
CANADA / JUDGMENT

Parker Cove Properties v. Freeborn

2009 BCSC 920

COURT

Supreme Court of British Columbia

DECIDED

28 May 2009

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2009 BCSC 920 Parker Cove Properties v. Freeborn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Parker Cove Properties v. Freeborn,

2009 BCSC 920

Date: 20090528

Docket: 80362

Registry: Kelowna

Between:

Parker Cove Properties Limited Partnership

Plaintiff

And:

Howard Douglas Freeborn and

Roberta Freeborn

Defendants

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J. Hardwick

Appearing on his own behalf:

H. Freeborn

Appearing on her own behalf:

R. Freeborn

Place and Date of Trial/Hearing:

May 15 and 21, 2009

Kelowna, B.C.

Place and Date of Judgment:

May 28, 2009

Kelowna, B.C.

- [1] THE COURT: The plaintiff, Parker Cove Properties Limited Partnership, applied for a declaration that the defendants, Mr. and Mrs. Freeborn, are unlawfully occupying subleased premises at the Parker Cove development and for an order requiring them to immediately vacate those premises.
- [2] The Freeborns oppose the plaintiff's application. They did so without the benefit of legal assistance. They wish to have the plaintiff's application dismissed, and failing that, they wish an opportunity to sell their interest in the development.
- [3] I gave oral reasons on April 21, 2009, in which I concluded that either under s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253, or pursuant to my inherent jurisdiction, I had authority to relieve against the forfeiture by the defendants of the remainder of their lease. Because I was satisfied that the circumstances warranted the exercise of that authority, I refused the plaintiff's application for a declaration that the defendants were unlawfully in occupation of the premises and ordered that the defendants pay the plaintiffs \$500 per month on or before the end of May 2009, and each month thereafter up to and including August 2009, and that if the defendants listed their interest in the development prior to the end of May 2009, they would have until the end of August to arrange for a completion of sale, but if such a sale were not concluded by the end of August, that the plaintiffs would be entitled to the relief they sought.
- [4] The parties were unable to agree on the form of order, and as a result the matter came back before me. When it did, the plaintiff invited me to reconsider my decision on the basis that counsel had not had an opportunity to address the issue of whether the Law and Equity Act applies in these circumstances. I have now heard submissions on that issue.

- [5] As a result of all of the foregoing, there are two issues to be resolved. The first is whether this is a situation in which I should permit a reopening of the proceedings in order to address the question raised by the plaintiff. If so, the second issue is whether I have, either as a result of s. 24 of the Law and Equity Act or otherwise at law, the authority to relieve against forfeiture in these circumstances.
- [6] As to the first issue, I am satisfied that this a matter in which it is appropriate to reopen the proceedings to the extent necessary to permit the plaintiff to address the issue it wishes addressed. It was and is, in my view, implicit in the defendants' material and submissions that the issue of relief for forfeiture was before the court for consideration. Because they were acting on their own behalf, they did not raise it expressly. I did not give the plaintiff an opportunity to address the issue before issuing my reasons, and I should have.
- [7] In any event, in these circumstances, I am satisfied that based on the principles expressed by Tysoe J. (as he then was) in *United Mexican States v. Metalclad Corp.*, 2001 BCSC 1529, that it is appropriate to reopen the proceedings for purposes of receiving submissions on the issue raised.
- [8] As noted above, the second issue is whether the court in these circumstances may grant relief from forfeiture, either under the provisions of the Law and Equity Act or otherwise. Before turning to the legal aspects of this question, some background factual material should be noted.
- [9] Parker Cove Properties Limited Partnership is a British Columbia limited partnership created under the laws of this province. The general partner in that limited partnership is Parker Bonneau Management Ltd. The other partners are not identified in the materials.
- [10] On July 18, 1994, Her Majesty the Queen in Right of Canada leased a portion of Okanagan Indian Reserve No. 1 to the plaintiff. That lease, referred to by the parties as the "head lease", was duly registered in the reserve land register under the terms of the Indian Act. The head lease expires on January 31, 2043.
- [11] Although the precise dimensions of the land covered by the lease are not in the materials, suffice it to say that they are substantial. The plan diagram for the development reveals the presence of in excess of 700 individual lots, some of which front on Okanagan Lake.
- [12] In June 2001, the defendant, Howard Freeborn, and his brother, Kenneth Freeborn, entered into a lease with the plaintiff. That lease the parties referred to as the sublease. The sublease is for a term of 39 years and would expire, unless previously determined, on January 31, 2043.

