

CANADA / JUDGMENT

Grenier v. Kamlands Holdings Ltd.

2020 BCSC 1215

COURT

Supreme Court of British Columbia

DECIDED

29 July 2020

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2020 BCSC 1215 Grenier v. Kamlands Holdings Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Grenier v. Kamlands Holdings Ltd., 2020 BCSC 1215 Date: 20200729 Docket: S56876 Registry: Kamloops Between: Michael Grenier Plaintiff And Kamlands Holdings Ltd., Michael John Ternier, Kenneth Dale Friesen, Brittany Friesen and James Funk Defendants Before: The Honourable Mr. Justice Marchand Oral Reasons for Judgment Counsel for the Plaintiff (appearing via teleconference): J.M. Young G. Grenier Counsel for the Defendants (appearing via teleconference): J. Frame Place and Date of Hearing: Kamloops, B.C. July 29, 2020 Place and Date of Judgment: Kamloops, B.C. July 29, 2020

Introduction

- [1] The plaintiff, Michael Grenier, owns a residential building lot, Lot 13, within the "Equestrian Neighbourhood" of the Tobiano Development near Kamloops. The defendants are the developer of Tobiano, Kamlands Holdings Ltd. ("Kamlands"), and individuals who were, are, and/or held themselves out to be involved, in one way or another, with Kamlands.
- [2] Lot 13 is subject to the Tobiano Equestrian Neighbourhood Design Guidelines. The Design Guidelines require a letter of consent from Kamlands' Design Review Committee ("DRC"), as a condition of obtaining a building permit from the local government with jurisdiction, the Thompson-Nicola Regional District ("TNRD").
- [3] In May 2018, Mr. Grenier excavated Lot 13, and applied to the TNRD for a permit to build a beautiful and large custom home on the site. Though the DRC had previously been supportive of Mr. Grenier's house plans, they did not provide a letter of consent. They still have not done so. The main issue appears to be the peak height of Mr. Grenier's proposed home, which exceeds the Design Guidelines. As a result, the TNRD has not issued a building permit and Mr. Grenier has been unable to commence construction of his home. Instead, Lot 13 presently consists of a large and deep excavation, surrounded by a double-layered fence, sandwiched between two completed homes.

- [4] On December 17, 2018, Mr. Grenier filed a notice of civil claim seeking general, aggravated and/or punitive damages from the defendants for breach of contract, negligent misrepresentation, bad faith, breach of warranty of authority, and/or tortious interference in contractual relations. Though Mr. Grenier's action has advanced through the discovery stage, no trial date has been set.
- [5] The defendants have esthetic, safety, and convenience concerns regarding Mr. Grenier's excavation. They say that the excavation is unsightly and presents a risk to the public. They also say that the excavation is eroding, that dust and weeds are spreading from Lot 13, and that the fencing creates noise that is disrupting neighbours. Finally, they say that the excavation contravenes the Design Guidelines. As a result, by letters dated June 18 and 19, 2020, Kamlands and their counsel advised Mr. Grenier that if the excavation on Lot 13 was not filled in by July 18, 2020, Kamlands would enter Lot 13 and fill the excavation, holding Mr. Grenier accountable for all costs incurred.
- [6] In response to these letters, on July 6, 2020, Mr. Grenier filed the present notice of application seeking to restrain and enjoin the defendants from entering onto Lot 13 to fill in the excavation. Following a two-and-a-half-hour hearing on the afternoon of July 17, 2020, I granted Mr. Grenier a temporary injunction, pending delivery of these reasons for judgment. Legal Principles
- [7] The legal principles are not in dispute.
- [8] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Supreme Court of Canada established the well-known test for the granting of an interlocutory injunction:
1. Is there a serious question to be tried?
 2. Has the applicant demonstrated that it will suffer irreparable harm if an interim injunction is not granted?
 3. Does the balance of convenience favour the granting of an injunction?
- [9] In British Columbia, the test for an interlocutory injunction has often been compressed into a two-part test, where irreparable harm is treated as an element of the balance of convenience test. In either case, the fundamental question is whether the granting of an injunction is just and equitable in all the circumstances. *British Columbia (Attorney General) v. Wale*, [1987] 9 B.C.L.R. (2d) 333 (CA), *aff'd* [1991] 1 S.C.R. 62; *Tracy v. Instalogs Financial Solution Centres (B.C.) Ltd.*, 2007 BCCA 481 at paras. 30-33.

