

CANADA / JUDGMENT

Ladner Reach Properties Ltd. v. Cameron

2020 BCCA 198

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 198 Ladner Reach Properties Ltd. v. Cameron

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ladner Reach Properties Ltd. v. Cameron,

2020 BCCA 198

Date: 20200622

Docket: CA46500

Between:

Ladner Reach Properties Ltd.

Respondent

(Plaintiff, Defendant by way of Counterclaim)

And

Leigh-Anne Cameron

Appellant

(Defendant, Plaintiff by way of Counterclaim)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

October 11, 2019 (Ladner Reach Properties Ltd. v. Cameron, Vancouver Docket S1710836).

Oral Reasons for Judgment

Counsel for the Appellant, appearing

via videoconference:

E.M. Patel

M. Magaril

Counsel for the Respondent, appearing

via videoconference:

M.B. Funt

Place and Date of Hearing:

Vancouver, British Columbia

June 18, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 22, 2020

Summary:

The appellant appeals an order striking two paragraphs of her amended counterclaim and dismissing most of her application for production of documents. Held: Appeal allowed and application for documents remitted to the trial court for determination. In striking portions of the counterclaim, the judge did not consider whether the pleading in issue was material to the appellant's plea of deceptive and unconscionable acts or practices and the declaratory and injunctive relief sought under s. 172 of the Business Practices and Consumer Protection Act ("BPCPA"). With respect to document production, the judge assessed the relevance and materiality of the documents sought without regard to the s. 172 BPCPA claim, and without regard to the facts pleaded in the paragraphs struck. As such, her determinations cannot stand. This Court should not make specific rulings on document production, and that matter should be remitted to the trial court for determination.

[1] FENLON J.A.: The appellant Leigh-Anne Cameron appeals orders made by a chambers judge striking out two paragraphs of her amended counterclaim and dismissing most of her application for production of documents.

Background

- [2] Ladner Reach Properties Ltd. ("Ladner Reach") operates a marina on the Fraser River estuary in Delta. Ms. Cameron has moored her float home there since 2004. At that time she entered into a moorage agreement on a month-to-month basis which says that either party may terminate the agreement on 30 days' notice. However, Ms. Cameron also paid \$12,500 to Ladner Reach as a prepaid moorage deposit to secure the right to enter into a long-term moorage agreement, the terms of which were not specified.
- [3] In February 2017, Ladner Reach gave Ms. Cameron notice that her lease would be terminated effective April 30, 2017. Ms. Cameron refused to leave. Litigation ensued.

The Pleadings

- [4] Ladner Reach filed a notice of civil claim alleging that Ms. Cameron is in breach of the moorage agreement by failing to vacate. It seeks two forms of relief: (1) an order that Ms. Cameron vacate possession of her moorage berth, a storage locker and two parking stalls at the marina; and (2) a declaration that the 2004 moorage agreement is at an end.
- [5] Ms. Cameron's pleadings are considerably broader in scope. In her amended response to the notice of civil claim, Ms. Cameron says that Ladner Reach breached the terms of the moorage agreement by not granting her an option to enter into a long-term moorage lease for a minimum of ten years, which it has promised to do since 2004, and for which option she paid a \$12,500 fee. She also says it was an implied term of the moorage agreement that Ladner Reach would act in good faith toward her and that it has failed to do so.
- [6] The response further alleges that since March 2016, Ladner Reach has represented to Ms. Cameron (as well as other float homeowners), that it would not exercise the 30-day termination clause and, instead, would only terminate the moorage agreement for cause (which has not been asserted here). Ms. Cameron says the parties have a landlord/tenant relationship within the meaning of the Manufactured Home Park Tenancy Act, S.B.C. 2002, c. 77, rendering the termination clause unenforceable. She also asserts that the decision to give her 30 days' notice was part of a systematic and calculated effort by Ladner Reach to have each float home owner at the marina, who had a right to enter into a long-term moorage agreement, abandon that right and forego the deposit they had paid, as well as to be subject to highly restrictive terms and conditions.
- [7] Of significance to this appeal, Ms. Cameron pleads in her amended response to the notice of civil claim that Ladner Reach has engaged in deceptive and unconscionable acts and practices within the meaning of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 ("BPCPA"), both in relation to her personally (s. 171) and in its dealings with tenants generally (s. 172). In her amended counterclaim, she alleges breach of contract, including breach of an implied term to act in good faith. The counterclaim adopts the allegations of deceptive and unconscionable acts and practices that are asserted in the response, seeks damages for the impact of the unconscionable acts on her personally, and

injunctive and declaratory relief in relation to those practices generally. Ms. Cameron also relies on this conduct in support of a claim for punitive and exemplary damages.