- [13] In May 2006, Kenneth Freeborn sold his interest in the lease to his brother Howard. The defendant, Roberta Freeborn, is Howard Freeborn's wife. The sublease set the Freeborns' annual rent at \$3,647. It provides for increases in that basic rent by a formula based on the consumer price index. By February 2008, the annual rent had increased, as a result of the application of that formula, to \$4,245.79.
- [14] The sublease permits sublessees to either pay the entire amount of the annual rent in advance or to pay the amount in monthly instalments. In order to exercise that option, the sublease requires that the sublessee give written notice to the sublessor 90 days before the annual rent would otherwise be due.
- [15] There is no question but that the Freeborns have a history of delinquency in relation to their rental obligation. They missed making a number of payments in 2007. Although they tendered a monthly payment for February 2008, the sublessor refused to accept it, because, I gather, the Freeborns had not given the requisite written notice and because the sublessor's patience had been exhausted.
- [16] As of March 2008, the total amount of the Freeborns arrears was, based on the materials that are now before me, \$4,845.79. All but \$600 of that amount was for rent going forward.
- [17] The Freeborns' sublease covers two lots. One of the lots is undeveloped. The other has a house on it, in which the Freeborns live together with their elementary school-aged child. Mr. Freeborn has a number of medical problems which, I gather, render him virtually unemployable. The family relies on a disability income.
- [18] After the sublessor refused to accept further rent from the Freeborns, they listed their interest in the property with a real estate agent in early 2008. The initial listing price was \$195,000. The Freeborns increased their asking price to \$239,900 in April 2008. Over the next four months, they reduced that price eventually to \$169,000. Their real estate agent described them as among the most motivated vendors in his clientele.
- [19] Although the Freeborns were attempting to sell their interest in the sublease, in the summer of 2008, the plaintiff took the position that their lease had been cancelled, and thus they had nothing to sell. Mr. Bonneau, on behalf of the plaintiff, conveyed that position to the Freeborns' real estate agent. The Freeborns have deposed that, as a result, they were unable to continue their efforts to sell.
- [20] As noted, the sublease runs until January 31, 2043. Mr. Freeborn has deposed that single lots within the development are selling for an average of \$40,000. That assertion is not denied. He has also deposed that his interest in the sublease is the only significant asset he or his wife has.

- [21] It was as against this background that I concluded the Freeborns should be granted a limited opportunity to realize on their equity and to be relieved against forfeiture of the remainder of the term of their sublease. In doing so, I set conditions and limited the time within which they would be entitled to realize on their equity.

ANALYSIS

- [22] The sublease contains a number of provisions that are of relevance to the issue at hand. Paragraph 21.1 of that sublease provides:

The sub-lessor shall be entitled to such other rights and remedies as may be available to it pursuant to this sublease, at law or in equity, including without limitation rights of distress, the right to claim damages against the sub-lessee and the right to seek and obtain injunctive or other equitable relief upon the happening of a default.

- [23] Paragraph 32.1 provides:

This sublease shall be construed and governed by the laws of Canada and the Province of British Columbia applicable to the Lands and the sub-lessor and sub-lessee agree to attorn to the jurisdiction of the British Columbia courts, which shall have exclusive jurisdiction to determine any dispute arising out of this sublease.

- [24] The head lease is not in evidence.

