

CANADA / JUDGMENT

Otter Bay Developments Ltd. (Re)

2008 BCSC 806

COURT

Supreme Court of British Columbia

DECIDED

23 June 2008

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2008 BCSC 806 Otter Bay Developments Ltd. (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Otter Bay Developments Ltd. (Re), 2008 BCSC 806 Date: 20080623 Docket: B061635 Registry: Vancouver In Bankruptcy and Insolvency In the Matter of the Proposal Of Otter Bay Developments Ltd. Before: The Honourable Madam Justice Brown Reasons for Judgment Counsel for the applicants Otter Bay Marina Ltd., and Jochen Neumann and Katarina Jacob G.G. Plottel Counsel for the respondent Campbell, Saunders Ltd., Interim Receiver of Otter Bay Developments Ltd. H. Ferris Counsel for the respondent The Owners, Strata Plan VIS5996 T. Keast, Q.C. Counsel for the respondent 269893 Alberta Ltd. K.R. Doyle Counsel for the respondents Glenda Treleavan, Dan Treleavan and 673097 B.C. Ltd. G.E.H. Cadman Q.C. H. Harrison Counsel for the respondents Gulf Excavating Ltd., Edwards Electric Ltd. and 555870 B.C. Ltd. N.W. Lott Counsel for the respondents Forsite Construction Inc., Forsite Development Inc., Towne Millwork Ltd. and K.D. Cabinet Components Ltd. A.N. Habib J.R. Parkinson Date and Place of Hearing: March 12, 2008 Vancouver, B.C.

- [1] There are two applications before me. The first application is for leave to commence a petition against the interim receiver of Otter Bay Developments Ltd., Campbell, Saunders Ltd. (the "Interim Receiver"). The second application is for liberty to discontinue providing water to Otter Bay Developments Ltd. (the "Developer"). Both of the applications arise out of the order of Master Bolton of November 2, 2006, appointing an interim receiver of the Developer. That order prohibits any party from commencing litigation against the Interim Receiver without leave of the court. The order also prohibits any party from terminating or cancelling any agreements, or cutting off, discontinuing, or altering any utilities or services to the Interim Receiver. LEAVE TO COMMENCE PETITION
- [2] Otter Bay Marina Ltd. (the "Marina") asks for leave to commence the petition because of, as it puts it, problematic terms of the 2005 easement, which charges the marina land, as servient tenement, for the benefit of the lands now owned by The Owners, Strata Plan VIS5996 (the "Strata Corporation") as the dominant tenement. The Marina also alleges breach of the easement.

- [3] The easement was registered in April 2005. At that time, the dominant and servient tenements were owned by a company, 269893 Alberta Ltd. The general purpose of the easement was to allow for the construction of certain community facilities on the marina lands, including:
1. a utility building;
 2. a sewerage system; and
 3. a water system. These community facilities were to be operated for the benefit of both the dominant and servient tenements. In 2005, 269893 Alberta Ltd. sold the servient tenement to the Marina and the dominant tenement to the Developer. In 2006, the Developer transferred the dominant tenement to the Strata Corporation and began construction of the works on the marina lands.
- [4] The Marina says that the works are not yet completed:
1. there is no occupancy permit for the utility building;
 2. there is no permit for the sewerage of the utility building and other buildings constructed pursuant to the easement to be connected to the community sewerage system;
 3. no irrigation system has been installed on the marina lands to replace the previous irrigation system;
 4. the permit for operating the community water system is held by the Marina, but work is being done under the authority of the Interim Receiver;
 5. there is no agreement with respect to how expenses are to be paid; and
 6. liens have been filed on the marina lands due to the Developer's failure to pay for community facilities.
- [5] The Marina argues that the easement is unenforceable and should be cancelled or modified on the basis that its terms are void or unenforceable, including that they include positive covenants that at law do not run with the land.
- [6] The Marina argues that it should be granted leave to commence a proceeding against the Interim Receiver, that the test is not a difficult one to meet, and that it is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact, relying on *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 [2006] 2 S.C.R. 123 at para. 55 [GMAC].
- [7] The Marina argues that its petition is not frivolous or vexatious, and that the basis for relief is well founded and supported by the authorities.

- [8] The Interim Receiver takes the position that it is not a necessary party to the Marina's proposed petition and should not be named as a party. The Interim Receiver says that the Marina can, and should, if it wishes, take action against the Strata Corporation, not involving the Interim Receiver.
- [9] The Strata Corporation says that the matter should be resolved between it and the Marina; that they need to work out a way to continue as neighbours into the future. The Strata Corporation says, in any event, that no action should be commenced against assets in the hands of the Interim Receiver and that this distinguishes the proposed petition from GMAC. The Strata Corporation refers to the arbitration clause in the easement agreement and is willing to attend arbitration.
- [10] I accept the submissions of the respondents.
- [11] I am not satisfied that the Interim Receiver is a necessary or proper party to the litigation. The Marina has remedies under the Commercial Arbitration Act, R.S.B.C. 1996, c. 55, should it chose to use them, or it can commence a petition or action against the Strata Corporation. The petition, which the Marine proposes would be an action against the assets within the control of the Interim Receiver, rather than an action against the Interim Receiver for its acts in the course of administering the assets, and would interfere with the administration of the estate. There is no urgency in proceeding against the Interim Receiver and I am not prepared at this time to grant leave to commence proceedings against the Interim Receiver.
LEAVE TO DISCONTINUE PROVIDING WATER
- [12] The application for liberty to discontinue providing water to the Developer or the lands of which the Developer is the registered owner, is brought by Jochen Neumann ("Neumann") and Katarina Jacob ("Jacob"). At the time I heard this application in March 2008, it was my understanding that developments were afoot such that the Interim Receiver may well be able to stop using water from the Neumann/Jacob well. I require that the parties provide me with an update as to the current status. An order may no longer be necessary. "B.J. Brown J."
The Honourable Madam Justice B.J. Brown

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