CANADA / JUDGMENT

Wan v. British Columbia

2022 BCSC 106

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2022 BCSC 106 Wan v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wan v. British Columbia,

2022 BCSC 106

Date: 20220124

Docket: S215207

Registry: New Westminster

Between:

Heyan Wan

Petitioner

And

Her Majesty the Queen in Right of the Province of British Columbia and

The Corporation of the District of West Vancouver

Respondents

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Petitioner:

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Place and Date of Trial/Hearing:

New Westminster, B.C.

October 28 and 29, 2021

Place and Date of Judgment:

New Westminster, B.C.

January 24, 2022

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Introduction

[1] At the centre of this dispute is an outdoor swimming pool, built on a rocky headland on the Crown foreshore of English Bay. At high tide, the elevated pool is surrounded on three sides by the waters of English Bay, and, from the pool deck, there are unobstructed views of English Bay.

[2] The pool was built in about 1949 by Ken and Louise Russell, who then owned 3928 Marine Dr. in West Vancouver ("Property"). The pool is surrounded by a stone seawall, and it, together with a planter and an adjacent boat ramp, all encroach onto the foreshore ("Encroachments").

[3] In January 2015, Heyan Wan bought the Property from the estate of Louise Russell.

[4] Ms. Wan originally commenced this proceeding by notice of civil claim on January 23, 2019. In May 2019, she converted it to a petition proceeding.

[5] In her petition, Ms. Wan seeks a declaration, pursuant to s. 36(2)(b) of the Property Law Act, R.S.B.C. 1996, c. 377 [PLA], that title over a portion of land owned by the respondent, Her Majesty the Queen in Right of the Province of British Columbia (the "Province" or "Crown"), be vested in her, upon her paying compensation to the Province. The land she seeks to have vested in her is part of the publicly-owned foreshore, the area of the shore between the high and low tide marks ("Foreshore") in front of her property.

[6] Alternatively, Ms. Wan seeks a declaration, pursuant s. 36(2)(a) of the PLA, permitting her to proceed with repairs to the pool, and that she be given a 30-year easement over the Foreshore to allow her to continue to use the Encroachments.

[7] As against the Corporation of the District of West Vancouver (the "District"), Ms. Wan seeks:

a) a declaration that the District be estopped, in law or in equity, from terminating a licence agreement she entered into with it for the continued use of the Encroachments ("Licence"); and

b) to prevent the District from issuing any further order requiring her to demolish the Encroachments.

[8] The Foreshore is owned by the Province, and is held and administered by the District under the authority of a lease. The Province opposes any order that would give Ms. Wan a proprietary interest in the Foreshore. It says that there is a statutory bar to Ms. Wan's claim.

[9] The Province takes no position on the declaration Ms. Wan seeks against the District, except to note that the relief she seeks is not appropriate in this petition proceeding.

[10] The District opposes the relief Ms. Wan seeks against it on the basis that it never represented to her, or conducted itself in a way, that would have led Ms. Wan to believe that she had any right to the Foreshore, other than a Licence to use and occupy it, subject to the strict terms of that Licence. It did not lead Ms. Wan to believe that it would not exercise its right to terminate the Licence for a defined period of time, or that it would not assert its right under the Licence to require Ms. Wan to remove the Encroachments on termination of the Licence.

[11] The District supports the Province's position that Ms. Wan is not entitled to a vesting order or easement over the Foreshore.

[12] The parties appeared before me in March 2021. At that time, Ms. Wan applied to: adjourn her petition; obtain an order for disclosure of certain documents from the District; and obtain an order that Matthew MacKinnon, the District's Environment Manager, attend for cross-examination on his affidavit. In the alternative, Ms. Wan sought an order that her petition be referred to the trial list, and continued as an action as if commenced by notice of civil claim.

[13] In reasons indexed as Wan v. British Columbia, 2021 BCSC 808, for the reasons given, I did not adjourn Ms. Wan's petition and did not order documentary disclosure, or an examination of Mr. MacKinnon. I also dismissed Ms. Wan's application to convert this petition into an action. The parties next appeared before me in October 2021.