- [25] The plaintiff argues that the provisions of the Law and Equity Act which give the court jurisdiction to grant relief from forfeiture do not apply to Indian lands. In support of that position, they refer to *Derrickson v. Derrickson* (1986), 1 S.C.R. 285; *Anderson v. Triple Creek Estates*, [1990] B.C.J. No. 1754 (S.C.); and *Matsqui Indian Band v. Bird*, [1992] B.C.J. No. 1887 (S.C.).

- [26] In *Derrickson*, the issue before the Supreme Court of Canada was whether the provisions of Part 3 of the Family Relations Act, which deal with the division of property, are constitutionally applicable to the lands within an Indian Reserve. Chouinard J., delivering the judgment of the court, concluded:

- [46] The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the Constitution Act, 1867. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands.

- [27] The foregoing conclusion, however, did not dispose of the issue before the court because although Part 3 of the Family Relations Act was not applicable to lands reserved for Indians by its terms, it may apply as a result of being referentially incorporated by s. 88 of the Indian Act. That section provides that, subject to the terms of any treaty or other act of the Parliament of Canada, all laws of general application that are applicable to and in respect of Indians, save to the extent they are inconsistent with the Indian Act itself, or any rule, regulation or order made under it, apply.

- [28] Chouinard J. concluded that because the provisions of the Family Relations Act conflict with a number of provisions of the Indian Act, it is not incorporated by operation of s. 88 of the Indian Act. He adopted the analysis of Hinckson J.A., who wrote for the Court of Appeal in *Derrickson*. Hinckson J.A. observed that s. 20 of the Indian Act, which provides for possession by an individual Indian of lands on a reserve, is to be made by the band council and with the approval of the minister. Were the Family Relations Act to apply, the court would be empowered to deal with land found to be a family asset and declare ownership and right to possession of it, otherwise than in accordance with s. 20 of the Indian Act. Therein, among other areas, lay the conflict.
- [29] The reach of s. 88 of the Indian Act, and specifically whether it applies to all laws, including those that regulate Indian lands as opposed to laws that only regulate Indians as Indians, was not decided in *Derrickson*. The court, having concluded that the Family Relations Act conflicted with the Indian Act in a number of respects, found it unnecessary to resolve the issue.
- [30] In *Anderson*, the tenant petitioner lived in a mobile home park on a reserve. The landlord, a Native Indian, sought to evict the tenant. When he had the tenant served with a notice of termination, the tenant sought to have the matter determined by an arbitrator acting under the provincial Residential Tenancy Act. The arbitrator declined to hear the matter on the basis that he or she was without jurisdiction because any decision that might be made would affect land on an Indian reserve. The petitioner sought judicial review of that decision.
- [31] Boyle J. concluded that, on the basis of *Derrickson*, possession of lands on an Indian reserve, including occupation of those lands, falls within the exclusive jurisdiction of the Parliament of Canada, and thus the Residential Tenancy Act cannot be resorted to if the result would be to effect occupation or possession of lands on a reserve. While Boyle J. noted the s. 88 issue, he did not decide the case on that basis. Rather, he rested his conclusion on a division of powers analysis.
- [32] A similar issue arose in *Matsqui Indian Band v. Bird*. The petitioner in that case was the Indian Band. It sought an order that the defendants deliver up possession of the property they had leased from the band on reserve lands. Although the tenants in that case applied to have an arbitrator designated under the Residential Tenancy Act, as in *Anderson*, the arbitrator declined to rule on the issue.
- [33] Leggatt J. expressed his agreement with the arbitrator's conclusion and then turned to the issue of what law applied to the landlord and tenant relationship in the matter before him. He concluded that the common law applied. The issue before him was the adequacy of the notice given by the landlord by which it purported to terminate the lease. Under any view of the facts in *Matsqui*, the tenant had received the notice to which it was entitled at common law, and thus their tenancy was properly terminated. As in *Anderson*, Leggatt J. did not decide the issue of whether, by operation of s. 88, the Residential Tenancy Act extended to lands on an Indian reserve.

