

CANADA / JUDGMENT

Richards v. Darwin Properties (Seymour) Inc.

2015 BCSC 2023

COURT

Supreme Court of British Columbia

DECIDED

4 November 2015

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2015 BCSC 2023 Richards v. Darwin Properties (Seymour) Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Richards v. Darwin Properties (Seymour) Inc.,

2015 BCSC 2023

Date: 20151104

Docket: S144228

Registry: Vancouver

Between:

Roslyn Jean Richards and others

Applicants/Plaintiffs

And

Darwin Properties (Seymour) Inc.

Respondent/Defendant

And

Susan Catherine Bornestig and others

Respondents

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Applicants:

P.J. Roberts

Counsel for the Respondent Darwin Properties (Seymour) Ltd.:

W. McMillan

Counsel for the Respondents Susan Catherine Bornestig and others:

J.D. Whyte

Place and Date of Hearing:

Vancouver, B.C.

September 24, 2015

Place and Date of Judgment:

Vancouver, B.C.

November 4, 2015

A. INTRODUCTION

- [1] This action began with the filing of a notice of civil claim on May 30, 2014. It seeks to have contracts between the plaintiffs and the defendant declared void and unenforceable.
- [2] The applicants/plaintiffs now apply to have this proceeding continue as a representative proceeding under Rule 20-3 on behalf of the owners of an apartment complex called Seymour Estates who signed individual contracts of purchase and sale with the defendant. The respondent/defendant opposes the application. The individual respondents are Seymour Estates owners who did not sign contracts with the defendants. They are not parties to the underlying action and only oppose the application as it pertains to costs. Specifically, they oppose the granting of an order that any award of costs against the plaintiffs be paid from the gross sale proceeds of Seymour Estates.

B. BACKGROUND

- [3] The plaintiffs are fractional interest owners in a property in North Vancouver, Seymour Estates. There are 114 owners in total and three of these are the plaintiffs in this proceeding.
- [4] Seymour Estates is a common law condominium. Despite its name it is not governed by the Condominium Act, RSBC 1996, c. 64 and the operative phrase is "common law." The property is governed by means of an Ownership Agreement and there is a representative Council. There is also Seymour Village Management Inc. ("Seymour Management") which has some management responsibilities for Seymour Estates.

[5] Beginning in 2011 the defendant sought to purchase the interests of the owners of Seymour Estates in order to re-develop the property. A number of meetings took place between the parties and among the owners. Correspondence was sent to Seymour Management, sent by email to the owners and posted in public areas of Seymour Estates.

[6] On May 30, 2012 offers were made by the defendant to all of the owners. A covering letter stated that the "goal" was to "obtain 100% approval of our offer". In an addendum to the offer the following was included:

26. CONDITIONS PRECEDENT

This Contract is subject to the following Conditions Precedent being satisfied or waived by the Buyer within the time stipulated:

- a) Assembly - The Buyer obtaining accepted Contracts of Purchase and Sale for each of the 114 properties forming Seymour Estates, to the sole satisfaction of the Buyer, on or before September 28, 2012;

These Conditions Precedent are for the Buyers' sole benefit and each may be waived unilaterally at the Buyer's discretion.

[7] On October 22, 2012 the defendant wrote to the owners to increase its offer by several thousand dollars per unit.

[8] By letter of November 23, 2012 the defendant advised the owners that 98 had accepted the offer, 5 had not accepted and 6 were undecided. Further meetings, correspondence and discussions took place.

[9] On March 20, 2013 a second offer was made by the defendant to all owners of Seymour Estates. This was a different offer inasmuch as it reflected the increase in the money offered and there was a provision for the owners to buy back into the new development at a discount. Another change was to the addendum of the offer which included changes to the assembly objective of the defendant. The new language was as follows:

26. CONDITIONS PRECEDENT

This Contract is subject to the following Conditions Precedent being satisfied or waived by the Buyer within the time stipulated:

- a) Assembly - The Buyer obtaining accepted Contracts of Purchase and Sale for the majority of the 114 properties forming Seymour Estates, to the sole satisfaction of the Buyer on or before April 30, 2013;

These Conditions Precedent are for the Buyers' sole benefit and each may be waived unilaterally at the Buyer's discretion.

