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CANADA / JUDGMENT

## 517521 B.C. Ltd. v. Brar

2021 BCSC 2597

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COURT

Supreme Court of British Columbia

DECIDED

4 November 2021

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2021 BCSC 2597 517521 B.C. Ltd. v. Brar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

517521 B.C. Ltd. v. Brar,

2021 BCSC 2597

Date: 20211104

Docket: 240019

Registry: New Westminster

Between:

517521 B.C. Ltd.

Plaintiff

And

Kewal Singh Brar,

Sarbjit Kaur Brar,

Harjit Singh Gill and

Manjinder Kaur Gill

Defendants

Before: The Honourable Mr. Justice Jenkins

Oral Ruling Re Application for an Interlocutory Injunction

In Chambers

Counsel for the Plaintiff (appearing via teleconference):

H.S. Sidhu

Counsel for the Defendants (appearing via teleconference):

J.S. Malik

Place and Date of Hearing:

New Westminster, B.C.

August 19, 2021

Place and Date of Ruling:

New Westminster, B.C.

## **November 4, 2021**

- [1] THE COURT: The plaintiff seeks an interlocutory injunction restraining the defendants from digging or excavating existing soil, and adding soil to farm land parcels located in Abbotsford, B.C. The parcels were sold by the plaintiff to the defendant pursuant to an agreement of purchase and sale made August 30, 2016, the sale completing on September 19, 2018.
- [2] The Gill defendants are husband and wife, and purchased the "first parcel." The Brar defendants are also husband and wife, and purchased what has been referred to as the "second parcel." Overall, there are nine parcels of farm land, seven of which continue to be owned by the plaintiff.
- [3] In his affidavit of August 4, 2021 filed on August 6, 2021, Jasbir Singh Banwait, the director of the plaintiff, deposed:
11. The Plaintiff added topsoil to the Properties, to make them arable before their sale was completed.
- [4] Carrying on:
- [A]s per the requirements of the Provincial Agricultural Land Commission and the City of Abbotsford.
- [5] In his affidavit made August 4, Mr. Banwait also deposed at para. 13 that the Agricultural Land Commission ("ALC") then inspected the properties and deemed them to be arable land properties, as defined in that affidavit as the two parcels which have been sold to the defendants.
- [6] The agreement of purchase and sale entered into by the parties was not before the court on this application. Mr. Banwait further deposed at para. 15 of his affidavit made August 4, 2021:

15. The Plaintiff posted a financial security in the form of Letter of Credit in the amount of \$300,000 with the Minister of Finance in favour of the ALC and the City.
- [7] Next, Mr. Banwait deposed at para. 16 that the letter of credit was "to ensure that the Nine Parcels are reclaimed to an agricultural standard and converted for agricultural use."
- [8] The plaintiff has not placed in evidence the letter of credit. However, as stated in paras. 16 to 18 of his affidavit, first of all, the letter of credit is to ensure that nine parcels are reclaimed to an agricultural standard and converted for agricultural use. The letter of credit will expire, and the amount will be released to the plaintiff only when the ALC and the City of Abbotsford conduct a final inspection of the nine parcels together and deem that they are reclaimed to an agricultural standard.
- [9] As for the minutes of resolution of the ALC, the plaintiff must complete the reclamation of the nine parcels by January 31, 2024. The ALC will then conduct a final inspection. The said minutes of resolution of the ALC were attached to the affidavit as Exhibit C.
- [10] Regarding the activities of the defendants which have given rise to this application, Mr. Banwait deposed around late June 2021 and early July 2021, the defendants had been digging out topsoil from the properties without the plaintiff's approval. The defendants have also been adding more soil to the properties and altering their arable state that existed at the time of the sale. It is my understanding that the defendants are doing the soil digging and the soil addition because in a letter from their counsel to the plaintiff's counsel, they allege that the plaintiff did not add the "agreed-upon" topsoil to the properties.
- [11] Included in Exhibit E to Mr. Banwait's affidavit is a letter of June 9, 2021, from the former counsel for the defendants to the plaintiffs which referred to the contract of purchase and sale between the parties in 2016, continuing:

As part of the contract, you agreed to add top soil to the aforementioned properties according to the scope of work identified by Pat Brisbin, which in turn was based on the requirements set out but the Agricultural Land Commission and the City of Abbotsford, on or before September 30, 2019.

Our clients advise us that you breached the contract by adding waste fill to the properties, including garbage and debris, instead of the agreed upon topsoil, which makes the properties unsuitable for farming. Our clients' position is supported by a written environmental assessment report.

- [12] Counsel then proceeded to demand the plaintiff remediate the lands to bring them in compliance with the contract of 2016, failing which the defendants would perform the work claiming the costs of the remediation in damages against the plaintiff. Counsel for the plaintiff responded on July 16, 2021, claiming the plaintiff had added topsoil as required by the ALC and that the ALC had passed inspection. Counsel also advised counsel for the defendants that the letter of credit, at times referred to as a bond, amounted to \$300,000, which had been lodged with the ALC and the City of Abbotsford, which are to be released

back to the plaintiff upon a final inspection of all nine parcels of land.