Standard of Review

- [8] The parties agree that the orders appealed from are entitled to deference on appellate review: *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 19; *British Columbia (Director of Civil Forfeiture) v. Day*, 2019 BCCA 160 at para. 10.

Issues on Appeal

1. Did the chambers judge err in striking out paragraphs 5 and 6 of the counterclaim?
- [9] *Ladner Reach* applied to strike part of Ms. Cameron's amended counterclaim under Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which provides:

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- [10] The judge granted the application in part, striking out paragraphs 5 and 6 of the amended counterclaim which read:

5. *Ladner Reach* has been guilty of reprehensible, insulting, high-handed, spiteful, malicious and oppressive conduct towards Ms. Cameron, as particularized in paragraph 3 of this Counterclaim, and also towards other tenants at the Marina as particularized below, and such conduct justifies this Honourable Court in imposing a substantial award of punitive / exemplary damages on the Plaintiff in addition to any award of general damages. The Defendant will rely upon the entire conduct of the Plaintiff and its officers, directors, and employees until the date of judgment in this action, including similar fact evidence of the Plaintiff towards other floating home owners at the Marina.
6. The particulars of the conduct complained of *Ladner Reach* towards other tenants at the Marina, including the proposed similar fact evidence is as follows:

- a. Ladner Reach engaged in a systematic and calculated effort on or about 10/FEB/2017 to have each floating home owner at the Marina that had a contractual right to enter into a long-term moorage agreement, to relinquish such right and acknowledgment of their deposit by terminating all of those float home owner's moorage agreements using a thirty days' notice provision and offering a Replacement Agreement to them. Each and every termination was a ruse and the application of substantial pressure by Ladner Reach towards its tenants tantamount to coercion to have each floating home owner accept unfavourable terms or face eviction. Similar to Ms. Cameron, Ladner Reach was in a position of power vis-à-vis all the tenants and knew of the extremely limited options available to floating home owners to relocate or sell their floating home. There is no commercial reality to a landlord evicting all of its tenants.
- b. At all material times Ladner Reach had no intention to offer any tenant a long-term moorage agreement despite each tenant paying a substantial amount of money for this right - in Ms. Cameron's case this was the equivalent of 25 months' base rent. Ladner Reach has refused to offer any tenant a long-term moorage agreement. Prior to 01/JAN/2015 Ladner Reach operated on recurring twenty year long-term waterlot leases from the Province of British Columbia. Despite being in a position to offer Ms. Cameron, Mr. Pettigrew, Ms. Ireland, Mr. Symonds, and all other tenants who executed a moorage agreement prior to 01/JAN/2005 a long-term lease Ladner Reach had refused to do so, and instead made materially false misrepresentations to each and every long-term tenant that Ladner Reach did not have a long-term waterlot lease and thus were not in a position to offer long-term moorage agreements to any float home owners.
- c. At all material times Ladner Reach has engaged in a systematic and calculated effort to avoid returning any pre-paid moorage deposits to any floating home owner in the Marina in circumstances that are akin to coercion and duress, and are compounded by the inherent power imbalance due to Ladner Reach being in the position of a landlord and the floating home owners being in the position of a tenant. The particulars of which are as follows:
 - i. In the case of Mr. Pettigrew and Mrs. Ireland, who are married, as soon as Ladner Reach learned that they were selling their float home, Ladner Reach requested that they transfer the remaining moorage prepayment to the purchaser and release all claims thereto. When Mr. Pettigrew and Mrs. Ireland refused to transfer their moorage prepayment to the purchaser, Ladner Reach indicated that they would have to inform all prospective purchasers that there could be a future request for a significant fee required to enter into a long-term moorage agreement with Ladner Reach. In pith and substance Ladner Reach was threatening to interfere with the purchase and sale of Mr. Pettigrew and Mrs. Ireland's float home by intimidating purchasers that a substantial monetary obligation would be placed on them, thereby ruining any prospect of a sale.

