

CANADA / JUDGMENT

Olenczuk v. Mooney

2014 BCSC 825

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 825 Olenczuk v. Mooney

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Olenczuk v. Mooney,

2014 BCSC 825

Date: 20140512

Docket: 96561

Registry: Kelowna

Between:

Ted Mitchell Olenczuk, Flint York

Nicole Joanne Nordine and Malachi Won Nordine

Petitioners

And

Kathleen Jensen Holiday Mooney

Respondent

Before: The Honourable G.P. Weatherill

Reasons for Judgment

Counsel for Petitioners:

D. Bloor

Counsel for Respondent:

Z. Ansley

Place and Date of Hearing:

Kelowna, B.C.

April 16, 2014

Place and Date of Judgment:

Kelowna, B.C.

May 12, 2014

Overview

- [1] This case involves a restrictive covenant registered in favour of the respondent's property against three neighbouring properties the petitioners own. The petitioners apply under s. 35(2) of the Property Law Act, R.S.B.C. 1996, c. 377 for orders to cancel the restrictive covenant against their respective properties and an order that the Registrar of Titles at the Kamloops Land Titles Office cancel the restrictive covenant's registration. The petitioners argue that the restrictive covenant is obsolete because of changes in the character of the land, the neighbourhood and other circumstances.
- [2] The respondent opposes the petition because the restrictive covenant's purpose has not changed - i.e., to preserve and protect the respondent property's privacy and view. In any event, the respondent argues the restrictive covenant's validity was previously litigated, and judgment was rendered in her favour, so the doctrine of res judicata, issue estoppel and cause of action estoppel apply. Moreover the abuse of process doctrine should be applied to preclude the petitioners re-litigating an issue that Holmes J. of this court already dealt with on January 5, 2005.
- [3] The residential properties at the center of this dispute are located in the hills on the south side of Kelowna, BC. The respondent's property is elevated higher than each of the petitioner's three properties that are individually owned. The restrictive covenant creates a "150 foot - no-build" buffer zone on the petitioners' properties, and it prevents constructing any building or structure in the buffer zone.
- [4] The petitioners argue that because of steps the respondent took after Holmes J.'s January 5, 2005 decision, the restrictive covenant's object, purpose and intent are no longer applicable. Therefore, the restrictive covenant is obsolete.
- [5] Those steps include deforesting the respondent's property that effectively took away the privacy that was the restrictive covenant's very essence.

- [6] In short, the petitioners' application is dismissed on the basis of res judicata. And even if I did not dismiss it on res judicata grounds, the petitioners nonetheless failed to satisfy s. 35(2) of the Act.

Background

History

- [7] Before 1985, the petitioners' properties and the respondent's property were part of a single lot owned by Appin Farms Corporation ("Appin Farms"). In June 1985, that single lot was subdivided into three properties, lots 1, 2 and 3 (lot 3 is not part of this dispute).
- [8] Anticipating lot 1's further subdivision into a residential subdivision and wanting to preserve lot 2's private nature, Appin Farms placed a restrictive covenant on lot 1 in lot 2's favour. On August 7, 1985, the restrictive covenant was registered, and it provided for a 150 foot no build buffer zone against lot two ("original covenant").
- [9] In October 2004, a development company, Windmill Ventures Ltd. ("Windmill") purchased lot 1 and subsequently subdivided it into 14 residential lots. The petitioner, Mr. Olenczuk, is a principle of Windmill.
- [10] One month later on November 26, 2004, Windmill filed a Supreme Court petition seeking the cancellation of the original covenant or alternatively having the original covenant's no-build zone reduced to 75 feet from 150 feet. On January 5, 2005, Holmes J. dismissed that petition. His reasons for judgment are in evidence, and his material findings are:
- The original covenant was important to the then owners of lot 2 when it was purchased by them. They intended to live on a private acreage where they could raise their family and enjoy retirement and the original covenant provided them with the privacy they sought.
 - Cancellation of the original covenant would have resulted in the construction of buildings or facilities which create sight-lines into the residence located on lot 2 and would magnify noise.
 - The owners of lot 2 were entitled to continue to have the increase use and enjoyment of the property as protected by the original covenant.

