

CANADA / JUDGMENT

Griffiths v. Sun Peaks Resort Corporation

2008 BCSC 640

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 640 Griffiths v. Sun Peaks Resort Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Griffiths v. Sun Peaks Resort Corporation,

2008 BCSC 640

Date: 20080521

Docket: S072633

Registry: Vancouver

Between:

Richard Mark Griffiths and Louise Elena Griffiths

Plaintiffs

And

Sun Peaks Resort Corporation, Hartmut Berger and

Hartmut Berger doing business as Tall Timbers Log Builders

Defendants

Before: The Honourable Madam Justice Brown

Reasons for Judgment

Counsel for the plaintiffs

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Counsel for the defendant Sun Peaks Resort Corporation

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Counsel for the defendants Hartmut Berger and Hartmut Berger doing business as Tall Timbers Log Builders

D. MacAdams, Q.C.

Date and Place of Trial/Hearing:

December 18-20, 2007

Vancouver, B.C.

INTRODUCTION

- [1] The plaintiffs own a house at Sun Peaks Resort. The defendant Hartmut Berger constructed a house next door to theirs, which the Griffiths say breached the provisions of the Statutory Building Scheme for Sun Peaks Resort. They say that the house and any other improvements on the lot, other than those in compliance with the Statutory Building Scheme, should be removed. Alternatively, they seek damages from Sun Peaks Resort Corporation and Mr. Berger for breach of the Statutory Building Scheme, or damages for misrepresentation and breach of contract against Sun Peaks Resort Corporation. The parties agreed to proceed on liability only, with the remedy, if any, to be determined later.

BACKGROUND FACTS

- [2] The plaintiffs bought a lot in the Fairways Phase IV Development of Sun Peaks Resort in 2003. They completed construction of their house in August 2005. Mr. Hartmut Berger, who does business as Tall Timbers Log Builders, purchased lot 2 of the Fairways Phase IV Development, which is immediately west of the Griffiths' lot. He obtained approval for construction from Sun Peaks in October 2006. He started construction on the house in the fall of 2006.
- [3] The Griffiths first learned about the construction on the Berger lot in December 2006 when they received a call from another neighbour, Ms. Holman, who was concerned about the work being done on the lot. She advised Mr. Griffiths that she intended to fight the development and sought his support. Mr. and Mrs. Griffiths first saw the construction when it was in its early stages in January 2007. (They use their property as recreational property and do not live in the house on a regular basis.) When they saw the construction only the footings were in place, it was snowy, and they did not understand what they were looking at. They thought the back of the development must be a ground level deck. They saw the construction for the second time in February 2007. By that time, framing had started on the first storey and the Griffiths were horrified. What they had thought was a ground level deck was the foundation for the house. Mr. Griffiths then called Sun Peaks Development Corporation and asked that the construction be stopped immediately. Mr. Griffiths met with Mr. Berger and Mr. Nixon, a representative of Sun Peaks, who attempted to resolve the

matter. They were not successful. Construction continued on the Berger house. It is now complete, or virtually so.

THE POSITIONS OF THE PARTIES

- [4] The Griffiths say that the Berger property is a neighbouring property within the meaning of the Design Guidelines at Sun Peaks. They say that the Berger house diminishes the view lines of the Griffiths' property, diminishes the privacy of the Griffiths' property and overshadows the Griffiths' house, all contrary to the design guidelines.
- [5] The plaintiffs say that all owners must develop in accordance with lawful approval provided by Sun Peaks, that is: a manifestly objectively reasonable approval, in accordance with the design guidelines. They say that Sun Peaks, in its capacity as the administrator, owed the Griffiths a duty to exercise its discretion to approve the Berger plans in a lawful manner. Mr. Berger can construct a house only with lawful approval, and no other. They say that Sun Peaks is required to abide by its design guidelines and to approve only in accordance with the guidelines. Either Sun Peaks has failed to appropriately apply its design guidelines or is liable in misrepresentation for the misrepresentation of its belief in the effect of paragraph 3.5 of the disclosure statement, that is:

Building Scheme. There is a Statutory Building Scheme registered against title to the Lots which requires owners/builders to have their plans and specifications for any building and landscaping submitted to the Developer for approval based on compliance with the design guidelines for this particular development. A copy of the Building Scheme is attached as Schedule "B". It is suggested that each purchaser carefully review and be familiar with the design guidelines and restrictions contained in the Statutory Building Scheme. The intent of this Building Scheme is to create an integrated residential community with certain minimum standards of construction and uniformity of design for the benefit of all owners.

