
CANADA / JUDGMENT

Toor v. Aujla

2015 BCSC 1104

COURT

Supreme Court of British Columbia

DECIDED

28 May 2015

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2015 BCSC 1104 Toor v. Aujla

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Toor v. Aujla,

2015 BCSC 1104

Date: 20150528

Docket: S1410092

Registry: Vancouver

Between:

Amritpal Singh Toor

Plaintiff

And

Jagjit Singh Aujla

Jaspal Kaur Aujla

J.R.T. Holdings Inc.

Defendants

Corrected Reasons: These Oral Reasons were corrected
on the cover page on July 10, 2015.

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

Robert J. Baylis

Counsel for the Defendants:

J. Luke Zacharias

Heather L. Bains

Place and Date of Hearing:

Vancouver, B.C.

May 27, 2015

Place and Date of Judgment:

Vancouver, B.C.

May 28, 2015

- [1] THE COURT: The Defendants apply for an order cancelling the registration of a certificate of pending litigation (CPL) against a blueberry farm. The two personal Defendants own the farm property in trust for the corporate Defendant, and I will speak of the three Defendants collectively in these reasons.
- [2] The Plaintiff agreed to buy the property by an offer which the Defendants accepted on June 26, 2014. The purchase price was to be \$5,050,000, with completion to be on October 28, 2014. By an addendum on August 8, 2014, a second deposit of \$100,000 was to be paid by October 5, 2014. It has never been paid. When the second deposit was not paid on time, the Defendants demanded in writing on October 9, 2014, that the Plaintiff pay it immediately. On October 21, the Defendants advised the Plaintiff he was in breach of contract.
- [3] The transaction never closed on any basis. On December 31, 2014, the Plaintiff commenced this action seeking specific performance, with a reduction in the purchase price by \$1,090,600 or other amount the Court determines, among other requested relief.
- [4] The CPL was registered December 31, 2014. The response to civil claim was filed April 8, 2015. The pleadings are now closed and no further steps in the litigation have been taken.
- [5] The governing statutory provisions for this application are ss. 256 and 257 of the Land Title Act, R.S.B.C. 1996, c. 250. They provide as follows:

Cancellation of certificate of pending litigation on other grounds

256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

(2) An owner whose indefeasible title or charge is registered subject to a certificate of pending litigation under section 217 (2) (a) or (c) (ii) may, on setting out in an affidavit

- (a) that the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate contains no allegation that the owner is not a purchaser in good faith and for valuable consideration,
- (b) that the owner applied to register the owner's indefeasible title or charge before the certificate was received by the registrar, and
- (c) particulars of dates and times of receipt, application and registration of the owner's application and the certificate,

apply for an order that the registration of the certificate be cancelled.

(3) An application under this section must be made to the court in which the proceeding was commenced and must be brought

- (a) as an application in that proceeding, if the applicant is a party to the proceeding, or
- (b) by petition, if the applicant is not a party.

Power of court to order cancellation

257 (1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
 - (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or

- (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
 - (ii) to give security in an amount satisfactory to the court and conditioned on the fulfilment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
- (2) The form of the undertaking must be settled by the registrar of the court.
- (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.
- (4) On hearing the application referred to in section 256 (2) and on being satisfied that
 - (a) the facts set out in the affidavit are consistent with the records of the land title office, and
 - (b) there is nothing in the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate that expressly or by necessary implication alleges that the owner is not a purchaser in good faith and for valuable consideration,the court may make an order declaring that the owner's indefeasible title or charge is not affected by the certificate of pending litigation or the outcome of the proceeding.
- (5) On receipt of an order made under subsection (4), the registrar must file it and cancel the registration of the certificate of pending litigation.
- [6] To succeed on this application, the Defendants must first show they are experiencing or likely to experience hardship and inconvenience from the CPL. Then they must show it is plain and obvious that the Plaintiff's specific performance claim will not succeed at trial: see *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at paras. 28 and 39.
- [7] The court in *Youyi*, again at para. 28, found that the hardship must be more than trifling, but also that the court should not be what the Court of Appeal called "exacting" in its analysis of the alleged hardship and inconvenience.
- [8] The Defendants have presented evidence of their hardship and inconvenience, and I adopt here the following summary of that evidence as presented at para. 31 of the Defendants' written submissions:
 - 31. The Defendants have provided the following evidence of hardship:
 - (a) The Defendants are unable to transfer or sell their interest in the Property since the filing of the CPL.