Mr. Pettigrew and Ms. Ireland thereby forfeited their deposit. The owners were not provided any credit or acknowledgment of a previously paid deposit that they could use towards a long-term moorage agreement. In effect, Ladner Reach took the pre-paid moorage deposit for themselves.

ii. At least three other purchasers found themselves in the same position as the purchasers of the float home owned by Mr. Pettigrew and Ms. Ireland. They purchased a floating home from a long-term tenant and received no credit or acknowledgment of a previously paid deposit that would be used towards a long-term moorage agreement. In effect, Ladner Reach took the pre-paid moorage deposit for themselves.

iii. In the case of Mr. Bruce Symonds who was a tenant between 31/MAR/1998 until 15/AUG/2011, he provided a pre-paid moorage deposit of \$12,500 in exchange for Ladner Reach providing a long-term moorage agreement in the future. There was ample time for Ladner Reach to offer Mr. Symonds a long-term moorage agreement as their 20 year lease was set to expire on 31/DEC/2014 - over 16 years later. Despite this Ladner Reach refused to provide a long-term moorage agreement to Mr. Symonds;

iv. In 2011, a woman by the name of "Barb" occupied berth #4 at the Marina. She was dying of cancer and needed to sell her float home so she could move to Ontario to be closer to her family. She had the same contractual right as Ms. Cameron to enter into a long-term moorage agreement, did not have a fixed term contract, and had paid a \$12,500 pre-paid moorage deposit. When she attempted to sell her float home in 2011, Ladner Reach falsely represented to her that she only had four years left on her moorage agreement since she had already lived there for six. Ladner Reach pressured her to reduce her selling price by the equivalent of six years' worth of the pre-paid moorage deposit amount (i.e. 60%) and forfeit the balance of the pre-paid moorage deposit, otherwise the new owner would have only four (4) years left until they would have to sign a new moorage agreement. Barb agreed to this, and Ladner Reach did not credit the new owner with any part of the pre-paid moorage deposit and in effect kept the entirety of the pre-paid moorage deposit for themselves;

v. Mr. Phil Linder and his wife occupied berth #8 at the Marina. At the time that they were trying to sell their float home, Ladner Reach was requiring new tenants to pay an increased pre-paid moorage deposit of \$20,000 for a long-term lease. Prospective purchasers did not want to pay this amount for the opportunity to live at the Marina and therefore the sellers had to drop their price in order to subsidize Ladner Reach's demand for a pre-paid moorage deposit. However the new floating home owner was given a moorage agreement that had a thirty days' notice termination clause and no contractual right to enter into a long-term moorage agreement;

vi. Both Ms. Barbara Douglas and Mr. Don Bruchet were pressured by Ladner Reach to execute documents at the "11th hour" of the sale of their float home by Ladner Reach to transfer their pre-paid moorage deposit towards the new owners. Ladner Reach made similar assertions to those made to Mr. Pettigrew and Ms. Ireland - that if the pre-paid moorage deposit was not transferred to the new owners that Ladner Reach would in the future require them to make a substantial

deposit in order to remain at the Marina. Neither of the new owners of the float home belonging to Ms. Barbara Douglas, or that of Mr. Don Bruchet received any credit towards a long-term moorage agreement or the right to enter into a long-term moorage agreement;

vii. A couple by the names of "Mel" and "Cathy" paid that purchased the float home that occupied berth #1 at the Marina from Mr. Bruce Wilde were required to pay a pre-paid moorage deposit of \$33,500 less a purported credit from Mr. Wilde's pre-paid moorage deposit of \$ 12,500 - totalling \$21,000. However this was a ruse as at the time the pre-paid moorage deposit was being advertised by Ladner Reach as being in the amount of \$20,000. Mel and Cathy in pith and substance received absolutely no credit from Mr. Wilde's purported transfer and instead were required to pay an amount exceeding what would otherwise be demanded of them. Further they did not have the benefit of any alleged balance of a long-term moorage agreement as their moorage agreement contained a thirty days' notice termination clause executable by either party and had no protection / cap for any rent increases;