The arbitration proceedings

- [11] The original covenant's arbitration clause stated:

In the event of a dispute as to the interpretation of this Agreement or any of the terms of words of this document and if no agreement can be reached by the parties or their respective solicitor's within 30 days after notice of such dispute has been given, then the matter shall be submitted to a arbitration pursuant to the Arbitration Act, R.S.B.C. 1979.

- [12] A garage was previously built in the 150 foot no-build zone, and Windmill sought to renovate and/or refurbish and/or relocate the garage within the no-build zone, so it initiated arbitration proceedings to determine its rights under the original covenant. During the arbitration proceedings, Windmill and the then lot 2 owner, the Finleys, agreed to settle the dispute.
- [13] On January 24, 2006, they entered into a property agreement that provided that the original covenant would be discharged from lot 1 and replaced with a new restrictive covenant containing similar terms ("new restrictive covenant"); Windmill and Mr. Olenczuk bore its costs. Windmill also agreed to construct a privacy barrier by planting six to eight foot tall evergreen trees, according to an agreed plan, between lot 2 and two of the now lot 1 subdivided properties.
- [14] The agreement also provided that Mr. Olenczuk could pave the existing driveway running within the 150 foot buffer zone and could alter his property's existing garage, now on lot 9. It was not to exceed 16 feet in height, and it could only be used to store vehicles; no suite or premises would be constructed for human habitation.
- [15] The new restrictive covenant is the subject of this case.

Subsequent events

- [16] On April 26, 2006, the new restrictive covenant was registered on three lots that were part of the lot 1 subdivision: lot 7 (now owned by the petitioner Mr. York), lot 8 (now owned by the petitioner Nordine), and lot 9 (now owned by the petitioner Mr. Olenczuk).
- [17] In November 2005, Windmill filed a lot 1 subdivision plan because it planned to make multiple new lots, including lot 7, 8 and 9. The petitioner Mr. Olenczuk became lot 9's registered owner.
- [18] In June 2007, the respondent purchased lot 2 from the Finleys; she intended to subdivide the property into multiple single subdivision lots similar to what Windmill did with lot 1.
- [19] In spring and summer 2008, the respondent commenced deforesting lot 2 and removed substantially all of lot 2's existing fir and pine trees. The trees subject to this removal were entirely within lot 2's property lines and approximately 60% were either diseased or infected with pine beetles. But before commencing deforesting, the respondent commissioned a report from a registered forest technologist, and in May 2008, the technologist confirmed the presence of western pine beetles and recommended removing most of lot 2's pine and fir trees.
- [20] Since becoming lot 2's owner, the respondent continued her efforts to obtain lot 2's subdivision approval. When I heard the petition, subdivision approval was still a work in progress.

- [21] As part of the subdivision approval process, the respondent needed cooperation from the petitioner Mr. Olenczuk regarding lot 2 and 9's easements, so the parties actively negotiated to accomplish their respective goals. The petitioners wanted the new restrictive covenant's 150 foot no-build buffer removed or reduced, and the respondent wanted Mr. Olenczuk to cooperate with her to expedite the City of Kelowna's subdivision approval process.
- [22] Negotiations were unsuccessful, and on September 14, 2012, the petitioners filed this petition.