- (b) The further into the growing season (May to late summer), the harder the Property will be to sell because of the anticipated revenue from the harvest.
- (c) The further into the growing season, the more expenses will be incurred to prepare the berry harvest, including pruning, fertilization, weed control, pest control and general spring maintenance. The Defendants estimate that in the next two to three months the maintenance of the Property will cost approximately \$30,000.
- (d) The Defendants are unable to obtain additional financing or restructure JRT's business financing due to the CPL.
- (e) JRT is attempting to restructure its business financing with TD Bank which is currently offering 0.75% less than Farm Credit Canada. TD Bank has advised me that they will not agree to the refinancing until the CPL is removed.
- (f) The purpose in selling the Property was to use the proceeds to expand JRT's nursery space by building 900,000 square feet of greenhouses. The annual gross revenue expected from these additional greenhouses was approximately \$10,000,000, with an expected annual net revenue of approximately \$5,000,000.
- (g) JRT received quotes from Harnois Industries Inc. in January, 2014 for the construction of the Greenhouse Project.
- (h) Following Completion, it was the Defendant's intention to commence building the greenhouses immediately. The property where the greenhouses were to be built is prepped and ready for construction. It was expected that the greenhouses would be built in three months and would be in use by February or March of 2015 with product volume of approximately 7,000,000 liners (young immature plants or trees).
- (i) In anticipation of having the additional greenhouse space, JRT advised its plant breeders that they could take on additional quantities of plants and had been building an ongoing relationship with breeders to obtain licenses for new species.
- (j) As a result of not being able to proceed with building additional greenhouses, JRT is now losing opportunities to obtain exclusive licenses to certain species of plants which would allow JRT to be the only nursery in North America with these new plant species. These licenses will be given to JRT's competitors and breeders may not be willing to deal with JRT in the future.
- (k) The longer financing is delayed by the CPL, the greater the negative impact this will be to JRT's expansion plans.
- [9] In my view, the Defendants, from that evidence, have satisfied the hardship and inconvenience requirement.
- [10] It is plain and obvious, in my view, that the Plaintiff's action for specific performance will fail as a result of the facts set out below.

- [11] Turning first to the merits of the claim, I note here, as I did above, that the Plaintiff has not paid the second deposit of \$100,000 toward the purchase, as he agreed to do, and has never come forward demanding to close the transaction as and when the parties had agreed.
- [12] Instead, he simply commenced the litigation seeking specific performance and damages, as well as other relief. As I noted earlier, as part of the relief he seeks, he asks the Court to adjust the closing price. That in itself worsens the case for specific performance, because it carries with it the recognition that an essential term of the contract, that is price, is not yet settled.
- [13] A second matter to consider at this stage is whether damages would be an adequate remedy for the Plaintiff, in which case the Court may cancel the registration of the CPL. In my view, damages would provide the Plaintiff with appropriate relief in this case for any legitimate claim he may have. My finding in that regard stems from my conclusion that the property is not unique, as that concept is defined in property law.
- [14] The Plaintiff's primary claim that the property is unique is based on the fact that there is or was a licensed marihuana grow op on the site, operating in an old and somewhat dilapidated barn.
- [15] The argument, as I understand it, is that revenue from the grow op would flow to the landowner in the form of rent paid by the operator of the grow op, and that grow op licences are site-specific and are not being renewed.
- [16] As a practical problem for the Plaintiff in advancing that argument, a fire has destroyed the barn and presumably the grow op, and therefore destroyed this allegedly unique aspect of the property. Furthermore, the Plaintiff's agreement to buy the property never contemplated a grow op business continuing on site. Instead, the agreement obligated the Defendants simply to provide vacant possession of the barn to the Plaintiff and allow the barn to be inspected by the Plaintiff's lender. The operator of the grow op has testified in an affidavit that he had no agreement to carry on his business at that site. Finally, the Plaintiff is faced with an "entire agreement" clause in the agreement which would appear to further negate any rights to having a grow op on the property.
- [17] The Plaintiff's other allegation that the property is unique is based on its high quality as a blueberry farm, which the Plaintiff links to the farm's profitability. The Plaintiff's realtor, Mr. Raman Dhillon, testified in an affidavit that the property is one of the best-producing farms in the area, although what area was included in that reference was not stated. Leaving aside the self-interest of the realtor, that evidence goes to profitability and is thus to be used in an assessment of damages rather than to base a claim for specific performance. On that point, again see Youyi, at para. 47.

- [18] The Supreme Court of Canada in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, found that real property should no longer be assumed to be unique. Evidence about the property in question needs to be examined to see if it is unique. From the facts I have found above, there is nothing that could lead to a conclusion that the property is unique.
- [19] In the result, I order that the CPL registration will be cancelled, subject to the following terms.
- [20] There remains to consider the security, if any, the Defendants should give the Plaintiff associated with his claims for damages. Section 257(3) permits the Court to consider the probability of the Plaintiff's success in the claim, including the claim for damages, and the amount of the damages: see *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2007 BCSC 1379 at para. 29. In my view, it is plain and obvious that there is not a case for specific performance and the Plaintiff's case for any damages is not strong. I order the Defendants to provide security of \$75,000 as a requirement for the registration of the CPL being cancelled.
- [21] The Defendants will have their costs of this application in the cause.
- "MACINTOSH J."

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