

CANADA / JUDGMENT

Arpeg Holdings Ltd. v. Mathisen

2012 BCSC 1812

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Supreme Court of British Columbia

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2012 BCSC 1812 Arpeg Holdings Ltd. v. Mathisen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Arpeg Holdings Ltd. v. Mathisen,

2012 BCSC 1812

Date: 20120717

Docket: S136297

Registry: New Westminster

Between:

Arpeg Holdings Ltd., Arpeg Farms Ltd.,

Carolyn Bell, Matthew Bell, Alexandra Mathisen,

Benjamin K. Mathisen, Emily Mathisen, Joanna Mathisen,

Rachel Mathisen, Sarah Mathisen, Kate Montgomerie,

Molly O'Callaghan, Deborah O'Malley, Candace Radcliffe,

Drew Ratcliffe, Beth Turner, and Megan Gratton McNeil Zandstra

Plaintiffs

And:

Bertha Margaret Mathisen, William John Mathisen,

Matfam Property Holdings Ltd., and Whistler Ski Lodges Ltd.

Defendants

Before: The Honourable Mr. Justice Masuhara

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

C.A. Clark

Counsel for the Defendant William Mathisen:

A.S. MacKay

Place and Date of Hearing:

New Westminster, B.C.

July 13, 2012

Place and Date of Judgment:

New Westminster, B.C.

July 17, 2012

- [1] THE COURT: The plaintiffs apply for an interlocutory injunction requiring Mr. William Mathisen to vacate the long-time Mathisen family summer property in Surrey, B.C., called the Crescent property. Mr. William Mathisen is a trustee of the Crescent property.
- [2] The cause of action in this case is an allegation of breach of trust against Mr. William Mathisen and Mrs. Bertha Mathisen. The latter is mother to William Mathisen and grandmother to the personal plaintiffs and is now deceased. I will refer to them as Bill and Bertha, respectively, for convenience only.
- [3] The Crescent property is about six acres of farmland that was purchased by Mr. Arne Mathisen and his wife, Bertha, in about 1976, to be the Mathisens' family summer home. The family included their seven children, Peggy Ann, Elizabeth Jane, Peter, Mary, Chris, Bill, and Barbara. As grandchildren and great grandchildren have come along, they too have become part of the expanded family summering at the Crescent property.
- [4] Arne Mathisen and Bertha over the years successfully accumulated wealth in real estate investments. A group of companies under the name Arpeg was created to hold these investments. Arne Mathisen died in 1998, and from that point on Bertha, has been the focal point of the family and a key decision-maker with respect to the Arpeg group.

- [5] On the Crescent property is a large residence called the main house, which is approximately 5,000 square feet and has 11 bedrooms, and a cottage, which houses a full-time caretaker for the property. This property has a large patio area, a pool and a tennis court. A section of the land is used as a soccer field. The evidence is that the Mathisen family has, since the property was established, spent a good part of their summers there together enjoying the benefits of the property and the activities in the community. This property is held in a trust.
- [6] Alongside the main house are three houses which are on lands not held in the trust but held by Arpeg Farms Ltd. These houses have been assigned for use to three of the children, Mary, Elizabeth Jane and Barbara. Within the main house, rooms were assigned to certain children. There is a room for Peter, there is a room for Bill, and there is a room for Anne. Bertha occupied the master bedroom.
- [7] In March 2008, for tax planning purposes, Bertha had certain properties placed into trusts. The Crescent property is held by a trust created March 18, 2008, and called the Matfam Property Trust No. 1 (the "Trust"). Also held in the Trust are three Whistler homes. The original trustees under the Trust were Bertha, Chris, Barbara and Bill.
- [8] On March 18, 2010, Bertha appointed her grandson Andrew as a trustee. On April 21, 2011, Barbara and Chris were removed as trustees by their mother. The beneficiaries under the written trust deed are specified to be the grandchildren.
- [9] In the past few years family tensions have surfaced. A glimpse of these tensions was presented in two cases brought before me involving this family earlier this year. The first is a conversion and breach of trust action against Bertha, and the second is an oppression petition brought by Bertha and Bill in relation to the family companies. The opposing parties in the latter action are Bertha and son Bill on one side and the children on the other. My Reasons are indexed as 2012 BCSC 96.
- [10] In 2011 Bill was removed as a director and officer of various Arpeg companies. His only source of income was through the positions he held in the Arpeg companies. In August 2011, his tenancy for his residence in an apartment building on Davie Street owned by Arpeg Holdings was terminated by Arpeg. That termination was rescinded in February 2012. Also in 2011, Bertha was removed as president of Arpeg Investments Ltd., Arpeg Holdings Ltd. and Arpeg Farms Ltd.
- [11] Bertha was infuriated by the actions taken against Bill and herself. She believed that her income from the Arpeg companies had been cut off and that property taxes for her home had not been paid, among other complaints. As a result, she deposed that she attended the Arpeg group's bank and withdrew \$1.8 million from the line of credit of Arpeg Holdings and placed the sum into her personal account to pay for her expenses and the operation of various trusts. She says this decision was hers alone and not Bill's. She referred to an independent assessment of her mental condition that she had requested in May 2011 to demonstrate her independence. The assessment was filed in the earlier proceeding before me (See: 2012 BCSC 96). Arpeg has sued Bertha and Bill for the taking of the monies from the

