

CANADA / JUDGMENT

## 0907289 B.C. Ltd. v. Fletcher Holding Inc.

2024 BCSC 2259

COURT

Supreme Court of British Columbia

DECIDED

16 September 2024

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2024 BCSC 2259 0907289 B.C. Ltd. v. Fletcher Holding Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0907289 B.C. Ltd. v. Fletcher Holding Inc.,

2024 BCSC 2259

Date: 20240916

Docket: S10790

Registry: Courtenay

Between:

0907289 B.C. Ltd.

Petitioner

And

Fletcher Holding Inc. and 1349546 B.C. Ltd.

Respondents

Before: The Honourable Justice Thompson

Oral Reasons for Judgment

Counsel for the Petitioner:

S. Gabel

D. Girard, A/S

Counsel for the Respondents:

M. Rose

Place and Dates of Hearing:

Courtenay, B.C.

August 20-21, 2024

Place and Date of Judgment:

Courtenay, B.C.

## September 16, 2024

- [1] The King George Hotel in the Village of Cumberland was rebuilt in 1933 after it was destroyed in a fire. The Hotel encroaches on an adjoining property by about two metres. In 2011, the petitioner bought this adjoining property with knowledge of the encroachment. This petition seeks an order that the encroaching portion of the Hotel be demolished, as well as damages for trespass and punitive damages.
- [2] Section 36 of the Property Law Act, R.S.B.C. 1996, c. 377, provides that if a survey shows that there is an encroachment, the Court may fix a compensation amount and declare an easement or vest title to the land encroached on, or make an order for the removal of the encroachment. Out of an abundance of caution, the respondents filed a cross-application seeking an easement or title to the land encroached upon. This application was served on the petitioner and also on the company holding a mortgage on the petitioner's property; this mortgagee did not file an application response or appear at the hearing.
- [3] Where an encroachment is established, s. 36 of the Property Law Act calls for a weighing of the equities between the parties to determine the balance of convenience: *Taylor v. Hoskin*, 2006 BCCA 39 at para. 53. This broad discretion to equitably resolve encroachment disputes is guided by certain "predominant considerations" articulated by Justice Leggatt in *Vineberg v. Rerick*, [1995] B.C.J. No. 2506 at para. 20: whether the parties were cognizant of the property lines, and the nature and size of the encroachment. The parties organized their submissions around these Vineberg considerations, but it is common ground that they are a guide to the exercise of the s. 36 discretion and not "tests" to be applied vigorously in every case: *Manita Investments Ltd. v. T.T.D. Management Services Ltd. (Realty World Capital)* (1997), 15 R.P.R. (3d) 88 at paras. 42-43, *aff'd* 2001 BCCA 334; and *Taylor v. Hoskin*, at para. 51.
- [4] In *Taylor v. Hoskin*, the Court of Appeal referred to the caution expressed by Laskin J.A., as he then was, when interpreting a somewhat similar Ontario statute in *Gay v. Wierzbicki* (1967), 63 D.L.R. (2d) 88 at 92 (Ont. C.A.): a person seeking to retain another's land must show that "the balance of convenience is decidedly in his favour" or that "the equities preponderate in his favour". The reasons in *Taylor v. Hoskin* proceed to a thorough discussion of the legislative history of s. 36, consideration of similar legislation in other

provinces, and a review of the authorities including Vineberg. I do not read Taylor v. Hoskin as endorsing a narrowing of the broad discretion in s. 36 to impose a vesting order or easement to cases where the equities decidedly or predominantly favour these outcomes. That said, I was referred by the petitioner to the concurring judgment of Frankel J.A. in District of West Vancouver (Corporation of) v. Liu, 2016 BCCA 96 at para. 98, where he referred with apparent approval to the elevated burden suggested in Gay v. Wierzbicki, and there are other examples in British Columbia authorities of the application of a heavier burden.

- [5] While I am not certain that this heavier burden reflects the law in British Columbia, I understand that the onus is on the party seeking a vesting order or easement to establish that the equities favour it. And, I think it is right to exercise caution before making such orders - it seems to me that the Vineberg considerations reflect this cautious approach. During her reply argument, Ms. Rose indicated that she does not contest that her client is required to meet the higher burden. Because I have concluded that the balance of convenience is in fact decidedly in favour of the respondents and that the equities preponderate in their favour, I do not need to decide this issue or say anything more about the nature of the respondents' burden.

