
CANADA / JUDGMENT

Griffiths v. Sun Peaks Resort Corporation

2011 BCSC 62

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 62 Griffiths v. Sun Peaks Resort Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Griffiths v. Sun Peaks Resort Corporation,

2011 BCSC 62

Date: 20110120

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 B. Brown

Reasons for Judgment

Counsel for the Plaintiffs/Respondents:

R. Lonergan

S. Coval

Counsel for the Defendants/Applicants, Hartmut Berger and Hartmut Berger dba Tall Timbers
Log Builders:

D. MacAdams, Q.C.

M.A. Misner

Counsel for the Defendant/Respondent,

Sun Peaks Resort Corporation:

R.D. Lee

Place and Date of Trial:

Vancouver, B.C.

November 12, 2010

November 17 & 18, 2010

Place and Date of Judgment:

Vancouver, B.C.

January 20, 2011

INTRODUCTION

- [1] In 2007, the first part of this action was heard by me, limited to liability. On May 21, 2008, I issued reasons on that aspect of the trial. I found that Sun Peaks had breached its obligations under the disclosure statement, the statutory building scheme and the design guidelines in granting approval to Mr. Berger to construct his residence. I found that the issues of liability and remedy were too intertwined with respect to Mr. Berger and I could not determine his liability alone.
- [2] That decision was appealed and the Court of Appeal upheld the decision in reasons dated March 13, 2009, indexed at 2009 BCCA 121.
- [3] The matter now comes back before me for determination of damages, if any, against Sun Peaks and liability and damages, if any, against Hartmut Berger.
- [4] The background facts are set out in my reasons (2008 BCSC 640) and I do not plan to reiterate them here, beyond that necessary to give context to these reasons. In brief, the plaintiffs bought a lot and built a residence in the Fairways Phase IV development of Sun Peaks' resort (the "Griffiths house"). Their house was completed in August 2005. Mr. Berger, who is a builder, bought the lot next door. He started construction of his house in the fall of 2006 and it was largely completed by the time the matter came to trial in December 2007 (the "Berger house"). The plaintiffs said that Mr. Berger and Sun Peaks had failed to properly interpret and apply the design guidelines and had breached their obligations under the disclosure

statement, the statutory building scheme and the design guidelines.

- [5] At the start of this hearing, I was advised that Sun Peaks had agreed to pay the Griffiths \$90,000 as compensation for the loss in value of their property, based on my earlier findings.

POSITION OF THE PARTIES

(a) The Plaintiffs' Position

- [6] The plaintiffs argue first that the Berger defendants are also liable to them for damages. The plaintiffs say that the development on Mr. Berger's property is in breach of the building scheme because the house was constructed without a "lawful" approval from Sun Peaks. The building scheme requires Mr. Berger to obtain approval before construction commences and "no improvement may be constructed ... unless the plans and specifications for the improvement have been approved in advance by the administrator in accordance with s. 3". In essence, the plaintiffs say that the administrator did not grant approval in accordance with s. 3 because the approval which the administrator granted was in breach of the design guidelines.
- [7] The plaintiffs say as well that Mr. Berger did not properly consider the design guidelines. They say that Mr. Berger's designer did not have a site plan showing the location of the Griffiths house. The designer placed the house as he saw fit on the lot. The designer was not in a position to take into account the impact on the neighbours in rendering his design. As such, the error made by Sun Peaks, failing to take into account the factors that the building scheme requires, was also made by Mr. Berger and his designer. The plaintiffs say that, viewed objectively, the plans do not respond to the Griffiths house; they call for a house that imposes itself immediately beside the living areas of the Griffiths house, impairs the views to the northwest, substantially impairs their privacy and deprives them of evening sun exposure.
- [8] The plaintiffs say that Mr. Berger has constructed his house on the strength of a manifestly objectively unreasonable approval, which is the equivalent of no approval at all. Consequently, he is in breach of his obligations to the Griffiths under the building scheme. Accordingly, the Griffiths say, he is liable to them also for damages.
- [9] With respect to remedy, the Griffiths say that the approval and construction of the Berger house has caused the Griffiths to suffer:
- (a) loss of property value;
 - (b) loss of the benefit of the amenities protected by the building scheme, being:
 1. privacy;
 2. viewlines;
 3. avoidance of overshadowing;