- [13] It is apparent that the major concern of the plaintiff is to eventually secure release of the bonds securing up to \$300,000 from the ALC and the City at the time of trial inspection. In his letter of July 16, 2021, counsel for the plaintiff alleged that due to the activities of the defendants at the time of final inspection, the ALC and the City of Abbotsford "might deem" that the properties are no longer arable and claim the remediation costs under the bond or letter of credit.
- [14] In an affidavit of August 14, 2021, the defendant, Mr. Brar, attached the letter of September 10, 2018, from the plaintiff to Mr. Brar stating that the plaintiff would be adding topsoil to the property as per Mr. Brisbin's report and that once the ALC's approval is received, the plaintiff agreed to complete the addition of topsoil as soon as possible. That addition of topsoil prior to the conveyance was the work which Mr. Banwait deposed to and stated had been approved by the ALC.
- [15] Subsequently, the defendants retained a consultant to determine the extent of the property's arability. The consultant determined the property was not arable and was unsuitable for their intended farming purposes. After failing to arrange a prompt meeting with Mr. Banwait, the defendants commenced the excavation and soil placement activities which have given rise to this application.
- [16] The concern of the plaintiff is that the reclamation of the property must be completed and inspected by the ALC and if the property is not deemed arable and remediated as required by the ALC, the ALC will then claim under the letter of credit and claim the costs under the letter of credit. What is clear is that there is a dispute between the parties as to whether the parcels were arable when purchased by the defendants.
- [17] The plaintiff submits it was arable and suitable for the defendants' farming purposes and was deemed so by the ALC, in or about the time of the purchase. Even though the plaintiff submits the land was arable, it retains potential liability should the land be deemed not arable by the ALC sometime before January 2024, and the ALC would seek recovery of costs under the letter of credit.
- [18] Based on the affidavit before me, it appears as though the defendants were not made aware of the letter of credit which had been provided to the ALC and the City. It is also noted that the plaintiff has made an alternate claim if not successful in obtaining an injunction. The alternate claim is that if the ALC and the City deem the property not arable on final inspection following the work being carried out by the defendants in 2021, the defendants compensate the plaintiff with the cost of making good the properties and compensate the plaintiff if the ALC and the City fail to return the letter of credit to the plaintiff.

- [19] Turning to the law. The long-standing test for granting an injunction is that which was established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), which requires the applicant to demonstrate that it will suffer irreparable harm should the injunction not be granted, defining "irreparable harm" as harm which either cannot be qualified in monetary terms, or which cannot be cured, usually because one party cannot collect damages from the other.
- [20] The defendants have submitted, and I agree, that the only harm that could befall the plaintiff is monetary in nature, if it is found the land is not arable. The cost of remediating the lands can be quantified, and is also limited as between the plaintiff and the ALC and the City to the amount in the letter of credit, should neither party remediate the land. As well, previously in these reasons, I referred to how the ALC and the City might deem the land not arable and could thereby presumably claim on the letter of credit. It is not a matter of speculating whether or not there will be a claim on the securities posted by the plaintiff; and if there were claims on the bond, that claim would amount to the cost of any remediation, which would be calculable and would not be the subject of an injunction.
- [21] Other considerations on whether or not to grant an injunction, such as the strength of the plaintiff's case and the balance of convenience, do not lean towards granting an injunction. The plaintiff has no interest in the two parcels sold to the defendants. Whereas if an injunction was granted suspending the right of the defendants to work the land, the defendants will be further delayed in being able to farm their land. These factors clearly fall in favour of the defendants in the balance of convenience.
- [22] Regarding the strength of the plaintiff's case, there is currently no way of assessing whether the ALC and the City will judge the arability of the land as of January 2024. If the ALC and the City find the land to be arable, the defendants will presumably claim against the plaintiff the cost of the work they have carried out since the purchase, and the plaintiff will receive the letter of credit security back without a claim.
- [23] If the land is found not to be arable, the ALC and the City will presumably claim under the letter of credit and order further remedial work. Responsibility for the failure to achieve arable land would be a contest between the parties now before the court. Either way, it is not possible to assess the merits of the plaintiff's claim or what the nature of that claim may be.
- [24] I also note the defendants' submission that if the plaintiff has not pled a cause of action in the notice of civil claim, it is likely because the claim is premature. The plaintiff has also submitted that their consultants would suffer a loss of reputation. If so, I find it unlikely, and any loss of reputation could also be the subject of the quantification of damages and would hardly be irreparable.
- [25] The applications of the plaintiff are dismissed, and the defendants are entitled to their costs of this application. Those would be costs in any event of the cause, and payable forthwith.

"Jenkins J."

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Prepared on 26 October 2026 · Esheria