

CANADA / JUDGMENT

GMC Properties Inc. v. Rampart Estates Ltd.

2022 BCCA 92

COURT

British Columbia Court of Appeal

DECIDED

3 March 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCCA 92 GMC Properties Inc. v. Rampart Estates Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

GMC Properties Inc. v. Rampart Estates Ltd.,

2022 BCCA 92

Date: 20220303

Docket: CA48083

Between:

GMC Properties Inc.

Appellant

(Plaintiff)

And

Rampart Estates Ltd.

Respondent

(Defendant)

Before:

The Honourable Justice Griffin

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 28, 2022 (GMC Properties Inc v. Rampart Estates Ltd., 2022 BCSC 142, Victoria Docket S192484).

Oral Reasons for Judgment**Counsel for the Appellant:**

J.C. MacInnis

M.C. Ohama-Darcus

Counsel for the Respondent (via videoconference):

L.J. Alexander

K. Vallee

Place and Date of Hearing:

Vancouver, British Columbia

February 28, 2022

Place and Date of Judgment:

Vancouver, British Columbia

March 3, 2022

Summary:

The appellant is a purchaser under a conditional purchase agreement for land. It claims that the respondent has not satisfied a condition precedent requiring the respondent to deliver an environmental report to the appellant. The appellant has not waived that requirement or other conditions precedent to the purchase, but says the conditional purchase agreement has given it an equitable interest in land. The respondent obtained an order cancelling the appellant's certificate of pending litigation on the property, pursuant to s. 252 of the Land Title Act, as the appellant had not taken a step in the proceeding for more than one year. The appellant seeks a stay of the order, pending appeal of the order. Held: Stay granted, on terms that will allow for an expedited appeal. There is at least some merit to the appellant's argument that the judge erred by concluding that its pleadings did not advance a claim to an interest in the property and that this error was a factor in the exercise of his discretion. The appeal would be made moot if the stay is not granted, and the respondent's concerns are general and can be met if the appeal is expedited.

GRIFFIN J.A.:

Nature of the Application

- [1] The appellant, GMC Properties Inc. ("GMC"), applies for an order pursuant to s. 18(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, that an order pronounced on January 28, 2022, cancelling the registration of the certificate of pending litigation (the "CPL") against the lands at 526 Head Street, Victoria, BC (the "Property"), be stayed pending a determination of the appeal from the order.

Background Facts

- [2] Rampart Estates Ltd. ("Rampart") owns an apartment block on the Property.
- [3] On February 3, 2017, Rampart entered into an agreement of purchase and sale to sell the Property to GMC (the "Purchase Agreement"). Under the Purchase Agreement, GMC's obligation to complete was conditional on it being satisfied, "in its sole and absolute discretion", of the results of a number of searches and evaluations of the property, the approval of its Board of the costs to renovate the property, and financing. These due diligence conditions were stated to be to the exclusive benefit of GMC, and if it did not waive them by the condition removal date, the agreement would be terminated.
- [4] The Purchase Agreement was subject to two amending agreements, dated April 17, 2017, and September 22, 2017, which addressed, among other things, the provision of a final report concerning the environmental condition of the Property.
- [5] The September amendment amended the due diligence condition, providing that GMC's obligation to complete the purchase would be conditional upon GMC approving a DSI Environmental Report to be provided by Rampart. As pleaded by GMC in the notice of civil claim that it subsequently filed against Rampart:
 - 12. The September Amending Agreement also provides that:

"The Vendor will instruct the Vendor's Environmental Consultant to conduct further necessary investigations and tests that are recommended under the interim report and will prepare a final report verifying the results of such further investigations ("DSI Environmental Report") in a form acceptable to the Purchaser and its lender, and will address and deliver the same to the Vendor, the Purchaser and the Purchaser's lender."
 - [6] The delivery of the required DSI Environmental Report was to trigger the running of a due diligence period of 21 days, allowing GMC the choice, in its sole discretion, of removing the conditions for purchase at the end of the 21 days.
 - [7] The amended due diligence condition provided as follows:

4.1 The obligation of the Purchaser to complete the Transaction is conditional upon the Purchaser being satisfied, in its sole and absolute discretion, with the results of: (e) the Purchaser and its lender approving the DSI Environmental Report. The conditions contained in this Section 4.1 are herein called the "Due Diligence Conditions".
 - [8] If GMC opted to not remove the conditions, it had no obligation to complete the purchase.
 - [9] While Rampart subsequently delivered an environmental report to GMC, GMC takes the position that it did not comply with the parties' agreement.