The History of the Petition and the Facts Giving Rise to It

[14] In January 2015, Ms. Wan purchased the Property, which had been marketed by Clara Hartree, a West Vancouver RE/MAX agent, specializing in luxury homes. A marketing video prepared by Ms. Hartree highlighted the Encroachments, particularly the pool, as unique features of the Property.

[15] The Property is located on the West Vancouver waterfront and slopes down towards English Bay. At its southern boundary, the Property ends at the Foreshore. The Encroachments were built on the Foreshore.

[16] According to Ms. Wan's evidence, the Encroachments, particularly the pool, and the extensive landscaping and flower gardens built on the slope between the house and the pool, were important features in her decision to buy the Property.

[17] There is very little evidence before me about the circumstances of the construction of the pool. There is no evidence from the District or from Ken and Louise Russell, both of whom are now deceased, about whether there was a licence or permit to build the pool in 1949. David Russell, the son of Ken and Louise Russell, deposes in his affidavit that he does not have direct first-hand knowledge of the arrangements his parents made with the District for the construction of the pool, since it was constructed when he was about five years old. He reports on a conversation he recalls having with his father, at some time prior to his father's

death in 2000. His evidence in that regard is hearsay and I have not considered it.

The Province's Lease of the Foreshore to the District

[18] In some parts of British Columbia, including the District, the Province has entered into leases giving municipalities the right to manage the Crown Foreshore, in exchange for rent.

[19] The District manages the Crown Foreshore pursuant to a head lease it entered into with the Province (the "Head Lease"). The Head Lease was most recently renewed, for a 30-year term, on July 2, 2014, replacing an earlier 30-year head lease signed in 1984. Similar arrangements have existed between the District and the Province since at least 1969.

[20] By its terms, the Head Lease does not create an agency, joint venture, or partnership between the Province and the District. In particular, Article 11.6 provides:

11.6 You [the District] agree with us [the Province] that

(b) nothing in this Agreement constitutes you as our agent, joint venturer or partner or gives you any authority or power to bind us in any way.

[21] The relevant terms of the Head Lease indicate that it is intended to:

a) grant the District authority to maintain and improve the shoreline within the "Land", defined in the Head Lease by reference to various lots outlined on an attached schedule, "together with unsurveyed foreshore or land covered by water being part of the bed of Burrard Inlet, Queen Charlotte Channel and Horseshoe Bay": see definition of "Land" in Article 1.1 and grant of authority in Article 1.15(a) of the Head Lease;

b) grant and administer "Subtenures", defined to mean any agreement entered into by the District on or after the commencement of the previous lease of June 21, 1984, under or through which a person derives any right, title, or interest in or to the Land, or part of the Land, or any right to enter on, use or occupy the Land, or part of the Land for any purpose permitted or restricted by the terms of the Head Lease: see definition of "Subtenure" in Article 1.1. Within the District's power to grant Subtenures, it may also grant "Minor Permits or Licences", as defined in Article 1.1, to registered owners of adjacent residential property, to encroach onto the Land for the purpose of permitting or regularizing decks, retaining walls under four feet in height, paths, fences, stairs, landscaping, accessory structures, and other similar residential encroachments;

c) control private "Improvements", as defined in Article 1.1, on the Land; and

d) use and improve the Land for "Community Purposes", as defined in Article 1.1.

[22] Pursuant to Article 2.3, the District does not need the Province's consent to grant Subtenures, so long as they are administered in a commercially reasonable manner as would be administered by a private landlord.

[23] Article 3 provides for rent and royalties to be paid by the District to the Province. It requires the District to keep records of revenues received from Subtenure and minor permits and licences.

[24] Pursuant to Articles 4.1(a), (n), and (aa), respectively, the District covenants to pay rent, realty taxes, and utility costs for the Land; not to grant Subtenures unless doing so conforms to good land use practice and ensures a quality environment; and not to grant Subtenures that permit the placement or construction of Improvements that would obstruct public access, except where the natural condition of the Land prevents public access.