line of credit. The sum taken was later paid into trust with her lawyer pending resolution of that litigation.

- [12] There are now several proceedings that have been launched that reflect the alignment of interests as I have described. I believe the proceedings, including this case, total now around six.
- [13] Bertha prior to her death in November 2011 deposed that she had trust and confidence in Bill and that she lacked confidence in her other children in running the affairs of the Arpeg companies. These other children have alleged that her views are biased by the influence of her alcoholic son Bill. Bertha has denied that such was the case. Bill is the sole executor of Bertha Mathisen's estate, and at present he and his son are the trustees of the Trust.
- [14] In this application the beneficiaries say that Bill is a rude and disagreeable man. It is clear that Bill has had serious challenges with alcoholism. He has gone into treatment four times. These treatment programs have been paid by Arpeg Holdings. Descriptions of his negative nature are found in the affidavit of Ms. Bell, Bill's sister, who deposes that:

Bill has a long history of insulting, degrading and being downright mean to the other members of our family.

Examples she points to are:

He once told our daughter that she was fat and that only lesbians play soccer. After one of our sons stopped playing hockey, Bill told him that he knew he would never have succeeded as a hockey player.

- [15] A grandchild, Megan, deposes at length of the negative conduct of Bill. She stated that:

Every evening during the summer my grandma hosted a happy hour on the porch outside the big house. Bill would generally sit next to my grandma and typically would be talking about people being idiots, the state of the economy, politics and other controversial topics. He would ask weird questions like, would you prefer to be an American or a Quebecois, and would yell at whoever answered about their answer.

She also mentioned an unsettling event where she noticed Bill sitting with a gun in the living room of the main house. She was moved to call the police. It turned out to be a pellet gun. Nonetheless, it was an upsetting event.

- [16] Drew, a grandchild deposes that his uncle's:

addiction has often resulted in tension and fighting at the Crescent property. Over the years I have personally observed Bill picking fights with guests at parties and in particular at my sister Candace's wedding in 1998, scream at the RCMP during a parents' night out event in 2002 or 2003, as well as making continual cutting and hurtful remarks to family members and guests. Bill often started arguments about everything from politics to religion to his siblings and their children. I would describe him as a troubled man.

- [17] Based on these experiences and because it appears Bill has taken up residence on the Crescent property and, even more upsetting, done so in Bertha's room, it is said to be simply not possible to attend the property to enjoy it as in the past and as intended by the Trust.
- [18] Bill does not contest the statements and the conduct attributed to him. He notes that he had emotional difficulties in 2009 and 2010 arising from the ending of his marriage and his drinking. He says, however, that he has remained sober since February 2011. Through his affidavit he states a form of apology wherein he deposes:

If I was rude to any of my family members during 2009 and 2010, I apologize.

Hopefully his words will be translated to actions moving forward.