- [34] The plaintiff argues that to the extent relieving from forfeiture is based on the Law and Equity Act, and to the extent that it may affect possession or occupation of Indian reserve land, it follows from the foregoing authorities that it does not apply.
- [35] I am not persuaded that the analysis in *Derrickson* leads inexorably to the conclusion that a provision in the Law and Equity Act which, if invoked, may affect possession of lands on an Indian reserve, is inapplicable. That is likely the case to the extent the conclusion rests on whether the Act, by its terms, applies to reserve lands. The Act may, however, by operation of s. 88 of the Indian Act, apply to reserve lands. Whether that is so, or not, depends on whether the enactment in question conflicts with the Indian Act itself and whether s. 88 extends to enactments that relate to Indian lands as opposed to Indians themselves.
- [36] No conflict with the Indian Act has been identified by the plaintiff. None of the conflicts identified in *Derrickson* appear to apply to the situation in the matter at hand. Her Majesty the Queen in Right of Canada has, presumably with the consent of the band, leased the entirety of the development to a limited partnership. I infer that under the terms of the head lease ministerial approval is not required to be obtained by the limited partnership in order to enter into leases with sublessees. Rather, the developer is at liberty to sublet property on the reserve to anyone it chooses.
- [37] It has not been argued before me that s. 88 is limited to laws that apply to Indians, as opposed to Indian lands; and thus, while I recognize that an argument exists to that effect, it is not appropriate to decide this matter on that basis in these circumstances. I will therefore assume that s. 88 extends to enactments that relate to Indian lands, as opposed to merely those that relate to Indians.
- [38] Based on the material before me, I am not persuaded that there is a conflict between the application of the Law and Equity Act to the extent it authorizes the court to grant relief from forfeiture and the Indian Act.
- [39] There remains for consideration the principles from *Anderson* and *Matsqui Indian Band*. The plaintiff argues that these cases stand for the proposition that recourse to a provincial enactment, whether it is the Residential Tenancy Act or the Law and Equity Act, is constitutionally impermissible if the result would be to effect possession or occupation of lands on an Indian reserve.
- [40] As earlier noted, the narrow point in *Anderson* was whether the arbitrator had erred in concluding that he or she did not have jurisdiction to deal with the validity of a notice of termination under the Residential Tenancy Act if it related to Indian lands. Boyle J. concluded the arbitrator did not err.
- [41] In *Matsqui*, the issue was not in relation to the jurisdiction of the arbitrator. The issue was, given that the Residential Tenancy Act did not apply, what law did? Leggatt J. concluded that it was the common law, and he resolved the issue before him by recourse to that law.