[25] Pursuant to Article 8.1, the Head Lease is terminable by the Province on certain acts of default. Pursuant to Article 8.4, the Head Lease may be surrendered by the District at will on 90 days prior written notice.

[26] Read together and in summary, the terms of the Head Lease provide the District with a leasehold interest in the Crown Foreshore, and permit it to deal with its leasehold interest only within the parameters of the Head Lease. In exchange for rent to the Province, the Head Lease authorizes the District to maintain and improve the Crown Foreshore; to grant and administer sub-tenures allowing adjoining property owners to use the Crown Foreshore for encroaching structures, and to collect fees for such use; to control private improvements; and to use and improve the Crown Foreshore for community purposes.

[27] The Head Lease does not give the District the power to dispose of Crown land under the Land Act, R.S.B.C. 1996, c. 245 [Land Act], convey an interest in the Crown Foreshore that is greater than its leasehold interest, or bind the Province through its actions.

[28] The land comprising the Crown Foreshore is also subject to the District's municipal regulatory jurisdiction over matters such as land use, community planning, building permit requirements, and environmental development restrictions.

The Licence Agreement for the Use of the Encroachments

[29] On November 5, 2014, prior to Ms. Wan's completion of the purchase of the Property, the District informed her that the Encroachments encroached onto the Foreshore, and land covered by seawater adjacent to the Property. It advised Ms. Wan that it controlled the Foreshore, and the land covered by seawater, pursuant to the terms of the Head Lease with the Province. The District said, in part:

Waterfront property owners whose improvements encroach onto the public foreshore within the Head Lease Lands have been required in the past (and will be required in the future) to enter into agreements with the District respecting those encroachments, if such encroachments are not required to be removed. At this time, the District's municipal council ("Council") has not yet ratified a foreshore policy to be applied consistently with respect to encroachments nor approved the standard form of agreement to be used. However, after such a policy is approved by Council, the District will require all such owners to execute formal foreshore encroachment licence

agreements (which will reflect the terms and conditions of the Head Lease) as a precondition to the continued existence of their encroachments on the foreshore, if such encroachments are permitted to remain.

[30] The letter advised Ms. Wan that, pending the District's finalization of a formal foreshore encroachment policy, it would grant her a temporary licence permitting the Encroachments to remain on the Foreshore, on certain terms and conditions. The conditions included a broadly worded liability indemnity in favour of the District, a broadly worded release of the District for any liability Ms. Wan might incur with respect to the Encroachments, a requirement that she maintain, and provide the District with a copy of, $5 million in liability insurance, covering the District as an additional insured.

[31] The Licence is specifically subject to the terms of the Head Lease and is not transferrable by Ms. Wan.

[32] Pursuant to para. 4 of the Licence, it is terminable upon certain events including, as relevant to this petition, on 30 days' notice from the District. Paragraph 4 does not require the District to provide a reason for termination of the Licence, and the Licence does not specify events of default.

[33] Paragraph 6 of the Licence requires Ms. Wan to keep the Encroachments in a safe condition at all times, and prohibits her from replacing, expanding, altering, adding to, or substantially repairing the Encroachments without the permission of the District's Risk Manager, which permission could be withheld at the Manager's sole discretion.

[34] Paragraph 7 of the Licence requires Ms. Wan to comply with all applicable laws, regulations, bylaws, policies, guidelines, requirements, permits, and approvals of all authorities having jurisdiction.

[35] Paragraph 10 of the Licence contains Ms. Wan's acknowledgement and agreement that the Licence does not grant her, or create, an interest in land or a right or interest in respect of personal property located on the Foreshore.