- [10] On February 11, 2019, GMC advised Rampart that the environmental report was not acceptable. Rampart said it provided all information required under the amended Purchase Agreement.
- [11] On April 23, 2019, Rampart advised GMC that the condition removal date in the Purchase Agreement had expired, and as GMC had not removed its conditions precedent, the agreement was terminated.
- [12] On June 19, 2019, GMC commenced the underlying action against Rampart. The relief sought in Part 2 of GMC's notice of civil claim was set out at para. 23 of the judgment under appeal, as follows:

Part 2: RELIEF SOUGHT

1. A declaration that the timing with respect to the Condition Removal Date, as defined in the September Amending Agreement, has not passed and further, that said timing has not started to run.
 2. An order for specific performance with respect to the Defendant's obligations with respect to the Purchase Agreement, as amended, including, but not limited to, the delivery of a final DSI Environmental Report as set out in the September Amending Agreement.
 3. In the alternative to the preceding order for specific performance of the Purchase Agreement, damages.
- [13] On the same day as it commenced the claim, GMC registered the CPL against the Property.
- [14] Section 215 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], permits the registration of a CPL by a person who has commenced a proceeding claiming an interest or estate in land.
- [15] On July 20, 2021, Rampart filed a notice of application to cancel the CPL. The relief sought was based on s. 252 of the LTA, which provides that a CPL may be cancelled if no step has been taken in the proceeding for one year.
- [16] Section 252 reads:

Cancellation of certificate of pending litigation

252 (1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.

- (2) An application under subsection (1) must be made to the court in which the proceeding was commenced and must be brought
 - (a) as an application in that proceeding, if the applicant is a party to the proceeding, or

- (b) by petition, if the applicant is not a party.
- (3) The registrar must, on application and on production of a certified copy of the order of the court directing cancellation under subsection (1), cancel the registration of the certificate of pending litigation.
- [17] As part of its argument set out in its notice of application, Rampart submitted that it was prejudiced by the CPL because GMC's claim did not advance an interest in land, but rather, alleged an entitlement to elect whether or not to confirm an agreement that would give it an interest in land. As such, Rampart was not in a position to respond to the claim by consenting to specific performance of the sale of the property, and was subject to having its property encumbered without knowing whether or not the plaintiff would ultimately be required to perform and complete the purchase.
- [18] In resisting Rampart's application to remove the CPL, GMC relied upon the affidavit evidence of a director of GMC, Jordan Milne, who explained the purpose behind the requirement of the environmental report. His evidence was that the report would give GMC the information to be able to decide whether proceeding with the development was viable, so that it could then make a "reasonably informed decision" on whether to remove "its condition precedent" to the completion of the purchase agreement.
- [19] Mr. Milne's affidavit also set out his evidence that the property was considered "unique" to GMC, from the perspective of its development potential.
- [20] The application to cancel the CPL was heard on August 26, 2021, with additional written submissions received in November 2021, and judgment pronounced on January 28, 2022. The reasons for judgment are indexed as 2022 BCSC 142.

Reasons for Judgment

- [21] The judge referred to the leading authorities regarding removal of a CPL pursuant to s. 252, including *Wiest v. Middelkamp*, 2005 BCSC 1626, and *Lawn Genius Manufacturing (Canada) Inc. (Drainmaster) v. 0856810 B.C. Ltd. Inc.*, 2016 BCSC 1915.
- [22] The factors relevant to the exercise of the court's discretion in a s. 252 application were summarized in *Wiest* at paras. 12-13 as follows:
- [12] In an application of this kind, where the applicant shows that no step has been taken in the proceeding for a period of one year, the court retains a discretion to disallow the remedy. However, prejudice to the owner of the land will be presumed, and the respondent bears the onus of proving that the prejudice is not serious or is outweighed by other factors which would make it unjust to cancel the certificate of pending litigation. See *Kal West Mechanical Inc. v. Bush* 1999 Carswell B.C. 774 (Cole, J.) and *Wilson v. Hrytsak* (1997) 34 C.L.R. 2d 65 (Master Joyce).

