

CANADA / JUDGMENT

Erschbamer v. Wallster

2013 BCCA 76

COURT

British Columbia Court of Appeal

DECIDED

20 February 2013

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2013 BCCA 76 Erschbamer v. Wallster

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Erschbamer v. Wallster,

2013 BCCA 76

Date: 20130220

Docket: CA039912

Between:

Miriam Erschbamer and Robert Walker Bowe

Respondents

(Plaintiffs)

And

Suzanne Marie Wallster

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, April 5, 2012

(Erschbamer v. Wallster, Vancouver Docket S108134)

Counsel for the Appellant:

M.E. Fancourt-Smith and

M.A. De Vera

Counsel for the Respondents:

J.L. Straith

Place and Date of Hearing:

Vancouver, British Columbia

January 17, 2013

Place and Date of Judgment:

Vancouver, British Columbia

February 20, 2013

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Mr. Justice Hall

The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

- [1] This appeal arises from an order made in the second of two proceedings between the parties. The chambers judge struck portions of the defendant's amended response to civil claim on the basis of the doctrine of res judicata or the doctrine of abuse of process. The defendant asserts that the judge erred in striking any part of the amended response.
- [2] The parties are neighbours in North Vancouver, and the dispute between them involves a restrictive covenant and an easement registered against the defendant's property for the benefit of the owners of the plaintiffs' property. The restrictive covenant prohibits the owners of the defendant's property from erecting a dwelling or structure exceeding the height of a specified windowsill of the house on the plaintiffs' property. The easement grants a right of way over a 6.95 foot strip of the defendant's property and prohibits any obstruction to exist in the strip of land.

- [3] The defendant decided to renovate the house on her property. Plans were prepared, and the District of North Vancouver approved the plans and authorized the construction of the new house. These plans contemplated that the roof of the reconstructed house would be approximately four feet higher than the height limit in the restrictive covenant.
- [4] After obtaining the approval of the District of North Vancouver, the terms of the restrictive covenant were brought to the attention of the defendant and her designer, and they realized that the planned house would violate the restrictive covenant. The defendant entered into discussions with the plaintiffs and revised the plans so that the roof of the house would exceed the height restriction by only 16 inches. However, the plaintiffs were not prepared to agree to a modification of the restrictive covenant.
- [5] The defendant petitioned to the court to have both the restrictive covenant and the easement cancelled or modified pursuant to s. 35(2) of the Property Law Act, R.S.B.C. 1996, c. 377. The focus of the submissions at the hearing of the petition was s. 35(2)(b), which permits modification or cancellation if "the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled".
- [6] In reasons for judgment indexed as 2009 BCSC 1619, the chambers judge dismissed the defendant's petition on the basis that she had failed to demonstrate the absence of a practical benefit to the plaintiffs in respect of both the restrictive covenant and the easement (he also briefly noted the defendant had not satisfied the criteria set out in the other clauses of s. 35(2)). An appeal to this Court was dismissed (2011 BCCA 27).
- [7] After being unsuccessful in having the restrictive covenant and the easement cancelled or modified, the defendant went forward with a renovation of her house, and this led to the commencement of the second proceeding by the plaintiffs. In general terms, the plaintiffs assert that the renovated house violates the terms of both the restrictive covenant and the easement. This is denied by the defendant, who pleads, among other things, that she made further revisions to the plans such that the renovated house complies with the restrictive covenant and the easement. As I understand it from counsel's submissions at the hearing of this appeal, the main items of contention with respect to the renovated house are the chimneys, mechanical vents and eaves (although the notice of civil claim does allege that the defendant proceeded with a design of the new roof that blocks the plaintiffs' view to the west and south).
- [8] The plaintiffs applied before the chambers judge to strike numerous paragraphs of the defendant's amended response to their claim. The plaintiffs did not ultimately pursue the striking of all of the paragraphs sought in their application, and the chambers judge declined to strike other paragraphs. The two paragraphs that the judge struck from Part 1, "Division 2 - Defendant's Version of Facts", of the amended response were as follows:

3. In the alternative, the Restrictive Covenant and Easement were amended by the original parties thereto by the construction of the original house, related structures and mechanical elements on the Defendant's property. As a result, the Amended Plans and the resultant renovation of the single family residence located on the Defendant's Property comply fully with the terms of the Restrictive Covenant and Easement as amended.
 4. In the further alternative, it was the intention of the original parties to the Restrictive Covenant that it was to be interpreted in accordance with the By-Laws prevailing in the District of North Vancouver from time to time. Specifically, but without limiting the generality of the foregoing, if the chimney and vents height exceed the lower window sill of the Plaintiff's west window south of the Plaintiff's chimney, this is in accordance with a specific exemption for chimneys and mechanical vents provided for in the bylaws of the District of North Vancouver.
- [9] One of the other paragraphs the plaintiffs sought to strike was para. 1 of "Part 3: Legal Basis" of the amended response, the relevant portion of which reads as follows:
1. The Defendant denies that it breached the Restrictive Covenant or Easement properly interpreted in accordance with its express words and the factual matrix at the time, including the existing structures and the prevailing District of North Vancouver Bylaws, or, alternatively, as amended by the parties.

[Underlining added.]

The judge ordered that the words I have underlined be struck.

- [10] In his reasons for judgment, the judge made reference to several of the leading authorities on the doctrines of res judicata and abuse of process: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77; *Cliffs Over Maple Bay Investments Ltd. (Re)*, 2011 BCCA 180, [2011] 8 W.W.R. 266; *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, 340 D.L.R. (4th) 733; and *Shuswap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176, 80 B.C.L.R. (4th) 211.
- [11] The core reasoning of the chambers judge was contained in two paragraphs of his reasons for judgment, which I will reproduce in view of the fact that the reasons have not been published:
- [34] In regard to the paragraphs that contain the assertion that the original parties to the RC [restrictive covenant] and Easement amended these items by the construction of the original house, related structures and mechanical elements on the defendant's property, such that the resultant renovations fully comply with the terms of the amended RC and Easement, as well as the assertion that it was the intention of the original parties to the RC, that it was to be interpreted in accordance with the bylaws prevailing in the District of North Vancouver from time to time, including the chimney and vent height are, in my view, matters that reflect an attempt to relitigate the first proceeding in which a modification or cancellation

was sought to specifically allow for the height of the house to exceed that as specified in the RC. I note in the first proceeding the materials submitted by Ms. Wallster included evidence asserting that the reference window was not the same as that when the RC was granted and that the height may have been changed to the prejudice of Ms. Wallster.

- [35] The proper time to argue that the RC had been somehow amended to allow, in essence, the recent construction, which exceeded the provisions in the RC, should have been raised in the first proceeding when the terms of the RC and Easement were clearly in issue and the height restriction was being challenged to either be not filed or cancelled. Similarly, the argument that it was the intention to interpret the document in accordance with the prevailing bylaw should have been sought at that time. The petition brought by the defendant was pursuant to s. 35 of the Property Law Act. The criteria set out in 35(2) were specified and would have encompassed these assertions.

Discussion

- [12] The general principles of the doctrine of res judicata were reviewed by this Court relatively recently in *Cliffs Over Maple Bay*. The doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.
- [13] In *Cliffs Over Maple Bay*, Madam Justice Newbury set out the requirements of issue estoppel at para. 31 (from *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at 935, as quoted with approval in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254):
- (1) that the same question has been decided;
 - (2) that the judicial decision which is said to create the estoppel was final; and,
 - (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies....

In the present case, it is not asserted that the issues the defendant wishes to raise as defences were questions decided in the first proceeding. Accordingly, it is not necessary to give further consideration to issue estoppel.

- [14] With respect to cause of action estoppel, Newbury J.A. quoted, at para. 13, from the seminal case of *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 at 319 (Ch.):

In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case,

and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

She noted, at para. 14, that this language has been somewhat narrowed by the decision in *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153, 162 N.S.R. (2d) 321, where Mr. Justice Cromwell stated that the doctrine should apply to "issues which the parties had the opportunity to raise and, in all the circumstances, should have raised" (para. 37).

[15] Madam Justice Newbury set out the requirements of cause of action estoppel at para. 28 (from *Grandview v. Doering*, [1976] 2 S.C.R. 621, as summarized in *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, *aff'd* (1987), 45 D.L.R. (4th) 766 (Man. C.A.)):

1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[16] Although it is referred to as cause of action estoppel, the principle applies to defences as well as claims. This is explained in Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham, Ontario: LexisNexis, 2010) at 137-38:

While the plaintiff may not split a cause of action or pursue litigation by instalments, the defendant may not split the defence by turning around and, as the plaintiff in a subsequent action, sue on an issue which, if successful, would challenge the integrity of the previous judgment. This is what was attempted in *Henderson*.

