

CANADA / JUDGMENT

Smithe Residences Ltd. v. 4 Corners Properties Ltd.

2020 BCCA 383

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 383 Smithe Residences Ltd. v. 4 Corners Properties Ltd. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Smithe Residences Ltd. v. 4 Corners Properties Ltd., 2020 BCCA 383 Date: 20201221 Docket: CA46636 Between: Smithe Residences Ltd. and Brendan James Schouw Respondents (Plaintiffs) And 4 Corners Properties Ltd. Appellant (Plaintiff) And Homer Street Residences Ltd., Boffo Investment Corp., Boffo Developments (Smithe) Ltd., Boffo Developments (Hornby) Ltd., and Boffo Developments (Homer) Ltd. Respondents (Defendants) Before: The Honourable Mr. Justice Grauer (In Chambers) On judicial review from: A decision of the Registrar of the Court of Appeal for British Columbia, dated December 1, 2020 (Smithe Residences Ltd. v. 4 Corners Properties Ltd., Vancouver Docket CA46636). Oral Reasons for Judgment Counsel for the Appellant (via teleconference): C. Dennis, Q.C. R. Power Counsel for the Respondents, Boffo Developments (Homer) Ltd., Boffo Developments (Hornby) Ltd., Boffo Developments (Smithe) Ltd., Boffo Investments Corp. (via teleconference): D. Gruber R. Arora Place and Date of Hearing: Vancouver, British Columbia December 21, 2020 Place and Date of Judgment: Vancouver, British Columbia December 21, 2020 Summary: After a division of this court allowed this appeal, the registrar settled the terms of the order. The order was subsequently signed by a member of the division, and entered. The applicants then applied, pursuant to section 10(3) of the Court of Appeal Act and Rule 35 of the Court of Appeal Rules, to set aside the decision of the Registrar settling the form of order and remit the question of the form of amendment of the notice of civil claim in the underlying action back to the division for clarification. Held: the application to review the contents of the order as settled by the Registrar is dismissed. There is no "order or direction of the registrar" to be reviewed, varied or cancelled, as required by section 10(3). What is in issue is not an order of the Registrar, but an order of the court. A single justice sitting in chambers lacks the jurisdiction to set aside an order of the court. The proper course of action is for counsel to contact the registry to seek leave to reopen the matter in order to make submissions to the division that heard the appeal.

- [1] GRAUER J.A.: This application is brought by one set of respondents whom I shall call compendiously Boffo Developments. It arises out of appeals that were heard on July 10, 2020, before a division of this court comprising the Chief Justice and Justices Harris and DeWitt-Van Oosten. Two proceedings were under appeal, and the appeals were allowed in reasons for judgment delivered by the Chief Justice, in which Justices Harris and DeWitt-Van Oosten concurred, on August 11, 2020. Those reasons are indexed at 2020 BCCA 227.
- [2] In his introduction, the Chief Justice made this observation:
- [1] This appeal raises novel issues involving the interplay between the Supreme Court Civil Rules, B.C. Reg. 168/2009, for adding parties and amending pleadings (specifically Rule 6-2(7)) in the face of an expired limitation period (permitted by s. 22 of the Limitation Act, S.B.C. 2012, c. 13) and the extinguishing effect, if any, of ss. 6 and 27 of the Limitation Act.
- [3] The terms of the order of this court were settled by Registrar Outerbridge on December 1, 2020. The order has since been signed by the Chief Justice, and entered.
- [4] Boffo Developments now applies for two orders:
1. That the Registrar's oral decision dated December 1, 2020, settling the form of order in the within appeal, be set aside; and
 2. That the question of the form of amendment of the notice of civil claim in British Columbia Supreme Court Action No. S1711962 be remitted back to the division for clarification.
- [5] I have concluded that I do not have jurisdiction to make the order sought. I therefore decline to hear the applications on their merits.
- [6] Counsel for Boffo Developments submits that I have the jurisdiction to grant the relief requested pursuant to section 10(3) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 and Rule 35 of the Court of Appeal Rules. The authority, if it exists, comes from the Act, which provides in section 10(3) as follows: A justice may review an order or direction of the registrar and, after reviewing it, may vary or cancel the order or direction.
- [7] As I see it, there is no "order or direction of the registrar" to be reviewed, varied or cancelled. The Registrar did not order or direct anyone to do anything. What he did was settle the terms of an order of the court, which terms were then approved by the court, and entered as a formal order. Accordingly, what is in issue is not an order of the Registrar, but an order of the court.
- [8] What counsel for Boffo Developments is really asking me to do is to set aside an entered order of a division of the court. It is not open to me to do so. Only the division that pronounced the order can do that. This is inherent in the second part of the application, which asks me to remit the matter to the division for clarification. That is not my job.
- [9] I reiterate what Madam Justice Saunders had to say in *Murphy v Wynne*, 2012 BCCA 113:

- [9] This takes me to the issues raised regarding the orders settled by the Registrar. Mr. Murphy complains that the contents of the settled orders do not reflect the orders made by the various judges. Such complaints as to the contents of the settled orders should be directed to the justice who made the order, or where it was made by a division of this court, to the division, with primary direction to the justice presiding. Accordingly, these complaints are not properly before me. For certainty, I would observe that the three orders of which Mr. Murphy complains have each been signed, after settlement by the Registrar, by the appropriate Justice; the contents of an entered order are beyond my review. The application to review the contents of the orders as settled by the Registrar is therefore dismissed.
- [10] Counsel for Boffo Developments suggests that, as the applicant there was in-person, and no counsel opposed, the relevant section of the Court of Appeal Act was not brought to Justice Saunders' attention, and the decision was per incuriam. I am quite satisfied that Justice Saunders needed no one to bring a section of the Court of Appeal Act to her attention, and her decision, in my respectful view, is correct.
- [11] The proper course is for counsel to contact the registry to seek leave to reopen the matter in order to make submissions to the division that heard the appeal concerning the proper terms of their order.
- [12] The application is dismissed. "The Honourable Mr. Justice Grauer"

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