viii. Another owner who used to occupy berth #18 at the Marina was pressured by Ladner Reach to transfer their pre-paid moorage deposit to towards the new owners. Ladner Reach made similar assertions to those made to Mr. Pettigrew and Ms. Ireland - that if the pre-paid moorage deposit was not transferred to the new owners that Ladner Reach would in the future require them to make a substantial deposit in order to remain at the Marina. The new owner of this float home did not receive any credit for this pre-paid moorage deposit, nor did they obtain any right to enter into a long-term moorage agreement.

ix. Ladner Reach has asserted in writing to the various float home owners that every floating home requires a pre-paid moorage deposit, and that if a deposit is not provided that it would be grounds for Ladner Reach to terminate the moorage agreement, and that if a deposit is not provided that the base rent would be substantially increased - despite the deposit being completely separate and having nothing to do with the base rent. Such a position is a concoction by Ladner Reach as there are no terms similar to the ones suggested by Ladner Reach in the moorage agreements of the long-term tenants and was intended to deter floating home owners from securing a return of their pre-paid moorage deposits; and

d. Such further and other particulars that are within the knowledge of Ladner Reach, or may be discovered by the Defendant in the future, or are otherwise proven at trial;

[11] Tracking the language of Rule 9-5(1)(b) and (c), the judge concluded that these paragraphs were "unnecessary or vexatious in the sense that they do not go towards advancing the claim". She also concluded that they were "embarrassing", in the sense that they were irrelevant (at para. 41). The judge noted that Ms. Cameron was not seeking to advance claims on behalf of the other tenants identified in the impugned pleading (at para. 43). She considered at length Ms. Cameron's submission that the impugned paragraphs identified similar fact evidence, the admissibility of which should be left to the trial judge (at para. 18) but concluded that insofar as the pleading could be maintained on the basis of similar fact evidence, the probative value of the facts relied on was outweighed by their prejudicial

effect. She found there was insufficient similarity between the conduct Ms. Cameron complained of and the circumstances of the other tenants described in paragraphs 5 and 6, and therefore struck that part of the counterclaim.

- [12] Ms. Cameron argues on appeal that the judge's order should be set aside. I agree with that submission.
- [13] The task before the judge required her to decide whether, assuming the facts to be true, the impugned pleading served to establish any of the plaintiff's claims: *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 65. However, the judge took an overly narrow view of the claims pleaded. In particular, she did not consider whether the pleading in issue was material to Ms. Cameron's plea of deceptive and unconscionable acts or practices and the declaratory and injunctive relief sought under s. 172(1) of the BPCPA.
- [14] In fairness to the judge, this basis for supporting paragraphs 5 and 6 does not appear to have been argued before her. Rather, Ms. Cameron opposed Ladner Reach's application to strike on the basis that the paragraphs contained similar fact evidence that went to establishing her claims for breach of contract, punitive damages, and deceptive acts involving her personally under s. 171 of the BPCPA. As is often the case, by the time the dispute reached this Court, the argument had taken on quite a different focus and emphasis. On appeal, Ms. Cameron supported the materiality of the impugned pleading primarily on the basis of s. 172 of the BPCPA, and only secondarily on the similar fact basis.
- [15] In my view, the claim under s. 172 is determinative of this ground of appeal. Paragraphs 5 and 6 of the amended counterclaim describe Ladner Reach's dealings with other tenants, facts which are to be presumed to be true on an application to strike. They allege misrepresentations as to the need to transfer the long term moorage deposits, the failure to provide promised benefits, and the abuse of a position of power to persuade tenants to relinquish both their contractual rights and deposits. The BPCPA gives Ms. Cameron (and indeed anyone) standing to assert that a company has engaged in unconscionable acts and practices, and to seek injunctive and declaratory relief in relation to such practices. It is not necessary that the wrongs pleaded under the BPCPA have any nexus with the wrongs pleaded by Ms. Cameron personally.
- [16] Ladner Reach submits that the judge's order striking paragraphs 5 and 6 of the amended counterclaim should be upheld because Ms. Cameron informed the court that she was not pursuing any claims on behalf of other tenants. But viewed in context, the statement relied on related to the claim for disgorgement of the long-term moorage fee of \$12,500 which Ms. Cameron seeks on her own behalf. It is clear from the pleadings that Ms. Cameron asserts BPCPA remedies based on business practices affecting other tenants, and there is nothing to suggest that she abandoned that claim at the hearing below.
- [17] Ladner Reach also submits that the pleading was properly struck because as framed, it attempts, but fails, to identify similar fact evidence to support her claim for punitive and aggravated damages. The problem with this argument is that, even if paragraphs 5 and 6