* * *

In other words, a cause of action in a second action which could have been a defence in the first action, but was not raised, is barred ... The cloak of cause of action estoppel is woven the same for both the plaintiff and the defendant in subsequent proceedings.

[Footnotes omitted.]

- [17] Hence, cause of action estoppel can apply in situations where the estopped litigant is the defendant in the first proceeding and the plaintiff in the second proceeding. Lange does not cite any authorities involving the converse situation that exists here, where the estopped litigant is the plaintiff (or petitioner) in the first proceeding and the defendant in the second proceeding. Nevertheless, it seems to me, as a matter of principle, that the converse must be true. A defendant should not be permitted to raise, as a defence, an issue which could have and should have been raised in a previous proceeding between the same parties. I do not accept the defendant's argument that cause of action estoppel is inapplicable simply because the party seeking relief in each of the two proceedings is different.
- [18] In the present case, the chambers judge struck two potential defences: (i) the restrictive covenant was amended by the conduct of the original parties to the covenant, and (ii) the restrictive covenant should be interpreted in accordance with the bylaws of the District of North Vancouver in effect at the time it was entered into.
- [19] I agree with the chambers judge that the amendment defence is an issue that could have and should have been raised in the first proceeding in which the defendant in this action sought to have the restrictive covenant cancelled or modified pursuant to s. 35(2)(b) of the Property Law Act. The court was being requested to assess whether the covenant had no practical benefit to the plaintiffs in this action. In order to make that assessment, the court needed to know what it was being asked to cancel or modify. If the covenant had been amended prior to the commencement of the proceeding, the court would have taken the amendment into account in assessing whether the covenant, as amended, had any practical benefit.
- [20] This is particularly the case in respect of the alternate relief in the first proceeding seeking the modification of the covenant. Although the focus of the proceeding was the cancellation of the covenant, the defendant had requested the alternate relief of having the covenant modified. If the court was to consider modifying the covenant, it needed to know whether it had previously been modified by way of an amendment.
- [21] In contrast, it is my view that the potential interpretation defence should not have been struck. There was no need, in all the circumstances, for the interpretation of the restrictive covenant to have been an issue in the first proceeding. The issue has arisen in the second action as a result of the allegations of the plaintiffs that the reconstructed house violates the restrictive covenant.
- [22] The plaintiffs assert that the issue was, in fact, raised in the first proceeding. With respect, I do not agree. All that was said in the affidavit relied upon by the plaintiffs in this regard was that the District of North Vancouver had approved the initial plans and that the height restriction in the relevant building code was four feet higher than the restriction in the covenant. The affidavit did not raise the issue of whether the covenant should be interpreted in accordance with the District's bylaws.

[23] The reasoning of the chambers judge appears to be internally inconsistent with respect to the striking of the potential interpretation defence. I previously quoted the reasoning of the judge in para. 35 of his reasons. Earlier, he said:

[32] Insofar as the impugned paragraphs deal with the interpretation of the RC and Easement, I am of the view that the plaintiffs have not persuaded me that those paragraphs should be struck. The question as to whether the actual construction that has occurred violates the RC was not before the court at the time of the first proceeding. The question is whether the vents and other alleged infractions constitute a structure, which I think Mr. Straith agreed was the issue in terms of the relevant work to be defined or interpreted.

I respectfully agree with this reasoning but, if applied, it would not have resulted in the striking of the potential interpretation defence contained in para. 4 of Part 1, Division 2, of the amended response. In addition, the chambers judge did not strike another paragraph of the amended response pleading that the District's bylaws at the time of the creation of the restrictive covenant contained exemptions in its height restrictions for chimneys and mechanical vents.