Res Judicata

- [23] The respondent argues the petitioners are in effect re-litigating the precise issues Holmes J. already determined in his January 5, 2005 decision. The current petition involves essentially the same challenge to essentially the same restrictive covenant as did the 2005 petition. And this petition concerns the same lots and successors in title. They argue that not only should the petition fail on the merits but also that the doctrine of res judicata applies to preclude the petition.
- [24] I agree.
- [25] I will grant the respondent's application that the petition be dismissed on the basis of res judicata. In my judgment, the issues the petitioners sought to be determined in this petition are precisely the same issues that Holmes J. determined on January 5, 2005.
- [26] Successors in title are privies to their predecessor's proceedings and can avail res judicata: *MacDougall v. Lake Country (District)*, 2012 BCCA 408 at paras. 4, 17.
- [27] The criteria for determining whether a matter is res judicata are well established. For example, in *Cliffs Over Maple Bay (Re)*;, 2011 BCCA 180 at para. 2, the Court said that res judicata requires:
- A final decision of a court of competent jurisdiction in a prior proceeding;
 - Parties to the subsequent litigation must have been the parties to or in with the parties to the prior proceeding;
 - The cause of action and the prior action must not be separate and distinct; and
 - The basis of the cause of action and the subsequent action was argued or could have been argued in the prior proceeding if the parties had exercised reasonable diligence .

[Emphasis in original.]

- [28] First, a final decision occurred.

- [29] Second, the petitioners and respondents are successors in title to the petitioners and respondents in the case before Holmes J. The petitioners are successors in title to Windmill who was the petitioner in the earlier petition, and the respondent is the successor in title to the Finleys who were the respondents. Moreover, both the original and new restrictive covenant stipulate that they bind successors in title to the subject properties.
- [30] Third, Holmes J. considered precisely the same issue as this case in dealing with the original covenant. The petitioners confirm at para. 28 of their petition that the new restrictive covenant's effect is, in all respects, the same as the original covenant. Para. 18 of their petition states:

The original covenant was similar in content and purpose of the restrictive covenant. Namely, it prohibited from building any structure within 45.72 meters (150 feet) of the boundary between lot 1 and the Mooney property save for a garage not in excess of 4.8768 meters (16 feet) in height without the permission of the owners of the Mooney property.

- [31] I find that the new restrictive covenant is, for all intents and purposes, the same as the original covenant, and Holmes J. already determined the matters of whether it was obsolete, had no practical benefit, had been agreed to be modified or that it would not injure lot 2.
- [32] The petitioners argue that the issue that was raised before Holmes J. related only to s. 35(2) (c), namely that the then lot two owners expressly or impliedly agreed to modifying or cancelling of the original covenant. But from reviewing Holmes J.'s reasons for judgment, Windmill clearly argued other s. 35(2) grounds
- [33] Nonetheless, in the event that I am wrong about res judicata and in the interests of judicial efficiency, I will address the merits of the s. 35(2) claim as I also found the petitioners did not satisfy its grounds.

Applicable Law: s. 35(2) of the Property Law Act

- [34] Section 35(2) of the Property Law Act provides the Court authority to modify or cancel a restrictive covenant (like the new restrictive covenant) upon being satisfied that the application is not premature and that:
- a. Because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete.
 - b. The reasonable use of the land will be impeded without practical benefit to others, if the registered charge or interest is not modified or cancelled.
 - c. The persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled.
 - d. Modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or

- e. The registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.
- [35] Section 35(2) provides a means to clear a restrictive covenant that ceases to fulfill its purposes or that no longer has practical meaning. The section is a comprehensive, complete code that describes all the grounds on which a court can make an order: *Vandenberg v. Olson*, 2010 BCCA 204 at para. 23.
- [36] A petitioner only needs to prove one of s. 35(2)'s grounds for a court to consider cancelling or modifying such a charge. But s. 35(2) is discretionary.
- [37] To consider whether to cancel or modify a charge, the court can consider both subjective and objective elements. But such consideration is not a balancing exercise. The petitioner must show that the charge currently provides no practical benefit ("practical benefit" can include subjective factors such as "neighbourhood aesthetics"), and a court can disregard a truly minimal benefit on the *de minimis non curat lex* principle - i.e., the law does not take notice of trifling matters: *Wallster v. Erschbamer*, 2011 BCCA 27 at paras. 10, 19 [Wallster].
- [38] The new restrictive covenant effectively serves to:
- Prohibit construction of any structures within 150 feet of lot 2 except for certain structures such as gates and fences and a paved driveway on lot 9.
 - Restrict the height of the garage on lot 9 to no more than 16 feet.
 - Prohibit the owner of lot 9 from removing or changing the tree barrier that was constructed pursuant to the property agreement dated January 24, 2006.