- [19] The essence of the beneficiaries' submission is that Bill as trustee is improperly taking a benefit by residing in the property and that his presence at the property makes it impossible for the plaintiffs to attend the property and enjoy it as they had in the past.
- [20] Surprisingly, there has not been a request from any of the plaintiffs to Bill to use the Crescent property during the summer, or other times, and there has been no request on the part of the plaintiffs for Bill not to enter or not stay at the Crescent property or the main house.
- [21] Bill deposes that he has not dissuaded anyone in the Mathisen family from using the property. I note that there is no income generated from the Crescent property though the Trust permits the property to be used to generate income or to be sold. I am told through counsel that Bill wishes the property to continue to be used for family purposes as it has in the past.
- [22] In response to my query as to what accommodations should be made by Bill as an interim measure to allow enjoyment of the Crescent property, the beneficiaries advise that they wish an advisory panel of grandchildren be struck to meet and decide issues with respect to the use of the Crescent property, with Peggy Anne, the eldest child of Bertha, to chair such meetings.
- [23] Bill does not agree with this. Rather, he proposes an immediate and specific proposal, which is that he will not attend the property on July 16th to 27th; August 8th to 15th, which includes the traditional parents' night out event; and August 22nd to 29th, which includes a synchronized swimming show and the swim club wrap-up event. I note that the swim club is a significant feature of past summers for the family.
- [24] Further, in response to the beneficiaries' assertion that the Crescent property is to become the family focal point for fall and winter events traditionally held at Bertha's Angus Street home, which is now to be sold, Bill proposes that:
1. He will not be present on the Crescent property during the day or the night on Thanksgiving, which is October 8, 2012, when the family has its Thanksgiving dinner.

2. He will not be present on the Crescent property during the day or night October 26th to 28th to accommodate the traditional family Halloween event held the Sunday before Halloween.
3. He will not be in attendance during the day or night on December 23rd, which is the traditional family Christmas dinner.

I note these fall and winter dates certainly are a change from the status quo where the Crescent property was not used for these events.

- [25] The evidence indicates that there are strong complaints about Bill. Family members, though, continue to attend the Crescent property, based on the material submitted, and use the lawn and yard, as well as the houses on the Arpeg farm property. The evidence also indicates that Bill has done some renovations and maintenance to the main house, though I note there is a full-time caretaker.
- [26] In terms of the test for an interlocutory injunction, the cases are well-known: *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, *Attorney General of BC v. Wale* (1986), 9 B.C.L.R. (2d) 333, [1987] 2 W.W.R. 331 (C.A.), and the *Canadian Broadcasting Corp. v. CKPG Television* (1992), 64 B.C.L.R. (2d) 96, 10 B.L.A.C. 211 (C.A.).
- [27] The test for granting of an interlocutory injunction has been expressed as a three-part test requiring:
1. an assessment of the merits;
 2. an assessment as to whether the applicant would suffer irreparable harm if the injunction were not granted; and
 3. a determination of the balance of convenience or inconvenience.
- [28] The issues in the submissions focused predominantly upon whether harm from the granting or refusal of the injunction would be irreparable. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured. In this case the plaintiffs' submissions also focused on the alteration of the status quo.
- [29] In terms of irreparable harm, the plaintiffs submit that it is a loss of time at this legacy property. In terms of the alteration of the status quo, the plaintiffs submit that Bill has done so by taking up residence on the property. This has been exacerbated by his occupation of the master bedroom which was formerly occupied by Bertha during the summer. The irreparable harm complained of is his presence and the negative atmosphere that he creates, which, it is argued, is sufficient to prevent the beneficiaries from enjoying in the property.
- [30] In my view, I do not find that the complaints amount to irreparable harm. There may be a temporary disruption here; however, people are free to attend the property and use it. In fact, this is being done by some family members. The deed of trust provides that vesting

date is in 2088, so there is considerable time here for the beneficiaries to resolve their issues with the defendant. Moreover, as I have already noted, there has not been any request by the plaintiffs to Bill to not be there at certain times, and I note that the underlying pleadings do not seek to have Bill removed as a trustee even though a breach of trust is alleged. I also note that Bill has commenced another action for rectification asserting that he and others were entitled to be beneficiaries under the Trust as well.