### Comprehension of the Property Lines

- [6] The Hotel has encroached on the adjoining lot for over 90 years. In 2011, this adjoining lot was vacant when purchased by the petitioner. Wayne Rideout, the principal of the petitioner, deposed that he was "aware of the encroachment" when the petitioner purchased the vacant lot; I interpret this evidence to mean that he was aware of the fact of an encroachment, and the degree of the encroachment.
- [7] In 2012, Hugh Fletcher, the principal of the respondent Fletcher Holding Inc. ["FHI"], became aware that the Hotel lands were going into foreclosure. Dr. Fletcher has purchased several Cumberland buildings that he believes have historical significance in order to preserve and protect the character of the Village. FHI acquired the mortgage on the Hotel property, and after a lengthy foreclosure process, became the registered owner of the Hotel property in 2017.
- [8] Dr. Fletcher did not see a survey at any point during the process of FHI acquiring the Hotel property. However, in the course of restoring other downtown Cumberland properties, he became aware that several buildings encroached on adjoining properties due to issues with historic surveying. He suspected the Hotel might encroach on the vacant lot, but he believed that if there was an encroachment it would be "limited to a couple of inches to account for a margin of error in historic surveying." He was not aware of the full extent of the encroachment until 2019 when Mr. Rideout spoke to him about it.

- [9] After becoming aware of the encroachment, Dr. Fletcher and his realtor made unsuccessful efforts to resolve the encroachment issue with Mr. Rideout. I find that resolving the encroachment was not a priority for Mr. Rideout. He had taken no steps to resolve the issue with the former owner of the Hotel property. He had formed the firm opinion that the Hotel was in such poor condition that it would almost surely be torn down. He proceeded with plans to design and build a four-storey mixed use (commercial and residential) building on the vacant lot, and "decided that instead of starting a long and costly legal battle, we should just design the building around the King George encroachment and plan to expand our development when it was finally removed." In the event, it was not removed and the petitioner's building was constructed against or virtually against the east wall of the Hotel. Construction of the building was completed in early 2023.
- [10] In October 2023, the respondents formed a partnership for the purpose of restoring the Hotel. This transaction resulted in each respondent holding a half-interest in the Hotel property. When the respondent numbered company acquired this half-interest, it did so with knowledge of the encroachment.

### Nature and Size of the Encroachment

- [11] The encroachment consists of a "lasting improvement" and it occupies an area 2.19 metres wide by 18.69 metres long. This 41-square-metre encroachment covers approximately 6.2% of the area of the petitioner's property, and 2.19 metres is approximately 12% of the petitioner's Dunsmuir Avenue frontage.
- [12] Determining the nature and size of the encroachment leads into an analysis of the effects of continuing or removing the encroachment. Where the encroachment is a lasting improvement such as this portion of the Hotel, the effort and cost involved in removing the encroachment is relevant. It is also important to come to grips with how the encroachment affects the use of both properties, both presently and prospectively. See Vineberg, at para. 20.
- [13] There would be a significant aesthetic cost associated with demolishing the easternmost two metres of the Hotel - the petitioner sensibly conceded in argument that the building façade would look lopsided. However, the petitioner argues that the Hotel has not been formally designated as a heritage building. In fact, Mr. Rideout clearly thinks that the Hotel is in such wretched condition that Dr. Fletcher's plan to renovate it is a fool's errand.
- [14] There is a suggestion in the petitioner's material that the Hotel is a fire hazard, and removal of the encroachment would help protect the petitioner's building from this hazard. This argument was not pressed with any vigour at the hearing, and for good reason. It can be fairly assumed that if the Hotel presented a serious fire hazard, the petitioner would not have built against it, and I suspect the municipal authorities would not have approved plans that allowed this to happen. Moreover, the petitioner's case on compensation assumes that if the encroachment had been removed, the petitioner would have built up against the

remaining part of the Hotel.

