

CANADA / JUDGMENT

Griffiths v. Sun Peaks Resort Corporation

2009 BCCA 121

COURT

British Columbia Court of Appeal

DECIDED

13 March 2009

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2009 BCCA 121 Griffiths v. Sun Peaks Corporation

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Griffiths v. Sun Peaks Resort Corporation,

2009 BCCA 121

Date: 20090313

Docket: CA036156

Between:

Richard Mark Griffiths and Louise Elena Griffiths

Respondents

(Plaintiffs)

And

Sun Peaks Resort Corporation

Appellant

(Defendant)

And

Hartmut Berger and Hartmut Berger

doing business as Tall Timbers Log Builders

Respondents

(Defendants)

Before:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Low

The Honourable Madam Justice Neilson

Oral Reasons for Judgment

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Counsel for the Respondents, R. Griffiths and L. Griffiths

Place and Date of Hearing:

Vancouver, British Columbia

9 March 2009

Place and Date of Judgment: Vancouver, British Columbia

13 March 2009

- [1] NEILSON J.A.: Sun Peaks Resort Corporation ("Sun Peaks") appeals from the order of a Supreme Court Judge pronounced May 21, 2008, finding it liable to the respondents, Mr. and Mrs. Griffiths, for breach of contract for permitting their neighbour, the respondent Hartmut Berger, to build a house that contravened the provisions of the Statutory Building Scheme for Sun Peaks. Her reasons may be found at 2008 BCSC 640.

Background

- [2] Sun Peaks was the developer of a six lot subdivision known as Fairways Phase IV (the "development"). In January 2003, it marketed the development through a disclosure statement that included this reference to a Statutory Building Scheme that was registered in the Land Title Office as a charge against title to each of the lots:

3.5 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.

[3] Paragraph 2 of the Statutory Building Scheme required Sun Peaks to approve all proposed buildings in the development in advance of construction. Paragraph 3 provided in part, "[Sun Peaks] shall consider all Plans and specifications submitted to it for compliance with the Design Guidelines and such other factors as [Sun Peaks] may in its discretion deem appropriate".

[4] Section 2.1 of the Design Guidelines provided:

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.

[5] In 2003, the Griffiths bought Lot 1 in the development, Mr. Berger bought Lot 2 to the west of them, and Brian Jacobsen and his wife, Kim Holman, bought Lot 3 to the west of Mr. Berger. The standard form offer to purchase used in each transaction included a term that the purchaser would comply with the Design Guidelines in the Statutory Building Scheme.

[6] The Griffiths and the owners of Lot 3 completed construction of their homes in 2005.

- [7] Mr. Berger, who had built houses at Sun Peaks in earlier phases of its development, began plans to build on Lot 2 in 2006. Since he was building a house for re-sale, he instructed his designer to maximize the lot. He submitted his plans and Sun Peaks approved them in October 2006. It is common ground that those plans only portrayed the proposed building on Lot 2, and that Sun Peaks did not consult any material related to the adjacent properties before approving them.
- [8] The Berger house on Lot 2 was set back significantly further to the north than the Griffiths' house to the east and the Holman house to the west. Soon after Mr. Berger commenced construction in November 2006, Ms. Holman contacted Will Takashita, the assistant to Peter Nixon, Sun Peaks' manager of real estate development, because of her concern that the siting of Mr. Berger's house was going to impact the view from Lot 3. In December 2006, Ms. Holman contacted the Griffiths to tell them about her opposition to Mr. Berger's construction, and to ask for their support in opposing his building. However, the Griffiths did not take an active role in Ms. Holman's efforts.
- [9] There followed a series of consultations between Mr. Jacobsen, Ms. Holman, Mr. Berger, Mr. Nixon and Mr. Takashita. In the course of these, Mr. Takashita and Mr. Nixon made several visits to Lot 2 to look at the Berger construction. Ms. Holman testified that when she told Mr. Nixon that the construction violated the Building Scheme and the Design Guidelines, he replied that he was not in a position to enforce that as it was just a guideline. He viewed it as a problem between her and Mr. Berger, and offered to arrange a meeting between them and mediate a solution. As a result of that meeting, Mr. Berger agreed to a five foot pullback in his design and a more limited roof extension. He prepared a revised plan and submitted it to Sun Peaks for approval.
- [10] On February 9, 2007, Sun Peaks issued a letter for approval of Mr. Berger's revised plans. Those plans again portrayed only Lot 2. The letter read in part:
- We have completed our final review of your revised plan for the single family home on Lot 2 at 2428 Fairways Drive and note that you have taken the necessary steps to address the rear easterly line of site concerns of your neighbors.
- [11] The Griffiths first saw Mr. Berger's construction on Lot 2 in January 2007. Only the footings were in place in the snow and they did not understand what they were looking at. They thought that what they saw at the north end of his development was a ground level deck.
- [12] In February 2007, the Griffiths saw the construction for the second time. Framing had started on the first storey and they realized that what they had thought was a ground level deck was the foundation for the house.
- [13] Mr. Griffiths called Sun Peaks and asked that construction be stopped immediately. He met with Mr. Berger and Mr. Nixon in an unsuccessful attempt to resolve the matter. On April 19, 2007, the Griffiths commenced an action against Sun Peaks and Mr. Berger, claiming breach of the provisions of the Statutory Building Scheme and the associated Design Guidelines.