[36] On November 14, 2014, prior to the closing, Ms. Wan signed the Licence. In paras. 2-3 of her affidavit, sworn April 25, 2019, Ms. Wan says that the factual allegations in specified paragraphs of the petition, are "true and correct". The list includes para. 41 that provides:

The petitioner is currently a citizen of China who is applying for immigrant status in Canada with her husband and child. Her primary language is and has been Mandarin and she is not fluent in English. The petitioner was not recommended to and did not obtain any legal advice concerning the contents of the [Licence] at the time that it was first presented to her and when she signed it. At the time of her signing, the petitioner had not retained any lawyer in respect to her purchase of the Residence.

[37] Ms. Wan does not say that she did not understand the Licence or any of its terms. In para. 3 of her affidavit, Ms. Wan says that the allegations contained in paras. 10-15 of the submissions are true. The allegations in Part 1, paras. 11-15 of the submissions summarize the terms of the Licence.

[38] In any event, the District and the Province do not argue that the Licence was not valid when it was entered into. Pursuant to the terms of the Head lease, the District was authorized to enter into the Licence without the Province's consent.

Construction on the Property

[39] In 2015, after closing the purchase of the Property, Ms. Wan entered into an agreement with Hartford Construction Ltd. ("Hartford") to demolish the existing residence on the Property and build a new one. The contract is not in the record. However, at para. 2 of Peter Foreman's first affidavit, sworn on May 28, 2019, he says that, in addition to the construction of a new home, the scope of the contracted work included the "renovation" of the pool located on the Foreshore.

[40] On Ms. Wan's behalf, Hartford obtained a building permit for the construction of a new single-family residence and a hot tub on the Property. The building permit did not include pool renovations.

[41] Hartford subcontracted the pool renovations to Alka Pool Construction ("Alka").

[42] Alka began structural repair work on the pool without a building permit as required by the District's building bylaw, and without the District's permission, as required under the Licence. In particular, Alka installed gravel material and rebar for the purposes of relining the pool in concrete to address leaks from cracks in the pool's perimeter wall. Mr. Foreman says that he and Alka acted on Alka's understanding, based on other projects, that a permit was not necessary.

[43] In her submissions, Ms. Wan suggests that Gary Harman, the District's plumbing inspector, authorized work on the pool, including upgrading the filtering system and installing a new plaster coating for the pool. Ms. Wan says that shortly after the meeting, Alka commenced work to renovate the pool. Mr. Harman's evidence does not support that submission.

[44] In his affidavit sworn on June 20, 2019, Mr. Harman says that, on or about April 19, 2018, he attended the Property to inspect, under a drainage permit and a hot tub permit, work being done on the new home. Mr. Harman had discussions with representatives of Hartford and Alka, regarding possible drainage measures for the pool. He called Coastal Drainage, the drainage contractor for the building permit on the Property, and asked about the pool's drainage. He learned that the pool water was discharged directly into the ocean. Mr. Harman advised that this was unacceptable and that arrangements would have to be made to discharge pool water into the sanitary sewer. Given the pool drainage issue, he did not pass the drainage in his inspection report.

[45] On a date later in April or in early May, Mr. Harman says that he attended a meeting at the Property with representatives of Hartford, two representatives of Alka, and a representative of Coastal Drainage. They presented a proposal for the pool water to be filtered within the pool to remove chlorine, and then to be discharged into the ocean. Mr. Harman had never heard of the type of system proposed. He said it might work, but he would have to consult with Marie Maddatu of the District's Environmental Department. Mr. Harman says he did not discuss renovations of the pool wall as that was not within his jurisdiction.

[46] On May 30, 2018, Rob Danieli sent an email to the District, purporting to summarize the onsite meeting and writing that Mr. Harman had authorized them to proceed with their proposed filtration system. About an hour later, Mr. Harman corrected the inaccuracy and reminded Mr. Danieli that he said he would speak to Ms. Maddatu and get back to Mr. Hartford.

[47] A close reading of the emails attached to Mr. Foreman's first affidavit confirms Mr. Harman's version of the meeting to discuss drainage and that Mr. Harman did not authorize the concrete pour.

[48] On May 29, 2018, the District Building Inspector attended the Property. He directed that no concrete be poured in the pool.