- [15] The respondents have commissioned detailed plans for the restoration of the Hotel and the Village of Cumberland has approved these plans. The respondents have secured a substantial provincial government grant, on the order of \$1 Million, to help fund the work. I acknowledge Mr. Rideout's opinion, based on years of experience as a builder and developer, that these restoration plans are folly, but it is clear that others with relevant experience are not of the same mind. It is not necessary for me to come to a judgement on this issue, even if I felt equipped to do so. It is sufficient to take notice that the Hotel has some historical significance, and that the respondents have restoration plans that are regarded as viable by an architect and government agencies with expertise in assessing these types of plans.
- [16] Although it has not been quantified, it is obvious that there would be significant expense associated with the demolition of this part of the Hotel and rebuilding its eastern exterior wall. This would be a big job. The encroachment includes three levels, including a below-ground foundation and basement. And, because the petitioner's building has been erected right up against the Hotel, it would be difficult to perform demolition work without damaging the parties' buildings.
- [17] The most significant cost to the respondents, however, would be the ongoing loss of use of this part of the Hotel. The ground floor of the Hotel contains several rooms that are partially located within the encroachment area. The planned renovations include conversion of the large rooms on the first floor to commercial rental units, and I accept the respondents' position that the loss of the encroachment space would impair future operation, and perhaps feasibility, of the plan to preserve the Hotel.
- [18] On the other side of the coin, I accept that the loss of use of the encroachment area has had and will continue to have a financial impact on the petitioner. I think it likely that, but for the encroachment, the petitioner's improvement would have been built out to the property line. If the encroachment is removed, Mr. Rideout deposes that the petitioner would promptly develop the encroachment area either by adding onto its building or creating a breezeway for access to the rear of the property. I accept the petitioner's position that the transfer of the encroachment area to the respondents would have a continuing effect on the profitability - and thus the value - of its property.

## Other Considerations

- [19] The petitioner argues that the respondents "should not be granted the equitable remedy that they seek as they have not come to court with 'clean hands.'" In particular, the petitioner points to the respondents' failure to follow through as yet with their stated intention to erect a temporary wall to prevent work from occurring in the encroachment area until the encroachment issue is resolved, and the respondents' refusal to allow representatives of the petitioner to access the Hotel to take photos of the interior of the encroachment area. Further, the respondents' photos of this area show that it is using the encroachment area as

storage.

- [20] The respondents' position is that they have acted in good faith throughout. They have ensured that the encroachment area is preserved in its current state pending the outcome of this proceeding, and have provided current photos to the petitioner to show the present state of that portion of the Hotel premises. Moreover, they argue that it is the petitioner that fails to come to court with clean hands; in this, they rely in particular on the failure of the petitioner to name its mortgagee as a party, potentially complicating the resolution of the proceeding.
- [21] I acknowledge but set aside the question of whether the respondents are, strictly speaking, seeking an "equitable remedy" (i.e. versus a statutory remedy based on the equities between the parties); the Vineberg considerations are not exhaustive and if a party seeking a vesting order or easement has been guilty of misconduct, I think the misconduct can be relevant. However, I am not persuaded that the petitioner's arguments have sufficient merit to result in any significant effect on the balancing exercise called for by s. 36.

## Determination

- [22] I conclude that the totality of the evidence, including the Vineberg considerations, is decidedly in favour of exercising the s. 36 discretion in favour of a resolution other than removal of the encroachment. The fact that the principal of the petitioner was aware of the extent of the encroachment of this historic hotel before the purchase of the adjoining vacant lot, and that the petitioner erected its building around the encroachment distinguishes this case from authorities cited by the petitioner in which an encroachment has been ordered removed. I find that with an appropriate compensation order, the equities are best served by preserving the current easternmost part of the Hotel.
- [23] With his knowledge of the problems with old surveys, Dr. Fletcher could have exercised more diligence before FHI took its various steps toward assuming ownership of the Hotel property. Although he expected the problem, if any, was a matter of centimetres rather than metres, he should have been more careful. In Vineberg, at para. 20, Leggatt J. suggested that a party seeking an easement should have an honest belief in the absence of an encroachment to be awarded this remedy, and that negligence is not an honest belief. It may be that Dr. Fletcher's ignorance of the correct boundary line can be characterized as a matter of negligence. However, despite the fairly categorical language in Vineberg, I instruct myself in line with the caution expressed in *Taylor v. Hoskin* that the Vineberg considerations are not "tests" to be applied rigorously in every case.
- [24] In this case, I conclude that the facts that bear on the comprehension of the property line are relevant but not determinative. Dr. Fletcher's negligence is much closer to an honest belief in the absence of an encroachment than it is to full knowledge of the extent of the encroachment: his assumption that any encroachment would be in line with the insignificant surveying errors he had previously encountered in Cumberland turned out to

be wrong, but it was understandable. And, I see little relevance to the fact that upon reorganization of the renovation project (i.e. FHI taking in a partner) FHI's partner was advised of the encroachment. I take into account that Mr. Rideout understood the degree of the encroachment when he purchased the vacant lot, and that it was evidently not a priority for him to resolve the encroachment issue before carrying on the building construction project to completion.