- [13] In my opinion, the factors relevant to the exercise of the court's discretion in this type of application include the following:
- (a) Whether the respondent has given an acceptable explanation for the delay in prosecuting the claim;
 - (b) Whether, despite the presumed prejudice, no actual prejudice would be incurred by the applicant if the order was not granted; and
 - (c) Whether the respondent's claim for an interest in the land has at least a reasonable prospect of succeeding.
- [23] Further, in *Lawn Genius* the principles applicable to the exercise of discretion under s. 252 were said to be:
- [11] It is common ground: (a) that the granting of the relief is discretionary; (b) that "step" in s. 252(1) means a formal step either required or permitted by the Supreme Court Civil Rules that moves the action forward towards trial or resolution; and (c) that "one year" in s. 252(1) refers to the year immediately preceding service of the Notice of Application to cancel the CPL
- [12] This agreement finds support in our jurisprudence. The court retains the discretion not to cancel the CPL, even where the statutory prerequisites are met, if cancellation would not be fair and equitable: see *Kal West Mechanical Inc. v. Bush*, 1999 CarswellBC 774 (S.C.) at para. 6; and *Tomczyk v. Toronto Dominion Bank* (1982), 36 B.C.L.R 149 (S.C.). Where the statutory prerequisites are met, prejudice to the landowner is presumed and the respondent must show that the prejudice is either not serious or outweighed by other factors that suggest cancellation of the CPL would be unjust: see *Wiest v. Middelkamp*, 2005 BCSC 1626 at para. 12 and *Motz Bros. Holdings Ltd. v. McKean*, 2009 BCSC 1133 at para. 12. The meaning of "step" in s. 252 of the Act is informed by case law in which the definition of that term in the analogous provisions in the Supreme Court Civil Rules, is discussed. The step must be either required or permitted by the Supreme Court Civil Rules, and it must move the action forward towards trial or resolution: see *Motz Bros. Holdings Ltd. v. McKean*, 2009 BCSC 1133 at paras. 9-10; *Canadian National Railway Co. v. Chiu*, 2014 BCSC 75 at para. 7; *Easton v. Cooper*, 2010 BCSC 1079 at paras. 6-13; and *Khan v. Johal*, 2006 BCSC 1547 at paras. 11-15.
- [13] The underlying purpose of s. 252 of the Act, which is to keep property from being tied up in dormant litigation, must always be borne in mind: *Wiest*, at para. 15.
- [Emphasis added.]
- [24] The judge first considered whether GMC had claimed an interest in land in its pleadings, a necessary requirement of a CPL pursuant to s. 215(1) of the Act. The judge considered the relief sought by GMC, as set out in Part 2 of the NOCC, set out above.

- [25] Before the judge made his ruling, on November 9, 2021, GMC filed an amended notice of civil claim. GMC's position on appeal seems to be that these amended pleadings did not change the nature of the original claim, but helped to better articulate it.
- [26] While the amended pleading was brought to the attention of the judge, the CPL was filed based on the original notice of civil claim, and the judge analyzed it on that basis. This approach is supported by authority of this court: see *Bilin v. Sidhu*, 2017 BCCA 429 at para. 62.
- [27] The judge found that if GMC was successful in its claim, Rampart would be required to deliver an environmental report "as set out in the September Amending Agreement." Thus, the judge concluded that the objective of GMC's claim was to require Rampart to comply with GMC's idea of what the environmental report should be, which would provide GMC with information to ascertain the cost of redeveloping the Property. He found this relief was akin to a mandatory injunction with respect to the environmental report, but the relief sought did not include an interest in land. Accordingly, he found that GMC failed to claim an interest in land as required by s. 215(1) (at paras. 23-27).
- [28] The judge went on to consider s. 252 and whether GMC had taken any steps in the litigation for one year.
- [29] The judge noted that under s. 252 of the LTA, a "step" is limited to formal steps required or permitted by the Supreme Court Civil Rules to move the litigation forward, citing *Lawn Genius* at para. 12 (para. 31). The judge found that the last formal step occurred on May 8, 2020, when GMC provided its list of documents to Rampart. Since then, the parties were in negotiations, but those negotiations ended in February 2021 (at paras. 32,36).
- [30] It is uncontested that no steps were taken in the proceeding from May 2020 until Rampart gave notice in July 2021 of its application to have the CPL removed.
- [31] The judge noted that the fact that the parties were in negotiations during part of this time, up to February 2021, did not preclude GMC from taking formal steps in the proceeding. Further, GMC had no reasonable explanation as to why it had not taken steps in the proceeding after February 2021 (para. 36). The judge noted that the onus was on GMC to show that the prejudice was not serious or that it would otherwise be unjust to cancel the CPL (para. 37). The judge concluded that GMC had not met this onus.
- [32] In the result, the judge concluded that the CPL must be cancelled under s. 252 of the LTA.