Analysis

1. Is there a serious question to be tried?

- [10] The threshold for establishing that there is a serious issue to be tried is a low one. I must satisfy myself that the application is neither vexatious nor frivolous and then move on to consider the rest of the test for granting an interlocutory injunction, even if I am of the view that Mr. Grenier is unlikely to succeed. At this stage of the analysis, "a prolonged examination of the merits is neither necessary nor desirable": RJR at p. 338.
- [11] Appropriately, the defendants concede that there is a serious question to be tried. I agree that this element of the test is satisfied.
2. Has Mr. Grenier demonstrated that he will suffer irreparable harm if an injunction is not granted?
- [12] In RJR, at p. 341, the Court held as follows regarding irreparable harm: "Irreparable" 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, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision ; where one party will suffer permanent market loss or irrevocable damage to its business reputation ; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration [cites omitted].
- [13] In this case, I agree with the defendants that, if their position is not ultimately vindicated, any extra costs Mr. Grenier may incur as a result of his excavation being filled in can be measured in damages, but that is not the end of the story. In addition to the examples of irreparable harm in RJR, trespass to land or chattels has often been found to satisfy the requirement of irreparable harm: *Cermaq Canada Ltd. v. Stewart*, 2017 BCSC 2526 at para. 15; *The Sol Sante Club v. Biefield et al*, 2005 BCSC 1908 at para. 18.
- [14] The question then becomes whether the Design Guidelines authorize Kamlands to enter Lot 13 to fill Mr. Grenier's excavation.
- [15] Section 1.4 of the Design Guidelines establishes that their purpose is to "ensure a sense of design continuity" as a means of enhancing land values. The Design Guidelines aim to achieve their purpose by establishing a set of minimum standards for the planning, design, and construction of all site improvements. Under s. 1.4, one function of the DRC is "to review all proposed Buildings and Improvements as a means to ensure compliance with the intent of the Design Guidelines "
- [16] Under s. 5.6.4, owners "shall not proceed with any construction until the DRC has issued a Notice to Proceed ". Further, owners "shall . . . complete the construction of the foundation and all exterior surfaces of any Homesite, Home and/or Improvements within 12 months after commencing construction". In addition, owners are responsible for landscape maintenance if construction does not commence within two years of purchase of a lot.

Minimum requirements include hydroseeding of any exposed topsoil. Finally, if an owner fails to comply with the timelines, the developer may exercise a variety of remedies, including those under s. 5.9 of the Design Guidelines.

- [17] Section 5.9 of the Design Guidelines provides, in part, as follows: In the event the DRC determines, in its absolute discretion, that the Owner has not complied with the approved Final Design Submittal or Guidelines, the DRC may notify the Owner in writing of the non-compliance (the "Non-Compliance Notice") together with the time required to remedy the non-compliance in accordance with the timelines provided for in the Guidelines or as may be established by the DRC.
- [18] Section 5.9 then establishes a number of remedies, including a right of entry to "remedy any defects and/or make such repairs as in the Developer's sole discretion are necessary to facilitate compliance with the Guidelines " All associated expenses are expressly to be payable by the owner to the developer.
- [19] In my respectful view, the Design Guidelines do not authorize Kamlands to enter Lot 13 to fill the excavation. I say this for several reasons.
- [20] First of all, filling in the excavation has nothing to do with the stated primary intent of the Design Guidelines to "ensure a sense of design continuity". That objective is achieved primarily through the review of designs submitted by owners, a process that is at the heart of this litigation.
- [21] Next, while the Design Guidelines do concern themselves with the sightliness of lots within the development, they have nothing whatever to do with three issues raised by the defendants, namely safety issues, loss of lateral support due to erosion, or noise.
- [22] Further, Mr. Grenier has prepared Lot 13 for construction, but, without design approval from the DRC and without a building permit, he has not "commenced construction". As a result:
1. the 12-month timeline in s. 5.6.4 for completing construction has not begun to run; and
 2. Kamlands, therefore, cannot rely on Mr. Grenier's purported failure to comply with the 12-month timeline in s. 5.6.4 as a means to exercise a right of entry under s. 5.9.
- [23] In addition, while Mr. Grenier is responsible for "landscape maintenance", filling in the excavation on Lot 13 is not really a landscaping issue.
- [24] Finally, and perhaps most importantly, Kamlands' right of entry under s. 5.9 arises only to "remedy defects" or "make repairs" to facilitate compliance with the Design Guidelines. At this stage, no design has been approved and no construction has commenced. In these circumstances, I am unable to characterize the excavation as a "defect" or the filling of the excavation as a "repair" that is necessary to facilitate compliance with the Design Guidelines.