cannot stand as similar fact evidence in support of those damages, the paragraphs have been incorporated into the BPCPA claim by specific reference in paragraphs 59.4 and 59.9 of the amended response to civil claim. The pleadings are somewhat convoluted as a result of the amendments, but in my view, it cannot be said that the paragraphs in issue are not material to a claim identified in the pleadings read as a whole.

- [18] As noted, although no longer her primary argument, Ms. Cameron continues to assert that the judge erred in failing to find that the pleading was material as similar fact evidence in support of the claim for breach of the contractual obligation to deal in good faith; her personal claim under s. 171 of the BPCPA, and punitive damages. In light of the conclusion I have reached on the soundness of the pleading in relation to s. 172 of the BPCPA, it is not necessary to consider whether the pleading should also have been maintained on the basis that it sets out similar fact evidence.
- [19] In summary on this ground of appeal, I would set aside the judge's order striking paragraphs 5 and 6 of the amended counterclaim.
2. Did the judge err in refusing to order production of documents?
- [20] Ms. Cameron applied for an order compelling Ladner Reach to produce documents. The judge agreed with Ladner Reach's description of the documents sought by Ms. Cameron as fitting into "approximately 18 categories with 42 subcategories of documents" (at para. 47). She found the appellant was attempting to obtain "virtually all of [Ladner Reach's] business records dating back to 2004". Based on the pleading as it stood after striking paragraphs 5 and 6, the judge concluded that Ms. Cameron was unable to demonstrate a sufficient "connection" between the documents and the issues raised by her counterclaim, with two exceptions: internal communications that "relate to the reasons for terminating Ms. Cameron's moorage agreement", and financial records (including ledgers and banking records) specific to the \$12,500 paid by Ms. Cameron as for the right to enter into a long-term moorage agreement (at para. 75).
- [21] Ms. Cameron argues that if the order striking the pleading is set aside, the judge's order dismissing her application for the documents identified at paragraphs 1 to 5, 7 to 12, and 15 to 18 of her notice of application, must also be set aside. I agree with that submission. Because the judge assessed the relevance and materiality of the documents sought without regard to the s. 172 BPCPA claim, and, without regard to the facts pleaded in paragraphs 5 and 6, her determinations cannot stand.
- [22] The judge below was rightly concerned about the breadth of document disclosure sought by Ms. Cameron, and the potential for document discovery to become disproportionately burdensome. These are important considerations. In this regard, I note that counsel for Ms. Cameron advised the Court at the hearing of the appeal that she will now restrict her application to documents relating to those persons named in the pleading. That is a commendable development.

[23] Both parties agree that this Court should not make specific rulings on document production, and that the matter should be remitted to the trial court for determination. In my view that is the procedure that should be followed in the circumstances of this case.

Disposition

[24] I would dispose of the appeal as follows: the order striking paragraphs 5 and 6 of the amended counterclaim is set aside.

[25] The order dismissing the application for documents sought at paragraphs 1 to 5, 7 to 11, 12(i)-(x), 12 (xii-xviii), 15 and 18 of the appellant's notice of application is set aside, and the matter remitted to the trial court for determination.

[26] In my view, each party should bear their own costs of the appeal.

[27] HARRIS J.A.: I agree.

[28] DEWITT-VAN OOSTEN J.A.: I agree.

[29] HARRIS J.A.: The appeal is allowed on the terms set out in the reasons of Justice Fenlon.

"The Honourable Madam Justice Fenlon"

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