- [25] The exercise of the s. 36 discretion in these cases is highly dependent on the facts. I am not surprised that none of the many cases cited to me are particularly useful comparators. The petitioner placed heavy reliance on *Gueldner v. Nichele*, 2013 BCSC 2354, an example of the Court making an order for the removal of fairly significant improvements; Justice Verhoeven ordered the removal of parts of a barn, shed, and fence that encroached on a neighbouring rural property. While there are some similarities to the case at bar, there are important distinguishing features. The rural versus urban context is very different. Further, the Gueldners (who owned the barn and other encroachments) were aware at the time they purchased that the improvements were not wholly on their property. Adding to the case for removal were Mr. Nichele's plans for that part of the property encroached upon which were frustrated by the encroachment. He planned to build a road along that edge of his property in order to provide access to his pasture lands on another part of his property. My sense of it is that the continuing existence and the encroachment in the *Gueldner* case would be a greater imposition than in the case at bar.
- [26] The respondents referred me to *Rowse v. Halloran*, [1997] B.C.J. No. 2213 at para. 23. The purchaser's awareness that a workshop encroached on their property, and their choice to build their improvements where they did, were weighed in the balance of convenience analysis. Justice Quijano declined to order the removal of the workshop. The distinguishing feature of the *Rowse* case is that the presence of the workshop had a limited effect on the use and enjoyment of the adjoining property, whereas in the case at bar the presence of the encroachment has some ongoing financial impact on the petitioner.
- [27] I heard little argument on the pluses and minuses of a vesting order versus an easement. I consider that a vesting order, effectively redrawing the property boundaries to the extent of the encroachment identified in the survey that is acknowledged by both sides to be accurate, is a better course than to make an easement order. It will reduce uncertainties that might arise from interpretation of an easement and it will reduce and perhaps eliminate the possibility of future litigation between these parties.

## Compensation

- [28] Justice Dardi canvassed several cases with varying methods for fixing compensation under s. 36 in *The Owners, Strata Plan VR 10 v. EE Management Corp.*, 2016 BCSC 1597 at paras. 32-37. At para. 38, she concluded that the jurisprudence does not endorse a preferred method of assessing the compensation amount.

- [29] In November 2023, the respondents obtained an opinion from an appraiser, Kelly Sayers, of the "contributory market value" of the 41-square-metre encroachment area. That is, the appraiser was asked for his opinion on the amount that the encroachment area would add to the value of the Hotel property if a vesting order is granted. The opinion is expressly restricted to the value of the land only: the conclusion of \$35,000 contributory value "assumes that the [encroaching] parcel of land is vacant or can be made vacant by demolishing any improvements."
- [30] I accept the opinion, but there are limits to its usefulness as a measure of appropriate compensation. First, the reality is that the respondents have firm plans not to demolish the Hotel including the portion that is encroaching so the added value of assumed vacant land is certainly at odds with the current use of the Hotel property. I understand the explanation in the appraisal report for the approach taken by the appraiser, but it places the resulting opinion at some distance from the reality of the case. Secondly, the contributory value to the respondents is only one side of the coin; they would be enriched by the addition of the 41-square-metre area to their property, but there is a deprivation to the petitioner of losing this area that is, in my view, at least as important.
- [31] The petitioner commissioned an opinion from Dan Wilson, an appraiser, that focuses on this deprivation. He estimates potential additional earnings to the petitioner assuming removal of the encroachment. Firstly, on the assumption of removal of the encroachment before the petitioner constructed its building, the appraiser concluded that the greater available leasable space would have yielded about \$15,500 gross income per annum. The net income is estimated as \$11,000 per annum. The appraiser did not carry on the analysis to translate this annual loss to an estimate of lost property value. However, later in the report, the appraiser converts an estimate of value of \$40,000 for the 41 square metres to an annual gross rental return of \$2400 per annum. Applying the same approach in reverse to the lost rental income implies a loss of approximately \$250,000. While I think this evidence about what would have occurred if the encroachment was removed before the petitioner constructed its building is relevant and should not be wholly ignored in the compensation assessment, fairness demands that its weight be much reduced by the choice the petitioner made to proceed with the construction without addressing the encroachment.
- [32] I pause to note that Mr. Rideout has deposed to extra professional fees, carrying costs, loan and mortgage interest, and other expenses associated with redesigns of the petitioner's building and associated delays allegedly caused by the presence of the encroachment. It is not necessary to say more about this evidence. The petitioner does not seek compensation for these alleged losses. Its claim for compensation, which is made strictly in the alternative to its principal claim for an order of removal of the encroachment, is articulated in paragraph 2 of Part 1 of its response to the respondents' cross-application for a s. 36 order:

If the Court grants the order sought . . . [the respondents] should pay an amount to [the petitioner that takes] into account the current value of [the petitioner's property], the amounts that [the petitioner] has already paid for taxes and insurance for the encroachment, past and ongoing trespass, the fact that [the petitioner's] profits from [its] Property will be permanently diminished and the fact that the [respondents' partnership's] profits will be permanently increased.