[49] On June 6, 2018, Mr. MacKinnon sent an email to Alka, instructing it to cancel the planned concrete pour for the pool and advising that Ms. Wan's planned pool renovations were being reviewed by the District.

[50] It appears that work carried out on the pool between April 19 and June 6, 2018, was done without a permit or, otherwise, getting permission from the District. In communications with the District, Ms. Wan's contractors described the pool work as "structural" in nature. In a July 5, 2018 email from Mr. Foreman to Mr. MacKinnon, Mr. Foreman described the work being done to the pool as minor in nature and said it was being effected to "make use of the pool safe and bring it to current code". He also said that the pool perimeter walls were cracked in several places which, at mid- to high tide levels, allowed water to migrate into the pool. The amount of inflow increased over time and caused "concern" about a possible breach of the sea walls.

[51] On October 4, 2018, the District's Risk Manager, Clay Nelson, wrote to Ms. Wan, denying her permission to carry out the pool renovations and providing 30 days' notice of the termination of the Licence. In his decision to terminate the Licence, Mr. Nelson said, in relevant part:

The District's current policy approach to encroachments in the foreshore is not to penalize owners who may have acquired properties with unauthorized additions, by granting temporary licences, where appropriate, to allow encroachments to remain until the end of their natural useful lives. Where unnecessary encroachments have reached the stage where they would require investment in replacement, expansion, alteration, additions or substantial repair for

their continued use, the District's approach is to rescind existing licences and require removal in order to bring the subject area into compliance with the Zoning Bylaw and OCP.

Given that the Pool has reached the end of its useful life in its current condition, I am hereby issuing 30 days' notice of termination of the Licence under paragraph 4(d). The Pool and any other encroachments formerly permitted by the Licence, including the seawall, planter, steps and ramp, must be removed. Please submit a completed demolition permit application on or before the expiry of this 30-day period, and complete the removal within 30 days of an approved permit.

[52] In a related petition proceeding, New Westminster Action S209724, Ms. Wan sought judicial review of Mr. Nelson's decision. By agreement, and before the judicial review was heard, Mr. Nelson rescinded the termination and invited Ms. Wan to make submissions regarding whether the Licence should be terminated. According to Mr. Nelson's affidavit, Ms. Wan's submissions will be considered by the District in making a future decision regarding continuation of the Licence. At Ms. Wan's counsel's request, Mr. Nelson had not issued a reconsideration decision pending the outcome of this petition.

[53] As a result, the appropriateness or fairness of the District's decision to terminate the Licence is not before me, and I am not required to determine the factors that were, or were not, considered by the District in terminating Ms. Wan's Licence. Further, as a result of the rescission of the decision and reconsideration, Mr. Nelson's first decision may be irrelevant.

[54] Pending a decision on the termination of the Licence, pool renovations have not advanced and, as I have said, the decision on the termination has been held in abeyance pending the outcome of this petition proceeding.

The Application to Amend the Petition

[55] During his submissions, Ms. Wan's counsel sought leave to amend the petition in three respects. First, he sought to add the following underlined wording to para. 3 of Part 1, the Orders Sought, of the petition:

3. An order declaring that the District is estopped, in law or in equity, from terminating the Petitioner's licence agreement and issuing any future demolition order to the petitioner to demolish the Pool, accessory features and boat ramp.

[56] Second, he sought to add the following underlined words to para. 6 of Part 2, the Factual Basis, of the petition:

6. By virtue of the express or ostensible agency relationship created by the provincial Crown in favour of the District relating to the foreshore, any knowledge of the District concerning the Pool must be attributed to the provincial Crown as principal of the District and the provincial Crown is vicariously liable for the actions of the District.

[57] Finally, he sought to add the following underlined words to para. 4 of Part 3, the Legal Basis, of the petition:

4. The petitioner relies on the doctrine of legitimate expectations, the principles of estoppel by representation, estoppel by conduct and equitable estoppel in claiming that the respondents are estopped based on her and her predecessor's reliance to their detriment on the conduct of the respondents, including the actual or ostensible authority granted by the provincial Crown to the District, or bound by the expectation created for her and she relies on s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253 for relief against forfeiture.