4. sun exposure; and, more generally,
 5. the ambience of a mountain resort community.
- [10] The Griffiths say that they are entitled to damages in lieu of a mandatory injunction quantified as:
- (a) the avoided cost of compliance; or
 - (b) on a quid pro quo basis, that is, quantified on the basis of a notional, before the fact negotiation.
- [11] The Griffiths say that the avoided cost of compliance is, in this case, the cost to remove the existing Berger house and replace it with one that complies. They say that this is in the order of \$1 million.
- [12] The Griffiths say that quid pro quo damages are available as compensation for the breach of the building scheme in lieu of a mandatory injunction and that the approach is to ascertain the sum of money as might reasonably have been demanded by the Griffiths from Sun Peaks and Mr. Berger as quid pro quo for waiving the protection of the approval process in respect of design guideline 2.1. They say that they stood nothing to gain from the waiver of the benefit of s. 2.1 of the design guidelines. They could reasonably have insisted on a reasonable portion of the benefits gained by the defendants, that is the increase in the value of the lot developed by Mr. Berger; plus full compensation for the lost property value and their loss of amenities. They say that Mr. Berger's property value was increased by 5% to 7.5%, in the range of \$69,950 to \$104,925, because his property has benefitted from the breach of the guidelines. They say that a reasonable price for their waiver would be 25% of the mid-point of these amounts, or \$22,000.
- [13] They say that in addition, they have suffered the loss of the value of their property and the loss of use and enjoyment of their property resulting from the impairment of the amenities protected by the building scheme.
- [14] With respect to loss of amenity values, the Griffiths seek the loss of their enjoyment of the property. They calculate that prior to the construction of the Berger house, they used the property on average 37 days per year. Based on an annual cost of \$50,520 (their opportunity costs of their investment in the property plus annual expenses of \$9,750), the cost per day of use is \$1,354. The Berger house impacts the Griffiths' use and enjoyment of their property because:
- (a) they attend less often; and
 - (b) they enjoy the property less when they do attend.

[15] They estimate, somewhat arbitrarily, that the value that they now receive in use and enjoyment of their property is 50% of what they did before the Berger house was built. On this basis, the Griffiths have calculated their loss of enjoyment of the property from construction of the Berger house until December 2010 at \$272,000. Accordingly, they seek \$272,000 for loss of amenity value, \$90,000 for loss of property value and \$22,000 for quid pro quo damages.

(b) Position of Sun Peaks

[16] Sun Peaks says that it was found liable for a breach of contract at trial. It says that the damages which flow from that breach are those which may fairly and reasonably be considered as naturally arising from the breach, namely, the diminution of value in the Griffiths' property. Sun Peaks says that it has consented to judgment in the amount of \$90,000 to satisfy its obligation to the Griffiths.

[17] Sun Peaks says that further damages should not be awarded. It says that damages for breach of contract should try to place the plaintiff in the same position it would have been had the contract been performed. Sun Peaks relies on *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at paras. 44 - 45:

...The measure of these damages is, of course, subject to remoteness principles. There is no reason why this should not include damages for mental distress, where such damages were in the reasonable contemplation of the parties at the time the contract was made. ... It does not follow, however, that all mental distress associated with a breach of contract is compensable. ... It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration....

[18] Sun Peaks says that in this case, the Griffiths cannot maintain that the object of the purchase contract for real property and, in particular, the design guidelines was to secure a psychological benefit which would bring mental distress within the reasonable contemplation of the parties or that the mental suffering caused by the breach was of a degree sufficient to warrant compensation.

[19] Sun Peaks says also that the loss of amenities claim is too remote. Sun Peaks says that the design guidelines permitted construction on the Berger property. The plaintiffs had no reasonable expectation that their view, solar exposure, etc. would remain as it had been when the property was vacant. Furthermore, Sun Peaks says that the damages claimed by the Griffiths for loss of amenities are not a natural or reasonably foreseeable consequence of the breach.

[20] Sun Peaks says that if it is liable for the loss of amenities, then the quantum sought by the plaintiffs is not supported by British Columbia law, as damages for this type of loss should be modest.