- [33] Mr. Wilson was also asked by the petitioner to estimate what the petitioner could earn if the encroachment were removed now. Mr. Wilson posits potential uses of the 41 square metres including a long-term ground lease to the respondents, the development of a small patio, or storage units. The long-term ground lease strikes me as the most solid premise by far, and it would not have associated construction costs. As I have just noted, the ground lease assumption translates from an estimated \$2400 per annum to a \$40,000 property value loss.
- [34] The petitioner seeks, and the respondents concede, that the compensation ought to include reimbursement for a proportion of the property taxes and insurance paid by the petitioner. The respondents propose a payment of \$7000 on this account, representing the 6.2% of the petitioner's property occupied by the Hotel encroachment. I find that this is a fair estimate of this aspect of the petitioner's claim.
- [35] On all of the evidence, I conclude that \$60,000, including the reimbursement for property taxes and insurance, is an assessment that fairly compensates the petitioner for the loss of the encroached-upon property and reflects the equities between the parties.

## Damages Claim

- [36] The respondents objected to the petitioner's amendments to its petition adding a claim for damages for trespass since July 2022, and a claim for punitive damages. The respondents also objected to the admission of Mr. Wilson's appraisal report of 9 August 2024, on the basis that it came to their attention long after it should have under the Supreme Court Civil Rules.
- [37] In these circumstances, an adjournment of all or part of the hearing was in prospect. However, in the course of the hearing, the respondents relaxed their opposition to the amendments and the admissibility of the Wilson evidence to which I have just referred. This commendably practical approach avoided an adjournment and paved the way to the timely conclusion of this litigation.
- [38] The respondents acknowledge that their continuing, albeit minimal, use of the encroaching premises to store some items constitutes a trespass, but urged that any damages award ought to be modest. Amongst other cases, I was referred by the petitioner to *Gambling v. Dykes*, 2021 BCSC 938, aff'd 2021 BCCA 434, wherein Justice Winteringham, then of this court, awarded \$5000 nominal damages. I consider that the facts of the case at bar also call for nominal damages, but in a lesser amount. I fix the damages at \$2500.

[39] In support of the petitioner's punitive damages claim, it relies on the absence of the temporary interior wall that the respondents plan to erect, and the continuing use of the encroaching portion of the premises. The nominal trespass damages award is a sufficient consequence for the minimal use the respondents have made of the part of the Hotel premises that encroaches on the petitioner's property. I reject the submission that the respondents have acted in a malicious, oppressive, or high-handed manner. The claim for punitive damages is, with respect, entirely without merit.

### Form of Order and Costs

[40] There may be complications arising from the fact that the mortgagee of the petitioner's lands was not named by the petitioner as a party respondent. However, as I mentioned at the outset of these reasons, the mortgagee did have notice of the cross-application; I gather that there have been no indications of interest or concern from the mortgagee.

[41] It will, however, be necessary for the parties to consult with the mortgagee about this judgment, and the form of the s. 36 order. The parties, and the mortgagee, have liberty to apply if they cannot agree, including with reference to any cost or expense associated with carrying out the vesting order.

[42] Without knowing if there were offers made that might be relevant, my inclination is to order that each party bear their own costs. The encroachment was admitted. The principal issues were whether the encroachment should be removed and, if not, the amount of compensation to be paid. The respondents succeeded in staving off a removal order, but the compensation order was larger than they urged. If either party seeks a different order, a brief hearing can be organized through Supreme Court Scheduling. If no party contacts Supreme Court Scheduling within 14 days to indicate that a different costs order is being sought, the order will go with no costs.

[43] Finally, I note that in the midst of the hearing I ordered the amendment of the style of cause to delete the incorporation numbers of the corporate parties. This need not be reflected in the form of order, but when the order is drawn it should bear the corrected style of cause.

"Thompson J."

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