[24] The only explanation for the judge's reasoning that comes to my mind is that he was concerned about the reference in para. 4 to the "intention of the original parties", which is similar to the reference in para. 3 to the assertion that the restrictive covenant had been "amended by the original parties". He may have thought it was being asserted that the original parties had agreed that the District's bylaws would provide exemptions under the restrictive covenant for chimneys and mechanical vents, and this is akin to an amendment of the restrictive covenant. However, I do not read para. 4 in this fashion. The purpose of interpreting a document is to determine the intention of the original parties, and I do not read para. 4 as asserting anything more than that the restrictive covenant should be interpreted in a manner consistent with the District's bylaws.

[25] The defendant argues cause of action estoppel is inapplicable because the causes of action in the two proceedings are separate and distinct. She also points to the decision of this Court in *Mohl v. University of British Columbia*, 2006 BCCA 70, 265 D.L.R. (4th) 109, and says that cause of action estoppel is inapplicable because the nature of the two proceedings is fundamentally different.

[26] In my opinion, the subject matters of the two proceedings are sufficiently similar for cause of action estoppel to apply. Both relate to the renovation of the defendant's home and the restrictive covenant benefitting the plaintiffs. In the first proceeding, the defendant was attempting to have the covenant cancelled or modified in order to permit her to reconstruct her house to a height prohibited by the covenant. In the second proceeding, the plaintiffs are alleging that the defendant reconstructed her house to a height that is prohibited by the covenant. Issues relating to the prior amendment of the covenant that should have been raised in the first proceeding should not be allowed to be raised in the second proceeding.

- [27] In *Mohl*, a student was given a failing grade by the university he was attending. He unsuccessfully pursued internal appeal procedures and then unsuccessfully applied for judicial review of the university's decision in the courts. He subsequently sued the university for breach of contract, breach of fiduciary duty and negligence. This Court concluded that cause of action estoppel did not apply because the judicial review proceeding was not an action for purposes of cause of action estoppel. The Court made the distinction between the court exercising its superintending power in the judicial review proceeding and the court adjudicating a dispute between parties in the second proceeding.
- [28] In my view, *Mohl* is clearly distinguishable from the present case. Here, the first proceeding was not an application for judicial review. The first proceeding did involve a dispute between the parties upon which the court adjudicated. It involved the same subject matter as the second proceeding; namely, the height of the defendant's reconstructed house and the restrictive covenant. I do not think anything turns on the fact that the first proceeding was commenced by way of a petition (as opposed to a writ of summons or notice of civil claim) and sought a statutory remedy rather than a remedy at common law.
- [29] Even if cause of action estoppel is not technically available in the circumstances of this situation, it was nevertheless open to the chambers judge to strike para. 3 of Part 1, Division 2, of the amended response as being an abuse of process. In his reasons, the judge referred to *Toronto v. C.U.P.E.*, the decision of the Supreme Court of Canada which held that the doctrine of abuse of process is available to prevent the relitigation of an issue in circumstances where the technical requirements of issue estoppel had not been met because the parties to the two proceedings were different.
- [30] *Lange* refers to the doctrine in this context as "abuse of process by relitigation". He confirms that, in addition to issue estoppel, it may be employed when the technical requirements of cause of action estoppel have not been met (at 215-16):

Abuse of process by relitigation applies to proceedings which would normally be governed by cause of action estoppel and to proceedings which do not meet the technicalities of that doctrine. As with cause of action estoppel, abuse of process by relitigation has sometimes been described as a rule against litigation by instalment, or the rule in *Henderson*. To breach the rule in *Henderson*, even though the parties are not the same, is an abuse of process. In applying abuse of process by relitigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings.

[Footnotes omitted.]

- [31] As I have explained above, the issue of an amendment of the restrictive covenant by the original parties is an issue that ought reasonably to have been raised in the first proceeding. It would be an abuse of the court's process to allow the defendant to raise it as a defence in the second proceeding, and the striking of para. 3 of Part 1, Division 2, from the amended response is justified on this basis.

Conclusion

- [32] I would allow the appeal, in part, by setting aside the portions of the order of the chambers judge striking para. 4 of Part 1, Division 2, of the amended response and the words "and the prevailing District of North Vancouver Bylaws" from para. 1 of Part 3 of the amended response.
- [33] Although the defendant had some limited success on this appeal, I would order that the plaintiffs have the costs of this appeal on the basis that they succeeded in upholding the striking of the paragraph alleging that the restrictive covenant had been amended prior to the hearing of the first proceeding.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Madam Justice D. Smith"

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