- [21] Sun Peaks says that some of the plaintiffs' theories of damages are flawed, for example, the claim for avoided cost of compliance. This is a claim for damages in lieu of an injunction. Sun Peaks says that no injunction was pleaded or sought against it and therefore the plaintiffs cannot claim on the basis of avoided cost of compliance damages in lieu as against Sun Peaks.
- [22] With respect to quid pro quo damages, Sun Peaks says that the only proper basis for a quid pro quo claim is a claim for equitable damages in lieu of an injunction; that the quid pro quo claim would be foreclosed in any event by the settlement of their claim for damages for loss of property value and their claim for loss of amenities; that the plaintiffs' quid pro quo claim is precluded because they did not seek an injunction against Sun Peaks; that to the extent they advance their quid pro quo claim as a portion of the increase in value of the Berger's property, that claim cannot be advanced against Sun Peaks; and finally, their claim is excessive and unreasonable in any event.
- [23] Finally, Sun Peaks says that the plaintiffs have failed to mitigate their damages. Sun Peaks says that the plaintiffs should have mitigated by selling the property as soon as they realized that they could no longer enjoy the property, which by their evidence was in early 2007.
- (c) Position of the Berger Defendants
- [24] Mr. Berger adopts the submissions of Sun Peaks.
- [25] Mr. Berger says that he has no liability to the Griffiths. Mr. Berger says that he was bound to construct only after obtaining approval from Sun Peaks, which he did. He says that he was bound to construct in compliance with the plans as approved, which he did. Mr. Berger says that apart from these obligations he has no contractual obligations. Mr. Berger says that the proper wording of clause 2.1 is: " the proposed project must take into consideration its effect on privacy, view lines and overshadowing of the neighboring properties ". Mr. Berger says that there was no mandated outcome for these considerations. On the evidence, Mr. Berger did take these factors into consideration, assuming that he had any obligation to do so. Mr. Berger says that the contractual documents mandate no result from his obligation to " take into account " these factors.
- [26] Mr. Berger says that Sun Peaks was the administrator of the plan, not Mr. Berger. Mr. Berger's function was to propose. Sun Peaks' function was to dispose. Mr. Berger's contractual obligation was to take into account privacy view lines and overshadowing. Mr. Berger received Sun Peaks' approval for his plans before construction. He fulfilled his contractual obligations. Mr. Berger says that taking the plaintiffs' position to its logical conclusion, a builder who seeks approval under a building scheme from an administrator would be required to seek declaratory relief from the courts to ensure that the approval process had been undertaken appropriately by the administrator when approving the proposed construction. Mr. Berger says that such a result would be absurd.

- [27] With respect to the heads of damage, Mr. Berger says that the loss of property value claim has been settled by Sun Peaks and that awarding damages for loss of amenity would be in effect double recovery.
- [28] With respect to the avoided cost of compliance, quid pro quo and the defendants' benefits claims, Berger submits that the plaintiffs are seeking multiple recoveries.
- [29] With respect to avoided cost of compliance, Mr. Berger says that there is no evidence of what the cost to comply would have been. With respect to quid pro quo damages, Mr. Berger says that the court is without direct evidence as to the relative bargaining positions of the plaintiffs, of Sun Peaks and of Mr. Berger in the relative time period (early February 2007). Mr. Berger says that if the court were to enter this exercise in conjecture, the court would conclude that a rational and objective person in the position of the plaintiffs would accept the \$90,000 provided in Sun Peaks' consent judgment rather than pursue litigation. With respect to the defendants' benefit, Mr. Berger says that the plaintiffs must establish what views from the Berger house have been augmented by the siting of the house and to what extent those views have been augmented. Mr. Berger says that the estimate made by the plaintiffs' appraiser, Grover Elliott and Company, in the Griffiths' damage report of 5% - 7.5% is generic and not specific to the Berger house. Mr. Berger points out that the appraiser says that even if the Berger house were sited in line with the neighbouring properties "it would still have an unobstructed mountain view and close to 180 degrees of golf course views".
- [30] Mr. Berger says that if the court finds that Sun Peaks' consent to judgment in the amount of \$90,000 is insufficient compensation of the plaintiffs, anything more required to compensate the plaintiffs should come from Sun Peaks, which breached its obligations, and not from Mr. Berger, who fulfilled his contractual obligations.

DISCUSSION

- [31] Turning first to the claim against Mr. Berger, I find that Mr. Berger considered the design guidelines, thought that he had appropriately addressed the Griffiths' interests and submitted his plans to Sun Peaks for approval. I am not satisfied that he needed to do more. The action is dismissed against Mr. Berger.
- [32] With respect to the issue of remedy, I am not persuaded that Sun Peaks' breach has caused a loss to the Griffiths. It may be that had Sun Peaks properly considered the design guidelines, the administrator would still have approved the Berger house. In the decision on liability, I found that Sun Peaks had breached its obligations because it had not considered the necessary factors at all:

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.

- [33] As I indicated in those reasons, I was not saying what conclusion Sun Peaks must reach had it properly considered the factors, or that had it considered the factors and then approved the Berger plans, the decision would have been objectively, manifestly unreasonable. For the reasons that follow, I am not satisfied that Sun Peaks could not approve the Berger plans, i.e. that it would have been objectively manifestly unreasonable for it to do so.
- [34] 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.". The design guidelines provide, in part:

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.