- [6] Sun Peaks argues that it is not liable for breach of contract, negligence or negligent misrepresentation. It accepts that it may be liable for failure to perform its obligations under the disclosure statement and Statutory Building Scheme, but says that the plaintiff's claim must fail because:
- (a) Sun Peaks did consider the impact of the Berger residence on the Plaintiff's view lines, privacy and sunlight. Sun Peaks has complete discretion as to what it approves; even if it owes a duty, it cannot be said that the approval was so unreasonable that no one would allow it. It is not manifestly unreasonable;
- (b) Sun Peaks was not negligent in granting approval. The plaintiffs have not established that a duty was owed and even if a duty were owed, Sun Peaks did not breach the standard of care; and

- (c) there is no basis for an action for negligent misrepresentation, as the representation, if any, was as to a future event; furthermore, the plaintiffs did not rely on the alleged representation.
- [7] The defendant, Hartmut Berger adopts the submissions of Sun Peaks and argues that he has breached no legal duty. His duty is not to construct unless the plans and specifications for the improvement have been approved in advance by the administrator. He says that he received the requisite approval and is therefore not in breach. He denies any suggestion that he intentionally set out to diminish the Griffiths' amenities. He says that the liability, if any, is Sun Peaks'.

DISCUSSION

- [8] The Fairways Phase IV was marketed by the Developer, Sun Peaks Resort Corporation through a disclosure statement dated January 6, 2003. The disclosure statement states that:

There is a Statutory Building Scheme registered against title to the Lots which requires owners/builders to have their plans and specifications for any building and landscaping submitted to the Developer for approval based on compliance with the design guidelines for this particular development. The intent of this Building Scheme is to create an integrated residential community with certain minimum standards of construction and uniformity of design for the benefit of all owners.

- [9] The Griffiths and Mr. Berger each purchased their property pursuant to a standard form Offer to Purchase, which provides at para. 10 that:

The Purchaser agrees to comply with the design guidelines contained in the Statutory Building Scheme registered against title to the Land.

- [10] The building scheme restricts development: no improvement can be constructed unless the plans are approved in advance by the administrator (Sun Peaks) who "shall consider all plans for compliance with the Design Guidelines ." (p. 8 of the Building Scheme)

- [11] The design guidelines provide for a number of design elements, including development of the site. They provide in s. 2.1:

Building Siting

The placement of buildings should respect the site by fitting into the existing topography. Building siting should respond to the following:

Topography and lot shape

Geological/soil conditions

Hydrology, flood elevations, and drainage systems

Existing vegetation

Views into and out of the site

Solar exposure

Access and circulation

Snow management

Parking and driveway grading

The design and siting for a proposed building must respond to the existing and/or future planned development on adjacent lots. The proposed project must take into consideration its effect on privacy, view lines and overshadowing of the neighbouring properties. Building siting on multi-family development sites should also take into account the possible location of a unit mailbox and garbage collection areas, if any.

[12] When Mr. Berger acquired his lot, he planned to build a house for re-sale. He instructed his designer to design a house which maximized the lot. To accommodate a house of this size on the lot, the Berger house is set back significantly further than the Griffiths' house to the west, and the Holman house to the east. As a result of the set-back and the size of the Berger house, it has significantly reduced the Griffiths' view to the north east. It is an imposing structure immediately beside the living areas of the Griffiths' residence.

[13] The significant issues in this case are:

1. Whether Sun Peaks has appropriately interpreted the Building Scheme and Design Guidelines; and
2. Whether it has properly exercised its discretion to approve the plans for the Berger residence.

[14] Sun peaks argues that it has. Sun Peaks refers to the purpose in s. 1 of the Guidelines "to ensure a high standard of architectural appearance and landscaping compatible with neighbouring lots", and argues that the clear underlying purpose is to ensure that the appearance of the buildings and lots are of uniformly high quality; that there is nothing in the Building Scheme or Design Guidelines which talks of protecting the view lines and privacy or preventing overshadowing. Sun Peaks says that the Building Scheme and Design Guidelines ensure the look and appearance of the residences, not their views, privacy or solar exposure.