- [10] By the summer of 2013 the defendant concluded it did not have a sufficient level of approval from the owners. By letter of May 17, 2013 the defendant advised that "98 owners are under contract". In the application for consideration here the three plaintiffs seek to continue this as a representative proceeding to represent these 98 owners. I will call the contracts entered into by these 98 owners the "2013 Contracts".
- [11] In August 2013, 87 of the 114 owners commenced a petition seeking the sale of Seymour Estates under the Partition of Property Act, RSBC 1996, c. 347 (S-136523). In a judgment dated January 17, 2014 the petition was allowed for reasons indexed at 2014 BCSC 714.
- [12] In January 2014 a third offer from the defendant was made to all owners, delivered to the Council, but it was not accepted. The Council also decided to test the market and retained a realtor.
- [13] In February 2014 the defendant delivered to most of the owners who signed the 2013 Contracts cheques in the amount of \$2,500 each as a deposit and a waiver of the environmental inspection in the 2013 Contracts. Six owners cashed the cheques and the rest either returned the cheques or have kept them without cashing them. The plaintiff Rhonda Coogan is one of the owners who cashed the cheques.
- [14] On March 3, 2014 the plaintiffs filed an application (under S-136523) seeking a declaration that the individual contracts of purchase and sale signed by some owners following the defendant's second offer were void and unenforceable. It is not clear what the relationship is between that application and the claim that underlies the subject application (under S-144228).
- [15] Following a case planning conference on April 15, 2014 Madam Justice Fenlon ordered a distribution of the proceeds in the event of a sale (under S-136523). The distribution of these funds was to be on the basis of the fractional interests of each owner. The order also provided for an application to distribute the funds by another means. There is another legal proceeding in which the issue is whether the distribution will be by fractional interest or unit type.
- [16] On September 25, 2014 the Council at Seymour Estates signed a letter of intent with another developer, Polygon. A formal offer to purchase was signed on October 31, 2014. On January 30, 2015 the sale to Polygon was approved in court for reasons indexed at 2015 BCSC 275. It has not yet closed.
- [17] The defendant responded by filing a notice of civil claim on January 9, 2015 seeking damages for repudiation of the contracts it had with some of the owners (VA S-150192). That matter is not being decided here.

C. ANALYSIS

- [18] In the underlying claim in this application (S-144228) the plaintiffs, three owners at Seymour Estates, seek declarations that their individual contracts with the defendant are void and unenforceable.
- [19] The plaintiffs' claim in their notice of civil claim is in contract, misrepresentation and estoppel. With respect to contract and misrepresentation the plaintiff relies on a series of written and oral statements from the defendant with respect to the 2013 Contracts. The defendant challenges the use of a representative proceeding for issues of misrepresentation and it also raises issues about reliance in this case.
- [20] The issue of estoppel relates to the plaintiffs' claim that the defendant is estopped from relying on the 2013 Contracts. As I understand it, the contracts that were completed in 2012 are not an issue except for factual issues related to those contracts that may be relevant to the 2013 Contracts.
- [21] I will proceed by considering the legal context for this application and then the issues of misrepresentation, reliance and estoppel.
- (a) Legal context
- [22] The current application by the plaintiffs, filed June 17, 2014, seeks to have this proceeding continue as a representative one under Rule 20-3(1) on behalf of the owners of Seymour Estates who signed the 2013 Contracts. That rule is as follows:

Rule 20-3 -- Representative Proceedings

Representative proceeding

- (1) If numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (10), the proceeding may be started and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.
- [23] The parties are agreed on the test for continuing a proceeding as a representative one. This was set out in a previous judgment about aboriginal and fishery issues (*Quinn v. Bell Pole*, 2013 BCSC 892 at para. 19):
- [19] Rule 20-3 of the Supreme Court Civil Rules authorizes the bringing of a representative action where "numerous persons have the same interest in a proceeding". While this Rule is usually applied in class proceedings, the criteria that must be satisfied before a representative action will be allowed to proceed have been considered applicable where individuals seek to establish or enforce aboriginal rights on behalf of others: see *Komoyue Heritage Society v British Columbia*, 2006 BCSC 1517; *Te Kiapilanoq v British Columbia*, 2008 BCSC 54. These criteria, established in *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 are:

1. the class of plaintiffs must be capable of clear definition;
 2. there must be issues of fact or law common to all class members;
 3. success for one class member on the common issues must mean success for all; and
 4. the class representative must adequately represent the class and the court should be satisfied that the proposed representative will vigorously and capably prosecute the interests of the class.
- [24] It is not disputed that the class of plaintiffs are capable of clear definition: they are the owners of Seymour Estates who signed the 2013 Contracts with the defendant. The other elements of the test in Quinn are in dispute.
- [25] All parties have used previous judgments under class proceeding legislation as generally applicable to this application to continue this proceeding as a representative one. In this regard there is the following (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46; cited in *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at para. 35):
- [39] The underlying question [for certification of a class proceeding] is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action.
- [40] [W]ith regard to the common issues, success for one class member must mean success for all.
- [26] In *Thorburn* the Court of Appeal also said this about commonality:
- [38] The commonality requirement has a low threshold. Although there must be a rational connection between the identifiable class and the proposed common issues, a common issue does not have to be determinative of liability. It merely needs to raise a triable factual or legal issue, the determination of which will move the litigation forward: *Campbell* at para. 53 [*Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.)].
- [39] Certification of a common issue will not move the litigation forward if: (i) it is dependent on individual findings of fact that must be made for each class member (*Lam v. University of British Columbia*, 2010 BCCA 325 at paras. 26 and 75, 321 D.L.R. (4th) 150); (ii) it is framed in overly broad terms (*Rumley* at para. 29 [*Rumley v. British Columbia*, 2001 SCC 69]); or (iii) it is not capable of benefitting all members of the class if successfully prosecuted (*Western Canadian Shopping Centres Inc. v. Dutton* at para. 40). In these instances the practical effect of certifying a class action would break down into numerous individual proceedings and therefore would not serve the ends of fairness or efficiency.

[27] Similar statements were made in a recent decision of this Court which was considering whether to certify a class proceeding or not (*Stachniak v. Jurock*, 2012 BCSC 601). The facts were that the plaintiffs alleged that the defendants made certain misrepresentations to induce the plaintiffs to buy a unit in a strata-titled building. With respect to the commonality of issues between potential members of the class Mr. Justice Sewell said this:

[31] In my view the notice of civil claim does raise a number of issues common to all Class Members. The common issues need not predominate over other issues to warrant certification, nor need a common issue be determinative of liability. It is sufficient that the resolution of common issues will move the litigation forward and be capable of application to all Class Members.

[32] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, the Court comments at paras. 39 and 40 as follows:

39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

40 Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[Emphasis added.]

[28] Bearing in mind that there are differences between certification of a class and continuing a proceeding as a representative one, the above statements provide some general context for considering this application for a representative proceeding.

(b) The contract and representation

[29] The following review of the evidence describes current evidence with respect to the contract and representation issues.

- [30] I emphasize that I am not deciding here whether there was misrepresentation (and reliance or estoppel) or not. As set out in the authorities above, the issue in this application for a representative proceeding is whether issues such as contract, misrepresentation and estoppel are the principal issues common to all class members. Further, Western Canadian Shopping Centres points out that the common issues need not predominate over non-common issues. There also has to be commonality with respect to the facts. The conclusive determination of these issues will be after a full examination of the evidence at trial.
- [31] The plaintiffs claim that the 2013 Contracts contained a term that the contracts "would not be enforceable against the individual Seymour Estates owners until Darwin had a contractual right and ability to purchase and own all the undivided fractional interests in Seymour Estates". That is, the defendant's offers would not be binding on the individual owners unless all of them agreed to the offers. The result, according to the plaintiffs, is that the offers made to individual owners were not binding on them because the defendant did not obtain agreement with all owners. Therefore, it is submitted by the plaintiffs that the contracts are void and unenforceable
- [32] For its part the defendant says the contracts are valid and enforceable.
- [33] Looking at the contracts specifically, there were different contract prices for different types of apartments and not all contracts were signed on the same day. They were apparently signed in March and April 2013.
- [34] However, this is not a case where there is more than one contract, some contracts were oral and some potential members of the class may not have had an offer from the defendant at all (*Hayes v. British Columbia Television Broadcasting Systems Ltd.* (1990), 46 BCLR (2d) 339 at p. 344).
- [35] I find that the contents of the 2013 Contracts is a common and principal issue among the potential members of the representative class proposed by the plaintiffs.
- [36] With respect to misrepresentation, a useful starting point to understand the plaintiffs' claim is a letter dated January 18, 2013 from the defendant to Seymour Management. It followed the unsuccessful conclusion of the 2012 contracts. It stated, in part:

After nearly 12 months of meetings with the Seymour Estates residents we can confirm that the majority wish to move forward with the redevelopment proposal. While we are very pleased with this high percentage of support, we have not yet achieved 100% agreement from the ownership group. Based on counter offers and feedback from the minority of owners who have yet to come to terms with us, completing the assembly would require increasing the price and/or modifying the terms in our offer to some or all of the remaining owners.

As we said before, we believe that Seymour Estates owners should be treated equally and receive the same value for their units, based on unit type. At this point we are prevented from proceeding with the project without receiving further instructions from the residence.

[37] Further discussions took place. In a letter dated June 12, 2013 Darwin wrote to each individual owner of Seymour Estates. Among other things the letter stated:

Throughout this process we have made it absolutely clear to our agents and the owners that we have no intention of negotiating the purchase price as we believe that all Seymour States owners should receive the same price for their unit, based on unit type.

We take this commitment very seriously and we will be providing copies of the accepted contracts to the lawyer selected by the residents which will confirm that everyone has received the same price.

[38] According to the plaintiffs, the above statements and other oral statements were representations that the defendant would not complete any individual contract until it obtained all of the properties. The plaintiffs claim that they and the proposed class relied on these representations in entering the 2013 Contracts. As a result, the plaintiffs say they are entitled to rescind the contracts.

[39] The defendant raises a number of objections to the claim of misrepresentation proceeding on a representative basis. It submits, for example, that misrepresentation claims are generally unsuitable for a representative process because they are not particularized and their content and broadcast (who said what to whom, where and when) are uncertain. Mr. Justice Sewell addressed this issue in *Stachniak*:

[43] Counsel for the defendants referred me to a number of authorities in support of his submission that the proposed common issues based on misrepresentation were not appropriate common issues. He relied in particular on the reasons of Montgomery J. in *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39 (Ont. Gen. Div.). However I note that the Ontario Divisional Court, while dismissing an appeal from that decision, [1995] O.J. No. 16, 21 O.R. (3d) 453, did not agree with Montgomery J.'s reasoning with respect to certifying actions involving claims for misrepresentation.

[44] On appeal, both O'Brien and Moldaver JJ. were of the view that elements of a misrepresentation claim could be considered to be common issues. In his reasons Moldaver J. stated as follows:

108 Finally, with respect to the defendant Deloitte Touche, Montgomery J. was of the view that no common issues had been raised and further, that the Act "was designed to remove some of the barriers to class actions that existed before its enactment. It was not intended to be used in circumstances where the individual issues to be determined predominate those issues common to the proposed class" (p. 51) (emphasis added).

109 With respect, I disagree that the pleadings raised no common issues against Deloitte Touche. In my view, they raised two common issues:

(1) Did the Deloitte letter amount to a misrepresentation and if so, was it made negligently? and