- [25] Given my interpretation of the Design Guidelines, any entry by Kamlands onto Lot 13 would amount to a trespass. Based on the authorities cited to me, Mr. Grenier has established that if the injunction is not granted he will suffer irreparable harm.
3. Does the balance of convenience favour granting the interim injunction?
- [26] In assessing the balance of convenience, the court should consider the following factors:
- 1) The adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if the injunction is granted.
 - 2) The likelihood that if damages are finally awarded they will be paid.
 - 3) Other factors affecting whether harm from the granting or refusal of the injunction would be irreparable.
 - 4) The strength of the applicant's case.
 - 5) Any factors affecting the public interest.
 - 6) Which of the parties has acted to alter the balance of their relationship and so affect the status quo.
 - 7) Other factors affecting the balance of convenience. (Canadian Broadcasting Corp. v. CKPG Television Ltd., [1992] 64 B.C.L.R. (2d) 96 (BCCA) at para. 23.)
- [27] Of course, this list is not exhaustive: National Bank Financial Inc. v. Canaccord Genuity Corp., 2018 BCSC 857. Further, these factors should not be regarded separately in a checklist fashion. Rather, all relevant factors should be considered at one time and in one unified context: Canadian Broadcasting Corp. at para. 25.
- [28] After carefully weighing all of the circumstances, I have concluded that the balance of convenience favours the granting of an interim injunction.
- [29] In reaching this conclusion, I take into account that both Mr. Grenier and the defendants appear to have the resources to pay any damages associated with the granting or denial of an injunction.
- [30] Further, I have to say that I am not relying on the strength of Mr. Grenier's case. Though the parties have submitted substantial affidavit evidence, I am simply not prepared to weigh in with my thoughts on whether Mr. Grenier is or is not likely to win his case.
- [31] Rather, my decision is based on: · the extent to which Mr. Grenier has safeguarded the excavation; · the fact that no public authority has raised any safety or other concerns regarding the site; · the absence of any expert evidence regarding any potential loss of lateral support to Mr. Grenier's neighbours; · the absence of any authority for Kamlands to enter Lot 13; · an injunction being the only means to prevent an unauthorized incursion by Kamlands onto Lot 13; · the fact that there are and will be other open excavations within the development for varying lengths of time; · the fact that the excavation has already been

open for more than two years without a serious problem; · Mr. Grenier's acknowledgment that he is responsible for the excavation; and, finally · Mr. Grenier's undertaking as to damages. Conclusion and Order

- [32] I am granting Mr. Grenier the interim injunction he seeks. In doing so, I note that other parties may be in a superior position, as compared to Kamlands, to seek a mandatory injunction compelling Mr. Grenier to fill in his excavation. For example, if Mr. Grenier's excavation results in an established loss of lateral support to a neighbouring lot, which jeopardizes the structural integrity of a neighbouring home, that neighbour may be in a good position to obtain a mandatory injunction. The same may be true with respect to a public authority that can, for example, establish that the excavation contravenes a local government bylaw or other statute. My interim injunction is not intended to foreclose such possibilities.
- [33] For all these reasons, I consider it just and equitable to grant Mr. Grenier an interim injunction. The terms are as follows:
- 1) The defendants, any person acting on their instructions or behalf, and all persons having notice of this order are restrained and enjoined until the trial of this matter or until further order of this court from:
 - a) entering onto or trespassing on Mr. Grenier's Lot 13 in the Tobiano Resort Development, Tobiano, B.C.; and
 - b) filling in the excavation on Lot 13.
 - 2) Mr. Grenier shall give an undertaking as to damages.
- [34] Finally, I am making no order as to costs. They can be dealt with in the fullness of time in the usual way at the conclusion of trial. "L.S. Marchand J." MARCHAND J.

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