[15] I am not persuaded that this is the proper interpretation. The building guidelines themselves require that "siting for a proposed building must respond to the existing development on adjacent lots [and] must take into consideration its effect on privacy, view lines and overshadowing of the neighbouring properties." If the interpretation were as narrow as Sun Peaks argues, there would be no need to consider the impact of siting of a proposed development on, for example, view lines of adjacent developments: attention to finishes, landscaping materials, etc. would be sufficient. The direction to respond to existing

developments, and to consider the effect of siting on existing developments is consistent with the purpose of the building scheme, as described in the disclosure statement.

[16] This broader interpretation is also consistent with the surrounding circumstances. As the disclosure statement and various related documents show, Sun Peaks marketed this development as a designed development, in that any improvement or proposed building must be approved by Sun Peaks, considering the design guidelines. The purpose of the restrictions is expressed in the Disclosure Statement: in order to create an integrated residential community with certain minimum standards of construction and uniformity of design for the benefit of all owners (s. 3.5), any residential dwelling must be built in accordance with a registered Building Scheme to create an integrated community (s.3.1). The restrictions are for the benefit of all owners: it is appropriate that the impact of a proposed development take into consideration its impact on its neighbours.

[17] As Madam Justice Dorgan stated in *Gubbels v. Anderson* (1994), 91 B.C.L.R. (2d) 379 at para. 23:

A building scheme, however, involves a community of interests. Under a building scheme all landowners share similar burdens and enjoy benefits relating to these limitations on property use. Purchasers of property within areas covered by building schemes do so with knowledge of the restrictions and often because they seek the specific benefits provided by the building scheme. The terms imposed are known to each owner and are entered into by the successors in title .

And, at para. 25:

In considering the different nature of building schemes and the fact that they are given effect through restrictive covenants, it is my view that the general purpose of building schemes is an important factor in "the surrounding circumstances" and one which I am permitted to consider when interpreting arguably ambiguously worded restrictive covenants.

[18] To meet the requirements of the guidelines here, the "siting for a proposed building must respond to the existing development on adjacent lots [by taking] into consideration its effect on privacy, view lines and overshadowing of the neighbouring properties." The clear meaning of this design requirement is that the impact of the siting of any particular building on neighbouring houses must be considered. Before the Berger plans were approved, Sun Peaks was required to consider the effect of the siting of the proposed building on the privacy, view lines and overshadowing of the Griffiths' residence.

[19] Did it do so? Sun Peaks says that even if this interpretation is given to the guidelines, it has properly approved the Berger development. Relying on *Scott v. Reimer* (1971), 22 D.L.R. (3d) 243 (Man C.A.), Sun Peaks says that, while it has a duty to consider a factor, it may give that factor great, little or no weight, but cannot ignore the factor. Sun Peaks argues that it considered these factors, but gave the non-primary view lines, privacy and solar exposure little weight.

- [20] Sun Peaks' representative, Mr. Nixon testified that when approving a proposed building, Sun Peaks reviews the plans to ensure that they comply with the Thompson Nicola Regional District zoning requirements, which include such things as setbacks and height restrictions. Sun Peaks also considers the design guidelines for the development, including those in s. 2.1 dealing with privacy, view lines and overshadowing. With respect to privacy, Mr. Nixon testified that Sun Peaks considers the privacy expectation to be limited, given that the lots are each $\frac{1}{4}$ acre. If a house plan contains too many windows along a side shared with a neighbour it may be rejected. With respect to view lines, Mr. Nixon testified that Sun Peaks considers the views out of the back or front of the lot as the "view lines". For the Griffiths, he considered the view line to be the view out of the back of the lot. With respect to overshadowing, Sun Peaks looks at average roof height to ensure that the proposed house does not exceed the maximum roof height permitted by zoning.
- [21] To obtain approval from Sun Peaks to construct the house, Mr. Berger provided Sun Peaks with the house plans. The approval was provided based on the plans. The plans do not contain information about the developments on adjacent lots. They show the site of the house within the Berger lot, elevations, room dimensions, etc., but provide no information about existing development on neighbouring properties.
- [22] In my view, Sun Peaks has not properly exercised its power to reject or approve the Berger development in two respects. First, it did not consider the siting of the Berger residence and consider whether it responded to existing development on adjacent lots as s. 2.1 of the guidelines requires. It had no information with respect to the siting of the Berger house relative to its neighbours, so could not consider these factors. It has, in other words, ignored the factors. Second, the interpretation which Sun Peaks gave to privacy, view lines and overshadowing was without reference to adjacent property and so did not comply with s. 2.1 of the guidelines.
- [23] Section 2.1 requires that the siting of a proposed building must respond to an adjacent development. Looking at the proposed siting, Sun Peaks must consider how that siting affects adjacent property. So, for example, siting a house on one part of a lot may have no impact on the privacy of an adjacent development, whereas the same house, sited elsewhere may dramatically affect the neighbour's privacy. The same is true of overshadowing: a house parallel to the neighbouring house may not overshadow, while one sited further back on the lot may overshadow, looming over the living areas of the adjacent home. Finally, siting most obviously affects view lines: once again, a house sited parallel to its neighbour may not restrict view lines, while one sited further down the lot may severely restrict the angle of the view, leaving the neighbouring lot with a tunnel view, in place of a view with some perspective.
- [24] This is not to say that Sun Peaks must reach a particular conclusion when considering siting and its impact on privacy, view lines and overshadowing. However, the approach taken by Sun Peaks did not consider the effect of the siting of the Berger house on privacy, view lines and overshadowing at all. There is no evidence that Sun Peaks considered the siting of the