- [42] The provisions of the Law and Equity Act dealing with relief from forfeiture do not apply to Indian lands, on the basis of a constitutional division of powers analysis, unless they are incorporated under the provisions of s. 88. Because I am satisfied that they are, the constitutional division of powers argument does not arise.
- [43] I rest my conclusion in respect of this matter on two grounds. The first involves the provisions of the sublease itself, and the second relates to the difference between granting relief from forfeiture and the sorts of orders that an arbitrator, under the Residential Tenancy Act, may be empowered to make.
- [44] As to the first matter, the parties expressly agree that the sublease is to be governed by "the laws of Canada and the laws of British Columbia". If the laws of Canada conflict with a provision in the law as enacted by the provincial legislature, then the doctrine of paramountcy set out in *Multiple Access Ltd. v. McCutcheon* (1982), 2 S.C.R. 161 at 91, would be engaged and the laws of Canada would govern.
- [45] There is, however, in the matter at hand, no conflict between the Indian Act and the relief available under the Law and Equity Act. It was open to the plaintiff in this matter to except from this provision of the sublease that section of the Law and Equity Act which empowers the court to grant relief from forfeiture. It did not do that.
- [46] Interestingly, the sublessor specifically reserved to itself all rights and remedies available "at law or in equity". It did not specifically exclude equitable remedies that may be available to a sublessee. Rather, the parties agreed that the laws of the province of British Columbia and the laws of Canada would apply to the sublease. I am satisfied, in so agreeing, that the parties agreed, save to the extent there is a conflict, that the laws of both jurisdictions apply.
- [47] Given that I am not persuaded there is a conflict between the forfeiture provisions of the Law and Equity Act and the Indian Act, both apply, and I may, as a result, grant relief from forfeiture.
- [48] As to the second proposition, there is a difference, in my view, between granting relief from forfeiture and the remedies that an arbitrator, or a court for that matter, may grant pursuant to the Residential Tenancy Act. In the latter case, the remedies may, and often do, involve in their essence the granting of a right on the part of the tenant to remain in possession of lands. The remedy of relieving against forfeiture may but does not necessarily involve a right to remain in possession or occupation of lands. For example, it may be open to the court to grant relief from forfeiture and yet put the tenant out of possession and occupation. If that course had been adopted in the matter at hand, the plaintiff's argument, to the extent it rests on the proposition that an order effecting a right to possession of lands on an Indian reserve, would not exist. My order does give the Freeborns a limited right to remain in possession of the lands. That, however, is ancillary to the primary aspect of the relief which relates to giving a party an opportunity to enjoy the fruits of his or her bargain.

- [49] I am not persuaded that, as an incident to providing that opportunity, if the tenant is permitted to continuing occupation and possession of lands for a limited period of time, it brings the matter within the principles of *Anderson and Matsqui*.
- [50] Finally, I note in passing that, in at least two cases, courts have addressed the application of s. 24 of the Law and Equity Act in the context of leases on Indian lands. The first of those cases is *Canada (Attorney General) v. Wang*, [2001] B.C.J. No. 907 (S.C.). In that case, as in the matter at hand, the defendants were sublessees of property on an Indian reserve. They had refused to pay rent, and thus the Crown, on behalf of the band, brought an action to have the subleases declared at an end and the tenants put off the property.
- [51] Melnick J. granted relief from forfeiture under the Law and Equity Act to certain of the tenants on the condition that they pay the arrears of rent within a fixed period of time. It does not appear from the judgment that the issue of whether, for the reasons advanced by the plaintiff in the matter at hand, the Law and Equity Act applying to Indian lands was argued. It was, however, applied.
- [52] The second case is *Canada (Attorney General) v. Lau*, [2002] B.C.J. No. 329 (S.C.). That case involved the same plaintiff that was before Mr. Justice Melnick and one of the same defendants. The defendant Lau applied to the court for further relief under s. 24 of the Law and Equity Act. Burnyeat J. declined to grant that relief, not because s. 24 of the Law and Equity Act did not apply to the lease in question but rather because s. 28 of the same Act, which limits the court's ability to grant relief from forfeiture to a single event, did apply, and the Lau had already been granted relief from forfeiture once.
- [53] Again, it does not appear that the arguments advanced by the plaintiff in the matter at hand were raised in Lau, but the fact remains that the court proceeded on the basis that the Act applied.
- [54] I note parenthetically that the court in Lau also considered that it had the discretion to stay the execution of an order. Under Rule 42(21), or pursuant to its inherent jurisdiction, the court elected to stay execution of its order, with the result being that the Laus were permitted to remain in possession of their property for a limited period of time.
- [55] In summary, I am not persuaded that the authorities to which the plaintiff points leads to the conclusion, in view of the specific terms of the lease to which the parties agreed, that s. 24 of the Law and Equity Act is not available in these circumstances. My order of April 21, 2009, will therefore stand.
- [56] Each party will bear their own costs of and relating to this application. The order for costs pronounced April 21, 2009, relating to the proceedings taken up to and including that date, stands.

Barrow J.

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