- [31] As disagreeable and hurtful as Bill's behaviour and comments have been, they are not new but have been a negative feature of many past summers. In fact, the plaintiffs' materials suggest that Bill's conduct and statements were unfortunately supported by Bertha. Hopefully, given Bill's apology and recognition of these concerns expressed, things will be different on a prospective basis.
- [32] In terms of a change in the status quo, I do not think that this is a strong point. As mentioned, it is apparent that Bill has always been present in the summer at the property, notwithstanding his disagreeable conduct and statements, and I note that some family members had begun to reduce their time at the property already some years ago.
- [33] The real change here is the death of Bertha, who was the glue who kept things in line and was much loved. There is evidence that Bertha permitted Bill to stay in the Crescent property. The evidence at this point does not indicate that Bill has set up full-time, permanent residence there, though I note he says he stays at the residence three to four times a week and the balance at his girlfriend's place.
- [34] I also note that this case is only part of a broader family dispute where, when reviewed from that perspective, the altering of the status quo can arguably be said to have been caused by the other side of the family. Again, this is simply an arguable point. In this regard, his tenancy at his permanent address on Davie Street was terminated by Arpeg. Bill was also terminated as an employee and director of the Arpeg companies. Those roles were his sole source of income.
- [35] In any event, the very nature of a discretionary trust, which is broadly worded in this case, does not lend itself well to a status quo analysis. Accordingly, the application for an interlocutory injunction is denied. But I add that the proposal by Bill, in the absence of anything more definitive from the beneficiaries, seems for the time being to be a reasonable one, and, as I understand things, Bill is prepared to consent to such an arrangement. I would therefore support such an order.
- [36] In addition, I think the idea of an advisory panel of the grandchildren from each family would be a useful forum for arriving at how the property should be used by each family fairly, with the guiding principle that no family is to be excluded. Recommendations from such a panel could then be put to the trustee or trustees for consideration in the trustee's discretion.

- [37] Finally, given the proliferation of proceedings, a management judge could enhance the efficiency. It seems that the trust-related cases should be dealt with at the same time and in the same manner, as I have already ruled in regard to the misappropriation and oppression proceedings.
- [38] I therefore invite counsel to make any submissions regarding this ruling or this consideration regarding management of the cases. That concludes this ruling.
- [39] MS. CLARK: Thank you, My Lord. Just a question with respect to your statement that you would support such an order that a schedule will be put into effect. Are you in fact making that order today, My Lord?
- [40] THE COURT: I just wanted to make sure. I thought that is what I heard, that the parties would consent to this, or at least Bill Mathisen would be consenting to this. I just want to make sure it was a consent as opposed to an agreement that he would do so.
- [41] MS. CLARK: Okay.
- [42] THE COURT: I am sorry, are you Mr. MacKay?
- [43] MR. MACKAY: MacKay, M-a-c-K-a-y. So Ms. Clough is away.
- [44] MR. MACKAY: We had talked about this point, which was that if he made a concession, then he could be viewed as having "lost" his application. If you are opposing an injunction and then you make a counterproposal as to terms as to occupation. It seemed reasonable as a trustee to try to mitigate the harm in the application by making a proposal, but at the same time he didn't want to have lost his injunction application. Sort of a gamble.
- [45] THE COURT: I recognize that. That is why I am saying I would support such an order, just so that everybody understood it is without prejudice obviously in terms of a consent to accommodate for the time being, and I thought that that was a positive step on the part of Bill Mathisen in terms of trying to reduce some of the tension here, recognizing that there is a constellation of things in dispute. So, Mr. MacKay, Ms. Clark is certainly looking for something to be documented in this regard; right?
- [46] MS. CLARK: Yes.
- [47] MR. MACKAY: It seems like it would be useful to have a document to avoid further disputes, and those are the dates that Ms. Clark has told me about. So that could be included in the order, but can the order go further and contain some sort of term as to cost, because as a trustee - well, as a defendant, generally the costs would be in the cause this way. That would result in, I suppose, the unsuccessful party paying the costs. I know Ms. Clark made submissions about whether the - ordinarily the Trust could indemnify the trustee, but there is no money in this trust to pay the defendant's costs.
- [48] THE COURT: Are you looking for costs because the plaintiffs were unsuccessful?