Berger house in relation to other properties before approving the Berger development. The plans submitted contained no information about adjacent lots. (Plans showing the locations of adjacent houses were attached to the Berger plans after the approval was granted.)

Therefore, to the extent that Sun Peaks considered privacy, view lines and overshadowing, it did so without considering siting relative to adjacent lots, as it was required to by s. 2.1. Its consideration of these factors would be the same regardless of the siting of the house. This approach does not comply with s. 2.1.

- [25] In addition, in my view the limited definitions which Sun Peaks gave to privacy, overshadowing and view lines is inconsistent with s. 2.1. To comply with s. 2.1, the siting of the proposed house and its effect on its neighbour must be considered. Sun Peaks defined "overshadowing" as "average roof height not exceeding the maximum". Siting relative to adjacent properties had no bearing on this definition. Privacy, too, can only logically be considered in relation to siting, relative to adjacent properties. View lines cannot simply be the view out of the end of the lot, with out regard to siting. For the Griffiths, the consideration of the rear view is meaningless: that view cannot be obstructed by any construction, it is only the peripheral views which could be affected by siting. Further, the design guidelines require Sun Peaks to consider the view lines, plural, not the main view or the primary view. Sun Peaks' definitions are overly restrictive and not in compliance with s. 2.1.
- [26] Although the test for judicial interference in a decision by the administrator to approve a development is high, the right and power given to the administrator is not unfettered, but confined by the community of interest and reciprocity of obligation. The test which should be applied to an administrator in exercising its discretion to approve or reject plans should be that of objective manifest reasonableness (*Hemani v. British Pacific Properties Ltd.* (1992), 70 B.C.L.R. (2d) 91).
- [27] Here, the administrator's decision is not objectively, manifestly reasonable as it has failed to consider factors which the building scheme requires it to consider.
- [28] Finally, Sun Peaks argues that it has complete, unfettered discretion to do whatever it considers appropriate, including allowing non-compliance with the Building Scheme and Design Guidelines by virtue of s. 3 of the building scheme, which says, in part that: "the Administrator shall consider all Plans and specifications submitted to it for compliance with the Design Guidelines and such other factors as the Administrator may in its discretion deem appropriate." [emphasis added]
- [29] Properly interpreted, this provision allows the administrator to consider other factors, as well as the design guidelines, not to ignore the design guidelines. It does not provide Sun Peaks with complete, unfettered discretion not subject to review. In any event, Sun Peaks does not suggest that it considered other factors in this case.

- [30] In conclusion, I am able to conclude that Sun Peaks breached its obligations under the disclosure statement, the statutory building scheme and the design guidelines in granting approval to Mr. Berger.
- [31] In light of the conclusion that I have reached with respect to Sun Peaks' breach of its obligations, I do not need to address the misrepresentation claim.
- [32] I am not able to determine the issues respecting Mr. Berger without considering the arguments with respect to remedy: the issues of liability and remedy are so intertwined with respect to Mr. Berger that I cannot determine his liability, if any, alone.
- [33] I am seized of this action, and the parties may schedule the remaining matters at their convenience.

"B.J. Brown J."

The Honourable Madam Justice B.J. Brown

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