Parties' Positions

Petitioners

- [39] The petitioner's main argument is that the new restrictive covenant is obsolete. By virtue of the change in lot 2 and the surrounding neighbourhood's character, the new restrictive covenant's purpose no longer applies to lot 7, 8 and 9. The petitioners rely on *Portrait Homes Ltd. v. Strata Plan LMS1191 (Owners)*, 2002 BCCA 257 where the Court of Appeal cited the following *Lambert J.A.* comments from *Chivas v. Mysek*, [1986] B.C.J. 2457 (C.A.) with approval at para. 24:

the test of whether the restrictive covenant is obsolete is not a test to be satisfied on the basis of balancing the rights of the parties, but rather by a consideration of the nature of the charge itself in the circumstances of the use of the relevant property and a determination of whether on those facts the charge or interest is obsolete.

[Emphasis in original.]

- [40] Relying on a further Court of Appeal decision in *TDL Group Ltd. v. Harvey*, 2002 BCCA 258, the petitioners argue that the Court must consider the restrictive covenant's purpose in the actual circumstances of how the relevant property is used, and the Court must determine whether the change in circumstances - in this case, deforesting lot 2 - renders the new restrictive covenant obsolete.
- [41] The petitioners argue that the new restrictive covenant is, in nearly every respect, the same as the original covenant: it was designed to protect lot 2's privacy, sight lines and view. The petitioners argued that, to facilitate the proposed subdivision and to enhance the view from the subdivision lots north to Okanagan Lake, the respondent removed nearly all of lot 2's trees. So this deforestation removed the new restrictive covenant's purpose because it eliminated the privacy the trees supplied. Moreover, removing the trees created direct sight lines from the petitioner's property to the home located on lot 2.
- [42] The petitioners argue that the respondent's primary concern was controlling lot 2's view of Okanagan Lake, but the new restrictive covenant's purpose and intention does not protect lot 2's unobstructed views of Okanagan Lake. Rather, its purpose and intention was to maintain privacy and prevent sight lines onto lot 2.
- [43] The petitioners argue that the respondent forever changed lot 2's nature and character by removing virtually all of its trees. And coupling the respondent's deforestation with the lot 2 subdivision plans, the respondent took away any of lot 2's original privacy or preservation considerations, so the new restrictive covenant is obsolete and must be removed.
- [44] Therefore, the petitioners argue the Court should remove the new restrictive covenant. That the new restrictive covenant may increase lot 2's value is irrelevant if lot 2's use is substantially different than it was when the new restrictive covenant was created in 2006.
- [45] A court must examine a restrictive covenant's objectives at the time of its creation, in this case 2006, not at the time of trial (*Tri-X Timber Corporation v. Rutherford*, 2012 BCCA 71 at para. 26).
- [46] The petitioners also argue that, under s. 35(2)(b) of the Act, the petitioners' reasonable land use would be impeded without practical benefit to the respondent if the new restrictive covenant is not cancelled.
- [47] The petitioners also rely on s. 35(2)(c) and argue that the respondent has, by removing the lot 2 trees, implicitly agreed to cancel the new restrictive covenant. The respondent effectively abandoned her need for privacy. And by removing the trees and applying for lot 2 subdivision, the respondent implicitly showed her intention to abandon the reason premising the new restrictive covenant.