Issues on Appeal

- [33] GMC does not challenge the conclusion of the judge that at least one year had passed since the taking of any step in the proceeding, giving the judge discretion to cancel the CPL under s. 252 of the LTA.
- [34] The thrust of GMC's argument is that the judge erred in two ways:

- a) by finding that GMC's notice of civil claim did not claim an interest in land; and,
 - b) by presuming prejudice to Rampart from the CPL, in the absence of any evidence from Rampart as to prejudice.
- [35] Rampart argues that the core issue in this appeal is the judge's exercise of discretion to cancel the CPL, and it is irrelevant whether or not GMC's claim advanced a claim to an interest in land. Rampart submits that there is no merit to an appeal from the exercise of the judge's discretion given the deferential standard of review that applies.

Stay - Legal Principles

- [36] A stay of proceedings may be made to preserve the rights of the parties pending an appeal: Court of Appeal Act, s. 18(1).
- [37] The three-part test for a stay of proceedings pending appeal is the same as the test for an interlocutory injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 1994 CanLII 117. The applicant must show:
- a) there is some merit to the appeal, in that there is a serious question to be determined;
 - b) the applicant would suffer irreparable harm if the stay were refused; and
 - c) that the balance of convenience favours the granting of the stay.
- [38] The ultimate question on any application for a stay of execution is whether it is in the interests of justice to make such an order: *Lu v. Shen*, 2021 BCCA 95 at para. 20 (Chambers), citing *Coburn v. Nagra*, 2001 BCCA 607 at paras. 7, 9.

Analysis

- [39] The threshold for establishing merit to an appeal is low, as a court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious: *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 at para. 22 (Chambers), citing *RJR-MacDonald* at 337-38. The threshold is met by an "arguable case": *Canadian Resort Development Corp. v. Swanese Bay Resort Ltd.*, 50 B.C.L.R. (3d) 55, 1998 CanLII 4598 (C.A.) at para. 2.
- [40] In part, the appeal is from the exercise of discretion, which is entitled to considerable deference on appeal. The exercise of discretion will only be reversible on appeal where the court misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice, or gave no or insufficient weight to relevant considerations: *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27.
- [41] I agree with Rampart that the core issue on appeal is whether the judge erred in the exercise of discretion under s. 252 of the LTA.

- [42] However, the judge's reasons show that he considered GMC's claim to not be a claim to an interest in land. GMC has an argument available to it on appeal that this conclusion was an important factor in the exercise of the judge's discretion to cancel the CPL.
- [43] The question of whether GMC's notice of civil claim disclosed a claim for an interest in land, within the meaning of s. 215(1) of the LTA, is a question of law, reviewable on the standard of correctness: *Yi Teng Investment Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCCA 357 at para. 22.
- [44] GMC has cited several authorities that it says stand for the proposition that a party with a conditional contract to purchase land has an equitable interest in the land: *Barabash v. Nand*, [1980] A.J. No. 586 (Q.B.); *Bricore Land Group Ltd. v. Mohawk Oil Co. Ltd. et al.*, 86 Sask. R. 179, 1990 CanLII 7334 (Q.B.); *Frobisher Ltd. v. Canadian Pipelines & Petroleums Ltd.*, [1960] S.C.R. 126, 1959 CanLII 47; *Sandhu v. Chan*, 2017 BCSC 1279; 2123201 Ontario Inc. v. Israel Estate, 2016 ONCA 409.
- [45] In *Barabash*, the Alberta Queen's Bench noted that a condition precedent operates to suspend the enforceability of an otherwise valid contract pending its performance or removal, and if never performed or removed, the contract is never enforceable and becomes void (at para. 23). However, the court went on to say that the contract nevertheless exists and creates an interest in land:

25 The concept of existence is important in this case as while the continuance of the condition precedent will prevent either party from enforcing the contract, it does not prevent the contract from creating an interest in land in favour of the plaintiff. The plaintiff may not be able to compel the defendants to convey that interest to him during the continuance of the condition precedent, but the interest exists and he is able to file a caveat against the title to the land, thereby assuring his priority as against competing claims if, as and when the condition precedent is performed or removed.

- [46] A similar conclusion was reached in *Bricore*.
- [47] Rampart's argument is not entirely clear, but it appears to be saying that so long as GMC continues to rely on its right to walk away from the contract by not waiving the conditions precedent, as is its current position in its pleading, it cannot be said to be claiming an interest in land. In my view, whether that is so is an interesting question better answered by a division of this Court than by a single judge in Chambers.
- [48] I am not persuaded that there is no merit to GMC's argument that its pleadings supported a claim to an interest in land, even if it is simply an equitable interest, contingent on certain conditions precedent.
- [49] I therefore conclude there is at least some merit to GMC's argument that the judge erred in the exercise of his discretion by concluding that GMC's pleadings did not advance a claim to an interest in the property and that this error was a factor in the exercise of his discretion.

- [50] Having reached this conclusion, it is unnecessary to consider whether there is merit in GMC's additional argument regarding the judge's assessment of prejudice.
- [51] I see the present application turning on irreparable harm and balance of convenience. These two factors weigh in the appellant's favour for two reasons.
- [52] First, if the stay is not granted, the appellant's appeal will effectively be moot.
- [53] Second, the appellant is willing to expedite the hearing of the appeal, and not much additional effort will be required for both parties to ready the matter for hearing. The key arguments have already been prepared, and the appeal record is brief. I am satisfied that with suitable directions to the appellant, and cooperation by the respondent, this appeal could be heard very quickly, in a matter of a few months.
- [54] The arguments advanced by Rampart as to prejudice and inconvenience are rather general and do not tip the scales in its favour. Rampart makes the point that it is unable to raise financing on the security of the property while a CPL is outstanding, but it does not suggest it has an immediate need to do so. Rampart also submits that it will be highly prejudicial to tie up its property with a CPL until the trial of the matter, which is unlikely to take place until September 2023 at the earliest, but the present stay will not be until the trial date. The stay being sought will only be until the appeal is heard or determined.
- [55] I conclude it is in the interests of justice to grant the appellant's application for a stay of the order of the court below, pending the hearing of the appeal. The appellant will need to address the division hearing the appeal if it wishes to obtain an order extending the stay until the determination of the appeal, in the event that judgment is reserved.

Disposition

- [56] I grant a stay of the order made January 28, 2022, until the hearing of the appeal of the order, on the following conditions:
- a) The parties will immediately take steps to fix a one-half day for the hearing of the appeal at a date convenient to counsel and the court, but it should be some time after May 14. I choose that date to allow for reasonable time for the filing of factums and other appeal materials. If the parties have difficulty agreeing to a date, they may seek a hearing before the registrar.
 - b) The appellant will file the appellant's factum, appeal book, and appeal record, and a certificate of readiness, by no later than March 31, 2022;
 - c) The respondent will file its factum by no later than 30 days after receipt of the appellant's factum.
 - d) All other time requirements in the rules will run as calculated from the dates of these filings.

[57] I pause to note that in setting a date for the hearing, it is not my view that the matter is urgent or that it should take priority over other appeals. Rather, it is that the steps taken by the appellant in the appeal should be shortened and expedited as I have directed, as a condition of the granting of the stay.

"The Honourable Justice Griffin"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/22/00/2022BCCA0092.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/gmc-properties-inc-v-rampart-estates-ltd-2022>

Prepared on 27 October 2026 · Esheria