[58] In order to avoid an adjournment of the hearing, I advised that I would decide the amendment request in these reasons. I have decided to permit the amendments on the basis that they are not extensive, do not require any additional evidence, and the respondents had an opportunity to address them in their submissions.

Conclusion

[59] For the reasons that follow, Ms. Wan's petition is dismissed in its entirety.

The Applicable Law

The Vesting Order or Easement

[60] The first issue I have to decide is whether I have jurisdiction under the PLA to grant either a vesting order or an easement in respect of the Foreshore. If I have jurisdiction, Ms. Wan has the burden of persuading me that the balance of convenience favours her such that a vesting order or easement should be granted.

[61] There is no dispute that Ms. Wan is an "owner" for the purposes of s. 36(1) of the PLA. Section 36(2) of the PLA provides:

36(2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application

(a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,

(b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or

(c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

[62] The purpose of s. 36 of the PLA was described by Justice G.P. Weatherill in Bland v. Bland, 2017 BCSC 1712:

[50] The purpose of s. 36 of the PLA is "to provide a basis, on equitable grounds, for resolving disputes over encroachments": [The Owners Strata Plan NES33 v. Westshore Developments Ltd., 2015 BCSC 1280] at para. 88 citing Taylor v. Hoskin, 2006 BCCA 39 at para. 52. In broad terms, its purpose is to allow the court to declare a statutory easement, or vest title to building or fence encroachments in circumstances where it would be equitable to do so. This is achieved through an assessment of the balance of convenience: Westshore, para. 88.

[63] For the court to have jurisdiction under s. 36, the Encroachments must come within the definition of a "building" or a "fence". Neither term is specifically defined in the PLA.

[64] The Concise Oxford English Dictionary defines a building as "a structure with a roof and walls": Catherine Soanes et al, eds, Concise Oxford English Dictionary, 11th ed (New York: Oxford University Press, 2008).

[65] It is well settled that the terms "building" and "fence" are to be interpreted broadly to give effect to the equitable purposes of s. 36. In Epp v. Gartside, 2011 BCSC 1687, Justice Melnick wrote:

[21] That section has been judicially considered in a number of cases. In Svenson v. Hokhold, [1993] B.C.J. No. 859 (B.C.C.A.) and in Vineberg v. Rerick, [1995] B.C.J. No. 2506 [Vineberg], our courts found that it was sufficient if the property in question had, at some time in the past, been partially enclosed by a fence or a construction equivalent to a fence. In Vineberg, Mr. Justice Leggatt indicated at para. 17 that one should not impose too strict a criteria on a section that is intended to provide equitable relief. Similarly, the definition of what is a building has been interpreted with seemingly great elasticity. For example, in Dattolo v. Merlo, [1998] B.C.J. No. 1499 [Dattolo], Mr. Justice Shabbits found a concrete sidewalk to be an extension of a home and thus coming within the definition of a building. Of course, he also found in those particular circumstances that if the sidewalk had been removed, access to a rental unit connected by it to the home would have been impractical. The sidewalk in question was two feet wide and encroached the neighbour's property by a couple of inches due to mutual mistake by the neighbours as to the location of the property line when the sidewalk was installed. Mr. Justice Shabbits ordered an easement to be granted as the balance of convenience favoured that applicant.

[66] In this case, the pool is not a structure with a roof and walls. Further, it is not an extension of the home on the Property. It is some distance from the home, and it is not integral to it. The home was built before the pool. I would describe the pool as an amenity or a feature, not a building. I also find that the rope "fence" around the top of the retaining wall, is not a fence as contemplated by s. 36 of the PLA.

[67] Even with great elasticity, a pool does not fit neatly into the definition of a building, and the parties did not direct me to any case where a pool was the subject of an application under s. 36 of the PLA.