- [49] MR. MACKAY: Well, that would be the general approach, but the other alternative would be to have the Arpeg reimburse the Trust their costs so that the costs - so that the defendant can reimburse himself. So far he's personally bearing these costs because there's no fund in the Trust. He would have to sell the Trust property, which obviously that wouldn't be very -
- [50] THE COURT: Well, he does not have to sell. As I already mentioned, I mean, this property can be income-generating.
- [51] MR. MACKAY: It could be. It doesn't seem like - I'm not sure what Ms. Clark's instructions are there, but it doesn't seem like they're going to rent the properties to generate the income to cover the cost of the defence of this proceeding.
- [52] THE COURT: Well, I think that is the problem here. We were talking about this. There was to be some capital originally from Mrs. Bertha Mathisen to pick up some of the expenses of this property or the trusts that she was looking after. There is nothing there?
- [53] MR. MACKAY: Right. The funds aren't in the Trust.
- [54] THE COURT: Ms. Clark, do you have any submissions on this?
- [55] MS. CLARK: My Lord, we're looking at two different submissions here. The one, the typical costs follow the event submission. The second submission is that you make an order for something that actually isn't even before you, and I think it's a matter for another day, frankly, that a company that isn't a trustee and isn't part of the Trust pay the costs of the trustee. Now, what I can advise the court, and Mr. MacKay is probably not aware of this, but there has been communications between Ms. Clough and our office with respect to the issue of indemnity of the trustee. We are in the process of - we're having a meeting with our client on Thursday to discuss this issue. I don't have instructions. In my submission, any order as to costs should be limited to costs in the ordinary course, and the matter of full indemnity of a trustee from a trust that may or may not have assets, have income - well, it doesn't have income, it has other ways of generating income - should be left for another day. That's a whole other application.
- [56] THE COURT: So, Mr. MacKay, there will be a consent order setting out the schedule as proposed by Mr. Bill Mathisen.
- [57] MS. CLARK: Would that be costs in the cause, My Lord?
- [58] THE COURT: Yes, it would be costs in the cause. There is a meeting on Thursday to deal with the full indemnification of the trustee?
- [59] MS. CLARK: Myself and my co-counsel are meeting with our clients on Thursday to deal with a number of issues, that being one of them.

- [60] THE COURT: It seems to me that that is probably an important meeting because if the trustee is feeling some financial pressure, there is some discretion here on the part of the trustee, broad discretion, to optimize and monetize some of the value here, and I do not know if the beneficiaries really want that.
- [61] MS. CLARK: I'm alive to that issue, My Lord.
- [62] THE COURT: So, Mr. MacKay, I think you might hear back from Ms. Clark in due course as to what can be done by the trustee generally in terms of indemnification.
- [63] MS. CLARK: A further point of clarification, My Lord. You noted that having the Matfam advisory board - you didn't use that phrase, but the group of beneficiaries chaired by Anne Mathisen would be useful and that they could put to the trustee matters for the usage of the property?
- [64] THE COURT: Yes. It was not meant to be part of an order. I am saying it would be a reasonable way of dealing with some of these difficult issues, because they become harder and harder over time.
- [65] MS. CLARK: What I would propose is that maybe perhaps Mr. MacKay give his comments to the court on whether he would be willing to have that issue also go by consent in the order.
- [66] THE COURT: You mean in terms of an advisory board -- it is non-binding because there is a trustee here. The trustee is the one that makes the decisions regarding the Crescent property and the Whistler property, as I mentioned.
- [67] MS. CLARK: I understand that, My Lord, but in the interests of having more voices in this conversation, that would be useful.
- [68] THE COURT: Mr. MacKay.
- [69] MR. MACKAY: We would like to stay away from that because we have the rectification of the Trust. There's already confusion as to how the Trust works and then there's the court.
- [70] THE COURT: Yes, I guess that makes sense.
- [71] MR. MACKAY: There's the trustee, the court, there's the beneficiaries, so to create another -
- [72] THE COURT: Mechanism?
- [73] MR. MACKAY: -- possible source of views - it's already before the court.
- [74] THE COURT: I do not hear there is a consent here on that.