[14] Construction continued on the Berger house and it was virtually complete by the trial. The trial judge described it as "an imposing structure immediately beside the living areas of the Griffiths' residence". Photographs show that its setback and design significantly reduce the Griffiths' view to the north-west, and shade the northwest deck and living space of their house. As well, the Berger house has four windows on its east side that look out on aspects of the Griffiths' house.

[15] The trial proceeded only on the issue of the liability.

Issues on appeal

[16] The issues raised by Sun Peaks on this appeal are best expressed by these two questions:

1. Did the trial judge err in concluding that Sun Peaks failed to consider the requirements in paragraph 2.1 of the Design Guidelines with respect to adjacent properties when it approved the siting of the Berger residence?
2. Did the trial judge err in finding that Sun Peaks exercised its discretion in a manner that was manifestly, objectively unreasonable when it approved the siting of the Berger residence?

[17] Sun Peaks concedes that if the first question is answered in the negative, the second question does not arise.

Discussion

[18] The trial judge found that, on a proper interpretation of the Design Guidelines, siting for a proposed building must respond to the existing development on adjacent lots and must take into consideration its effect on the privacy, view lines and overshadowing of neighbouring properties. She viewed that interpretation as consistent with the stated purpose of the Statutory Building Scheme, and the fact that the development had been marketed as a designed development for the benefit of all owners. She concluded that, before approving Mr. Berger's plan, Sun Peaks was required to consider the effect of the proposed building on the privacy, view lines, and overshadowing of the Griffiths' residence (paras. 15-18).

[19] The trial judge then examined whether Sun Peaks had done so, and found that there was no evidence that it had considered these factors. She observed that Sun Peaks' approval was based only on the plans submitted by Mr. Berger, which contained no information about the developments on the adjacent lots. Thus, Sun Peaks could not have considered how the proposed building on Lot 2 would affect the privacy, view lines and overshadowing of those lots, as required by the Design Guidelines. She concluded that Sun Peaks had breached its obligations under the disclosure statement, the Statutory Building Scheme, and the Design Guidelines. (paras. 21-22, 24, 26, 30).