- [48] The petitioners argue that the new restrictive covenant is not fixed, and it can become unenforceable over time if the lands render the restrictive covenant superfluous or irrelevant. In fact, that reasoning undergirded s. 35 of the Act being enacted. The respondent's actions since purchasing lot 2 in 2007 are antithetical to the new restrictive covenant's benefit and purpose. It must be cancelled.

Respondent

- [49] The new restrictive covenant still benefits lot 2, and the respondent argues it serves the same purpose and uses - in fact, nearly the same words - as the original covenant - i.e., protect lot 2's privacy, view and value.
- [50] The respondent argues that if the Court cancelled the new restrictive covenant, the petitioners could build structures, buildings, and pools to the edge of their respective property lines subject to the City of Kelowna set back requirements. And this conduct would interfere with lot 2's privacy, view and value.
- [51] When the respondent purchased lot 2 from the Finleys in 2007, the new restrictive covenant was part of the consideration. The evidence discloses that the new restrictive covenant was an important factor in the respondent's decision to purchase lot 2; indeed it was a key consideration to the purchase both in relation to lot 2's use and enjoyment and its value. The new restrictive covenant helped reduce noise and preserve the views and spatial separation between the properties' residences. These considerations continue to be important should lot 2 be subdivided into residential lots as it adds value to those lots.
- [52] Removing lot 2's diseased and other trees did not affect the spatial buffer the new restrictive covenant creates partially due to the trees that Windmill planted in the buffer zone under the terms of the January 2006 property agreement.

Analysis

a. Section 35(2)(a) - Obsolete

- [53] The respondent argues, and I agree, that the issue to be determined under s. 35(2)(a) is whether the new restrictive covenant has a continuing purpose for lot 2's benefit: *Deep Six Dev. v. Richmond (City)*, 2002 BCSC 955.
- [54] A restrictive covenant only becomes obsolete when its original purpose is no longer served. The new restrictive covenant's purpose was to preserve and protect lot 2's privacy and the Okanagan Lake view. Removing trees and the proposed lot 2 subdivision do not change the purpose for which the new restrictive covenant was created and neither fact makes it obsolete.

- [55] The new restrictive covenant was clearly created for the benefit of lot 2's present and future owners. And it serves precisely the same purpose today as it did when it was registered in April 2006 and when the original covenant was registered in 1985, namely to preserve and protect lot 2's privacy and view.
- b. Section 35(2)(b) Impending Land Use with No Benefit to Others
- [56] The petitioners bear the burden of establishing the respondent gains no practical benefit by keeping the new restrictive covenant on the petitioners' properties.
- [57] An unobstructed view of Okanagan Lake is a factor that continues to benefit lot 2. I can consider subjective and objective factors in determining the matter: Wallster at para.10.
- [58] The respondent argues, and I agree, that the petitioners have not shown that continuing the new restrictive covenant provides no practical benefit to lot 2.
- c. Section 35(2)(c) - Implied Agreement to Cancel
- [59] I agree with the respondent: no evidence before the Court demonstrates that the respondent ever agreed, expressly or implicitly, to modify or cancel the new restrictive covenant. Moreover, the petitioners did not aggressively argue this point in their submissions.
- d. Section 35(2)(d) - Cancellation Causes No Injury
- [60] This subsection is the flip side of s. 35(2)(b). If the new restrictive covenant provides a practical benefit to lot 2's owners - I have found it does - then the petitioner cannot say that cancelling the new restrictive covenant will not injure lot's 2 owners: Berrettoni et al. v. Belzberg, 2006 BCSC 225 at para. 31.
- e. Section 35(2)(e) - Charge is Invalid, etc.
- [61] No evidence before the Court suggests that the new restrictive covenant is in any way invalid, and the petitioners also did not press this point.

Decision

- [62] For the reasons stated, the petition is dismissed on its merits with costs.

Costs

- [63] The parties have requested that the issue of costs be spoken to at a later convenient time. The parties are at liberty to arrange a hearing on the issue of costs with the registry.

"G.P. Weatherill J."

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