- [75] Your last point is there may need to be some management over this. I am quite concerned, as I have said in my earlier Reasons. I have already ordered that some of the hearings be heard together. I do not think that the breach of trust, rectification ones would fit within those, but there seems to be a logic behind the breach of trust and rectification. I think there are about two or three of them that might fit together as well, and I am just curious as to what your thoughts are.
- [76] MS. CLARK: I disagree with part of that, and the reason why is because we have some - for example, the petition with respect to who can appoint trustees under the Trust is a standalone construction of the documents, of that one provision in the document. I see no reason why that has to wait, that particular proceeding has to wait, for months and months and months when we could have a one-day hearing on that in, you know, January or February. I don't know what dates are available right now, but I think next year. We have to have some sort of proportionality and efficiency in this as well.
- [77] THE COURT: But is that separate from the rectification brought on by Mr. Mathisen?
- [78] MS. CLARK: Yes, My Lord. That is the - I will have to grab my binder. That is a discrete legal issue of construction on trust. That's at Tab 2 of your binder, My Lord.
- [79] THE COURT: Well, I will let counsel then think about it. I am just trying to work my way through how to best manage the process - and it is not necessarily me who is going to have to deal with this anyway. I am just looking at the constellation of disputes and trying to find an efficient way to deal with them, because if they start to run off in different directions, there is a risk of conflicting findings and rehashing of ground already covered.
- [80] MS. CLARK: I have that point, My Lord.
- [81] THE COURT: Mr. MacKay, do you have any comments here?
- [82] MR. MACKAY: I think that counsel should talk about --
- [83] THE COURT: Right. Okay. Well, I encourage you to do that.
- [84] MS. CLARK: There is just one final issue. For the dates that - you noted that part of the issue is the sensitivity of where Mr. Mathisen is staying in the property, in the master bedroom.
- [85] THE COURT: Yes.
- [86] MS. CLARK: You know, as I gave submissions before and as my friend echoed, traditionally he's stayed in the addition, which is a self-contained suite in the property, and, My Lord, I would seek an order that for the times when the other people are at the property that Mr. Mathisen's personal effects and items be in the addition as opposed to the master bedroom and that, to the extent that any order is possible, that he reside in the addition and not the master bedroom, as that being traditionally Peggy's or Bertha's space and this being yet another area of controversy between this family.

[87] THE COURT: What we are really talking about is a consent order at this stage. Mr. MacKay, are you able to express anything regarding that?

[88] MR. MACKAY: No, I haven't got that detail.

[89] THE COURT: You know, it is a point of some aggravation.

[90] MR. MACKAY: I understand it is the master bedroom. There is a big issue of - I'm not sure what the other accommodation is, though.

[91] THE COURT: Well, Mr. Mathisen is here. I mean, do you want to just see if he has anything to say about that.

[92] MR. BILL MATHISEN: Yes, Your Honour, the new addition was planned - the new addition, which was actually done about 20 years ago, is full of the McNeil's or the first person's stuff. It's used as storage, so it's impossible to put stuff in that so-called new addition. It is used for storage for the Arpeg farm's house at [indiscernible]. Thank you, Your Honour.

[93] MS. CLARK: My understanding is that's a three-bedroom, self-contained suite that does in fact have space for someone to stay in.

[94] THE COURT: We are now getting into a topic that we cannot deal with today. My only comment on this, though, and since Mr. Mathisen is here, is that I think it is a reasonable proposal that he has made, and I have not put this in my order but I am assuming that during the times that he is not present. I think there is a main living room area, which is quite a central feature of the main house -- that if there are any personal things that are yours, Mr. Mathisen, you will just remove them and make sure that it can be occupied by everybody? Probably sort of withdraw all that stuff and put it into the master bedroom?

[95] MR. BILL MATHISEN: Yes, Your Honour. The main living room part is full of stuff from 3989 Angus Drive that was allocated [indiscernible]. It's all my mother's stuff from previously.

[96] THE COURT: But your stuff you will put in storage or put it out of the way?

[97] MR. BILL MATHISEN: Correct.

[98] THE COURT: Very good. I think this is the best we are going to be able to do today.

"The Honourable Mr. Justice Masuhara"

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