have been explicitly stated.
- [61] Furthermore, clause 3.3(a), when read as a whole, is more consistent with the notion that no real property is included. It refers to PPSA security interests and the assets being in "good order and repair". In my view, the structure of the Contract and the absence of the word "Property" in clause 3.3(a) supports the defendant's assertion that there was no warranty or representation that it had good marketable title to the Property.
- [62] In any event, the defendant submits that it did have good and marketable title to the Property. It asserts that marketable title means nothing more than a title that can be sold. It says having "title" to something simply means that the sale of that thing can be forced upon an unwilling purchaser: *Smith v. Graham*, 2009 BCCA 192 at para. 19. The defendant asserts that "good title" means it is not subject to an undisclosed encumbrance or charge.
- [63] For the reasons described above, I agree the defendant had good and marketable title in the Property, including the New Land.

- [64] The defendant also relies on the English case of *Barclays Bank PLC v. Weeks Legg and Dean*, (1999) 77 P. and C.R. 320 (C.A.) for the proposition that even if a title is technically defective (I do not find nor does the defendant take the position its title was defective), it is one a purchaser is bound to accept. In that case, there was an undertaking that the vendor was selling good marketable title to three parcels of land. The problem was that one of the properties was subject to a right-of-way, which precluded its development, a second had insufficient rights of drainage that adversely affected its development; and the third was owned by three co-owners, one of whom had not consented to the sale.
- [65] The Court of Appeal held, nevertheless, there had been no breach because the undertaking addressed the subject matter of the sale and not the use of the land. The Court held good marketable title "describes the quality of the evidence which the purchaser is bound to accept as sufficient to discharge this obligation": *Barclays* at para. 8.
- [66] The defendant says *Cinram Ltd. v. Armadale Enterprises Ltd.*, 31 O.R. (3d) 257 (C.A.), stands for the same proposition in Canada. In that case, there was a warranty that the defendant had good and marketable title to certain property. However at the time, the defendant was aware that the property contravened a building bylaw. The Court of Appeal held that the warranty was on the title alone, and there was no language in the warranty dealing with the use of the land. Therefore, there was no breach of the warranty.
- [67] The plaintiff submits those cases are not helpful because its complaint is that the title was deficient, regardless of what use it wanted to make of the New Land.
- [68] I disagree. The plaintiff chose not to get a survey of land at the time of the sale, even though it knew it was to its benefit to do so. Clearly, it was satisfied with the representation that WPV owned (and/or had title to) the Property the plaintiff believed it was buying. It did not seek as a condition of the sale a receipt of the survey confirming that representation to be true.
- [69] It was only when the plaintiff wanted to change its use of the Property (from mobile-home park to bare strata lot) that it was forced to get a survey. Prior to that, it was "using" the New Land to operate a mobile-home park. The plaintiff did not seek any representation about the legality of the location of those operations. In my view, the cases cited by the defendant are on point.
- [70] Nor has the plaintiff persuaded me that title to the Property was deficient at the time of the sale. At no time did any record at the LTO show that the New Land belonged to anyone other than the plaintiff. In my view, that is determinative.
- [71] The defendant also points to s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250, that states that "indefeasible title is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple " to the lands described in the title.

- [72] The plaintiff argues that s. 23(2) (h) of the Land Title Act does apply. That subsection creates an exception to the opening words of s. 23(2) if the indefeasible title is subject to "the right of a person to show that all or a portion of the land is, by wrong description of boundaries improperly included in the title".
- [73] I do not see how that helps the plaintiff's position. According to the plaintiff, the New Land was not included in the title: that is the plaintiff's whole complaint. Thus, no one can show that it was "improperly" included on title before the sale.
- [74] In any event, the defendant says the plaintiff's position misinterprets the legislation. In *Phillips v. Keefe*, 2012 BCCA 123, the Court of Appeal comments on s. 23(2)(h) and states there is a difference between the legal effects of land title and the location of property lines. The Court notes that s. 23(2) (h) is concerned with the former and not the latter. What that means is a provable error on the title might undermine indefeasible title, but the physical location of the boundary of the land on the ground is a separate issue (paras. 61 to 63).
- [75] I agree. The natural boundary of the Property changed over time by accretion; the title to the Property never did, despite Mr. Hango's opinion.
- [76] Accordingly, even if the representation of "good and marketable title" applied to the Property (which it does not), the defendant would not have breached that representation.