- [35] The Griffiths complain that the Berger house overshadows theirs (meaning casting shade, as well as looming, overbearing or overpowering), intrudes on their privacy and limits their view.
- [36] It may be that even if Sun Peaks had properly considered the design guidelines, and therefore not breached its obligations, Sun Peaks would still have approved the Berger house. The Berger house is set significantly further back from Fairways Drive than is the Griffiths house to the east, or the Holman house to the west. It is set back 15.9m, compared with 6m for the Griffiths and 8.5m for the Holmans. As a result, it protrudes to the north of the Griffiths house, restricting the view from the Griffiths house toward the west. It also restricts some of the solar exposure to the Griffiths' residence, particularly the setting sun. However, Sun Peaks reasonably may have concluded that these restrictions were not significant, or not sufficiently significant to require Berger to relocate his house on the site. The main living areas of the Griffiths house face north. Sun Peaks may have reasonably concluded that because the Griffiths' residence was north facing, the placement of the Berger house would have a limited impact on the Griffiths' solar exposure. With respect to the view, in Sun Peaks' opinion the primary view is to the north and east from the Griffiths residence. The Berger house has no effect on the Griffiths' view to the north and east. The Griffiths still have some view, although limited, to the west. Sun Peaks may have considered this sufficient protection of view lines and not required Berger to relocate the house on the lot. With respect to privacy, there are four windows above the basement on the Griffiths' side of the Berger residence: an upstairs bedroom, a main floor washroom and two main floor bedroom windows. Sun Peaks may have reasonably concluded that windows of this type would intrude only minimally on the Griffiths' privacy and required no change to the design or location of the Berger residence. With respect to overshadowing, Sun Peaks may have reasonably concluded that, as the Berger house is set lower on the site and the roof itself is lower than the Griffiths house, it would not overshadow the Griffiths' residence.

- [37] Had Sun Peaks considered these factors and therefore not breached its obligations, in my view, it could have reached these conclusions, such that its decision to approve Mr. Berger's plan would not have been objectively manifestly unreasonable.
- [38] The Griffiths recognize that a house next door would limit their views, and would have some impact on their solar exposure and privacy. However, they say that the Berger house should have been sited so that the north side of the houses were parallel. They say that, at most, the Berger house should be five feet further north of theirs. This would undoubtedly improve the Griffiths' view to the west and somewhat improve the sun exposure on the Griffiths' deck in the afternoon. However, in my view, if the Berger house were sited as the Griffiths suggest, the house would intrude more on their privacy and would be at least as overpowering as it is now. The house would be "pulled" further to the south, bringing the two most significant windows on the Berger main floor immediately beside the Griffiths' dining room window and the balconies side by side. In my view, this would intrude more on the Griffiths' privacy than does the current location. Secondly, the Berger house would then be higher on the lot and sit higher relative to the Griffiths house. The Griffiths would still see the Berger house immediately beside theirs when they are in their great room, which I am persuaded is their overwhelming concern.
- [39] Although they have expressed their concerns in a variety of ways, it is apparent to me that the Griffiths are distressed because the Berger house sits immediately beside theirs and is obvious and intrusive from most vantage points in their great room, resulting in a loss of enjoyment to them. However, I am not satisfied that the result would have been different had Sun Peaks properly fulfilled its role. It is inevitable that when large houses are built on relatively long narrow lots, as these are, the neighbouring houses will be obvious and intrusive, offensively to some.
- [40] Sun Peaks could have done a better job (from the Griffiths' point of view) when reviewing the Berger plans, and could have lessened the impact of the Berger house on the Griffiths' residence. However, the guidelines did not dictate any particular result, and did not require Sun Peaks to reach a conclusion satisfactory to the Griffiths. Rather, they obliged Sun Peaks to consider certain factors in order to ensure it acted in a way that was not objectively manifestly unreasonable. Applying this test, the losses claimed by the Griffiths could have resulted even had Sun Peaks acted in a manner that was not manifestly unreasonable. As such, any inconvenience or loss of enjoyment caused to the plaintiffs is not causally connected to the breach for which Sun Peaks was found liable.
- [41] In summary, I am not satisfied that Sun Peaks would or should have acted any differently with respect to its approval of the Berger House, even had it lawfully discharged its obligations. I am therefore not satisfied that the Griffiths have made out their claim for damages resulting from Sun Peaks' breach. As such, I do not need to consider the other categories of damages which the Griffiths claim.

[42] However, I am willing to accept the amount consented to by Sun Peaks and the Griffiths, \$90,000, as an assessment of the damages in this case. This amount compensates for what Sun Peaks believes might have occurred had it not breached its obligations. Since this amount reflects the parties' assessment of damages, I will not vary it.

[43] This case would normally be an appropriate one for nominal damages: *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528. However, since Sun Peaks has consented to judgment for damages of \$90,000, I need not address nominal damages. The parties may speak to costs if they are not able to agree.

"B. Brown, J."

The Honourable Madam Justice B. Brown

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