- [20] Sun Peaks acknowledges that these are findings of fact that this Court will treat with a high degree of deference. They will not be reversed unless it is shown that the trial judge made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 10.
- [21] Sun Peaks argues that the trial judge made such an error in ignoring a body of evidence that was inconsistent with her findings. While Sun Peaks concedes it did not perform its obligations under paragraph 2.1 of the Design Guidelines in approving the initial plan for Mr. Berger's residence in October 2006, it says that the trial judge failed to consider the steps it undertook later in response to Ms. Holman's complaints. Sun Peaks maintains that, had she done so, the trial judge would have found that the evidence of site visits and consultations at that time clearly established that Sun Peaks considered the potential impact of the design and siting of the Berger residence on adjacent properties in compliance with the Design Guidelines before it approved Mr. Berger's revised plan in February 2007.
- [22] I am unable to agree. First, there is no direct evidence that Sun Peaks considered the Design Guidelines with reference to the Griffiths' lot during its dealings with Ms. Holman. Nor is there an adequate evidentiary base from which one might draw an inference that they did so.
- [23] There is no evidence of communication between Sun Peaks and the Griffiths before Mr. Berger's second plan was approved. While Ms. Holman initially alerted the Griffiths to her concerns, they did not participate in any of the resulting consultations.
- [24] The evidence indicates that all of Sun Peaks' dealings were with Ms. Holman and Mr. Berger. Visits to the site addressed view lines from the Holman residence only. Meetings were set up to resolve issues between Mr. Berger and Ms. Holman.
- [25] The trial judge accurately summarized Mr. Nixon's interpretation of paragraph 2.1 of the Design Guidelines at para. 20 of her decision:
- [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.

- [26] Leaving aside whether that interpretation fully captures the intent of the Design Guidelines, nothing in Mr. Nixon's evidence in chief or cross-examination indicated that he applied his mind to these considerations with reference to the Griffiths' residence before approving Mr. Berger's first or second plan. There was no evidence that he considered privacy or overshadowing. At the end of his testimony, in response to a question from the trial judge, he did make a vague reference to consideration of "I guess some peripheral view". However, his evidence as a whole is clear that he considered the view lines in this case to refer only to what he called the "primary view", which was the view to the north. Since all three lots were north-facing, it was impossible for Mr. Berger to build anything that obstructed that view line for Lots 1 or 3. Thus, it is unlikely that Sun Peaks considered the view lines from the Griffiths' residence at all.
- [27] The letter of February 9, 2007 approving Mr. Berger's revised plan confirms that Sun Peaks' entire focus was the Holman property. It stated that Mr. Berger's revised plan addressed "the rear easterly line of site concerns of your neighbours". That refers only to Lot 3, which was to the east of Mr. Berger's lot.
- [28] Further, the evidence suggests that, even in its dealings with Ms. Holman, Sun Peaks did not fully understand or carry out its obligations under the Design Guidelines. Ms. Holman said that when she advised Mr. Nixon of her concerns, he told her that he could not enforce the Building Scheme or Guidelines as they were just a guide, and the problem was between her and Mr. Berger only. He declined to get involved except as a mediator.
- [29] As well, Mr. Nixon appeared to be of the view that the Griffiths and Ms. Holman and her husband were the authors of their own misfortune, stating at one point during his evidence:
- I guess the fact that the Griffiths and the Holmans pulled their houses as close to the front of the lot, I mean, they're obviously going -- I guess would lose some of their view if he put his house in the centre of the lot. I guess my question is are we -- if he wants to put his house sort of towards the centre of his lot where most of the other houses have done that down the street, should he be required to pull it all the way to the front because they put their houses in the locations that they did prior to him building.
- [30] These passages from Mr. Nixon's evidence suggest an abdication by Sun Peaks of its responsibility to administer the development in accord with the Statutory Building Scheme and the Design Guidelines.
- [31] While it is true that the trial judge did not explicitly set out the evidence of Sun Peaks' dealings with Ms. Holman, it is not clear that she failed to consider it. Nor is it likely that, had she done so, she would have reached a different conclusion.
- [32] I am satisfied that she made no palpable or overriding error in concluding that Sun Peaks failed to perform its obligations to the Griffiths. I would accordingly give no effect to this ground of appeal.

[33] Sun Peaks having agreed that a finding against it on the first ground makes it unnecessary to consider the second ground of appeal, I would dismiss the appeal.

[34] ROWLES J.A.: I agree.

[35] LOW J.A.: I agree.

[36] ROWLES J.A.: The appeal is dismissed.

"The Honourable Madam Justice Neilson"

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