- (2) If the answer to question 1 is "yes", was Deloitte entitled to rely upon the disclaimer clause contained within that letter?
- [40] On this basis I conclude that there is no general bar to misrepresentation as a common issue in a representative proceeding. Rather, the question is whether misrepresentation is common to all potential class members in this case.
- [41] As can be seen there is written evidence setting out what the plaintiffs say was the misrepresentation by the defendant. It was a single, written representation in correspondence from the defendant to all owners of Seymour Estates: the defendant would not enforce any individual contracts until it had contracts with all owners. In some cases it was sent through Seymour Management and/or the Council for Seymour Estates but there is no dispute that the letters were sent to and received by the owners. It is clear that the owners received the alleged representation unlike in other cases where it was not at all clear who received what (Hayes at p. 344).
- [42] In my view the written representation relied on by the plaintiffs and set out above can be appropriately dealt with under a representative proceeding. It is a substantial common ingredient to this litigation and, indeed, it is the primary issue between the parties. As well, having a representative proceeding will avoid the duplication and cost of alternate proceedings. I am also satisfied that a representative proceeding will result in the same result for all owners who signed the 2013 Contracts. This logically follows from the fact that the members received essentially the same contracts.
- [43] The one difference among the owners who signed the 2013 Contracts is that many of them were given deposit cheques in February 2014 by the defendant. Six of these owners cashed the cheques. The legal significance of these events will have to be determined at trial but I am satisfied that the common issue of misrepresentation is at least significant in that issue. I also note that the plaintiff Rhonda Coogan was one of the owners who cashed her cheque so the current plaintiffs are representative of all interests among the class.
- [44] I accept the defendant's point that any oral representations are of a different character than the written material described above. These apparently arose during meetings of owners in which representatives of the defendant spoke. Many owners were there but some were not. As might be expected some owners were upset and some remember things differently or interpret things differently than others. For example, some owners believe that the court order of April 2014 by Madam Justice Fenlon ended any contracts with the defendant. Some others do not take that position. That is, in part, a legal issue that is not common among the owners and I understand there also to be factual issues about where the idea came from, among other issues.
- [45] These are the kind of circumstances discussed in the authorities that make it difficult to find that there are common issues between potential class members. Having said that, I cannot conclude that any individual issues that may arise from the alleged oral representations will overwhelm the common issues. I also note that misrepresentation may be suitable for

determination in a representative proceeding where there are "a limited number of representations that have a common import" (McKenna v. Gammon Gold Inc., 2010 ONSC 1591 at para. 137).

[46] The trial of this action will include oral evidence from both parties. It may explain in more detail the misrepresentation alleged by the plaintiff and the defendant may call evidence to disprove the allegation. Additionally, some owners have deposed that they signed the 2013 Contracts without noticing the change to the assembly objective of the defendant from the 2012 contracts (from getting acceptance from "each" owner in the 2012 contracts to getting acceptance from a "majority" of the owners in the 2013 Contracts). Oral evidence may describe that issue more fully. There will undoubtedly be other oral evidence that is collateral to the common issue of misrepresentation.

(c) Reliance and estoppel

[47] With respect to reliance, it is a necessary of a claim for rescission of a contract based on innocent misrepresentation and it is usually considered to be an individual issue that is not capable of being resolved on a common basis. This is because problems of proof arise when there is a need to make individual inquiries of each member of the class and review a multitude of sources in order to determine if members of the class actually relied on the alleged misrepresentation (see for example Hayes at p. 344).

[48] There are, however, exceptions to this general statement including situations where there is a single representation made to all members of the class or where there are a limited number of representations with a common import. As well, proof of reliance can be made by inference (McKenna at paras. 136, 137, 151).

[49] I am satisfied that reliance is a common issue among the owners who signed the 2013 Contracts. This primarily follows from the written evidence described above since it is not disputed that the contracts were signed by the owners. Thus, the facts are common. As well, whether there was reliance is an issue that will affect the owners equally.

[50] Estoppel is similarly a common issue in my view. If the defendant is estopped from enforcing the 2013 Contracts that will apply to all of the affected owners.

D. SUMMARY

[51] Pursuant to Rule 20-3, this proceeding is continued as a representative proceeding on behalf of the owners of Seymour Estates who signed the 2013 Contracts with the defendant for the sale of their undivided fractional interest in Seymour Estates.

[52] Any order following trial with respect to the enforceability of the 2013 Contracts will be binding on all parties to those contracts.

[53] Costs will be in the cause. The issue of whether any costs award against the plaintiffs will be paid from the gross proceeds of sale of Seymour Estates will be addressed at trial.

"Steeves, J."

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