Legal and Beneficial Owner

- [77] The representation under clause 3.3 (d) that WPV was the "legal and beneficial owner" of the Property is relevant and applicable. The plaintiff submits the clause is ambiguous or uncertain because "owner" is not defined in the Contract. Even though owner is not defined, I do not find it to be an ambiguous term. WPV had title to the New Land by accretion; it owned the New Land.
- [78] However, the plaintiff's argument proceeds from that proposition to make the remarkable submission that the concept of ownership has nothing to do with the Land Title Act system of land registration and conveyancing in British Columbia. The plaintiff argues that real property ownership in British Columbia should be interpreted as the English Courts define it. However, I was given no case to support that proposition.
- [79] Instead, the plaintiff refers to s. 169 (a) of the Land Title Act. That section states that if an application is made for registration of indefeasible title, the Registrar must register the title if the Registrar is satisfied that the boundaries of the land are "sufficiently defined by the description or plan on record".

- [80] It is not clear to me how that helps the plaintiff. The plaintiff relied on Mr. Ringwood's opinion to update the reference plan for the Property registered at the LTO to show the New Land is within the boundaries of the Property. Prior to that, the reference plan did not show the New Land at all (presumably because it had not yet accreted when that plan was filed, apparently in the 1800's). The plaintiff did not rely on Mr. Hango's survey. So there has never been a "record" in the LTO that showed the New Land belonged to anyone else.
- [81] The definitive point in time is the day the Contract was signed. It is clear that the description of the boundary of the Property on record at the LTO at that point did not match reality. However, the deficiency was not just the misidentification of a boundary; it was the absence of land that had accreted to the property. However, that deficiency was not due to any error or illegality. Mother Nature caused the boundary to change since the filing of the last reference plan.
- [82] There is no evidence that at any time before the plaintiff updated the survey, there was a record at the LTO showing that the New Land belonged to the Crown, or even, that the New Land existed. In my view, s. 169 does not support the plaintiff's position.
- [83] The plaintiff's complaint boils down to it having paid the rent for a number of years to the Crown for land that, apparently, the Crown never owned. That issue is the subject of a different action.
- [84] The plaintiff also complains that it incurred legal and surveying costs to update the reference plan. The plaintiff was advised but did not obtain a legal survey before the purchase had closed. It is unknown what would have happened if it had, but the responsibility for that lies squarely with the plaintiff. It is particularly odd that the plaintiff continues to blame the defendant for the costs associated with updating the reference plan even though the plaintiff relies on the survey obtained by the defendant.
- [85] The plaintiff also argues that the defendant is liable in indemnity as set out in clause 9.3 of the Contract.

9.3 Indemnification by the Vendor

[Tristar] covenants and agrees to indemnify and save harmless the [plaintiff] from any loss, damage, liability, cost and expense (including without limitation any tax liability) suffered by the [plaintiff] directly or indirectly as a result of or arising out of any breach of representation, warranty, covenant or agreement of [Tristar] contained in this Agreement or any document or certificate delivered under this Agreement.

- [86] Indemnity is only available if the plaintiff suffered loss, damage, liability, cost or expense arising out of a breach of the Contract. As noted above, I do not find the defendant breached the Contract.

CONCLUSION

[87] Based on the uncontested facts before me, there is no evidentiary or legal basis for me to conclude that the defendant breached the Contract, or is otherwise liable to the plaintiff. I grant the application and dismiss the claim.

[88] The defendant is entitled to its costs. If there is some fact of which I was not made aware that may affect the costs award, and the parties cannot agree, they may seek a brief appearance before me to address that so long as they make that request within 30 days of the date of this judgment.

"Sharma J."

[1] The property had a municipal address of 500-16th Avenue, Genelle, BC and PID 007-836-767 (the "Property").

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Prepared on 29 October 2026 · Esheria