[68] Ms. Wan did rely on Grant v. MacDonald, [1992] 68 B.C.L.R. (2d) 332, [1992] 5 W.W.R. 577 (C.A.), where adjoining neighbours disputed the enforceability of an easement, which had been reserved for the purpose of building a pool. The case was about the interpretation of the easement agreement and whether it had been terminated. It is not helpful in assessing whether the Encroachments fall within s. 36.

[69] I conclude that the Encroachments do not meet the definition of a building or a fence in s. 36.

[70] Even if I proceed on the basis that the pool is, broadly speaking, an encroaching building, on balancing the equities between Ms. Wan and the Province, I conclude that Ms. Wan is not entitled to a vesting order or an easement.

[71] In Taylor v. Hoskin, 2006 BCCA 39 at paras. 26 and 50, the Court of Appeal adopted the three-part test from Vineberg v. Rerick, [1995] B.C.J. No. 2506, 1995 CanLII 3363 (S.C.) to guide the Court's consideration of relief under s. 36 of the PLA. The Court said that the Vineberg considerations should be applied in the context of the words and intent of s. 36: to equitably resolve boundary disputes. It is the facts and the equities in each case that will determine the Court's exercise of its discretion, and other factors are open for consideration: Gainer v. Widsten, 2006 BCCA 580 at para. 8.

[72] The three Vineberg considerations for weighing the balance of convenience are:

1. Whether the party seeking relief under the PLA had an honest belief as to the location of the property line?

2. Is the encroachment a lasting improvement? The more costly and cumbersome it is to move the encroachment, the more the considerations will weigh in favour of the applicant.

3. How does the encroachment affect the properties in terms of present and future value and use?

Did Ms. Wan have an honest belief as to the location of the Property line and that the Encroachments were on land she owned?

[73] With respect to the first consideration, in Taylor at para. 47, the Court of Appeal said that the "improver" should have a bona fide honest belief that the land was their own.

[74] At para. 50, the Court adopted this formulation from Vineberg:

Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are three degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.

[75] Here, Ms. Wan was well-aware, before the closing of the transaction, that the Encroachments encroached on the Foreshore. Ms. Wan's affidavit does not say that she believed she owned the land on which the Encroachments are located. She was informed that the Encroachments were built on the Foreshore owned by the Province and she signed

a Licence specifically providing that the Licence did not create an interest in land. She closed the purchase of the Property knowing the terms of the Licence she had signed. She cannot argue that she relied on any representations from the Province, or for that matter the District, about the nature of the interest she was entitled to with respect to the Encroachments. It could not have been clearer.

[76] While living in China, Ms. Wan purchased a $7.2 million Property in Canada, demolished the home on it, and built a new one. Given the size of that investment, Ms. Wan should have exercised due diligence signing the Licence. A reasonable person making such an investment would have ascertained exactly what her rights were with respect to the Encroachments and the terms of the Licence. Having not done so, she cannot now say that she did not understand it or is not bound by its terms.

[77] Even if Ms. Wan shows that she had an honest but mistaken belief that she owned the Foreshore, that belief rests on representations made by the District and/or a real estate agent. The Province, which owns the Foreshore, made no representations to Ms. Wan.

[78] Ms. Wan makes a number of allegations against the District and its representatives. She submits these allegations weigh the balance of convenience in her favour. She submits that the representations informed her decision to repair the pool. The District denies the representations. Regardless of whether the representations were made, they do not weigh on the balance of convenience between Ms. Wan and the Province. An express agency relationship is not borne out by the terms of the Head Lease and there is no basis on which I could conclude, in the circumstances of this case, that an ostensible agency relationship existed. As confirmed in Argo Ventures Inc. v. Choi, 2019 BCSC 85 at para. 205:

[205] The court in Keddie at paras. 20-21 recognized two paths by which a defendant may be found liable for the acts of its agent: if the agent is acting within the scope of his actual authority (express), or if he is acting within his apparent or ostensible authority (implied). The court noted the distinction between actual and ostensible authority as follows at para. 24:

[24] Actual authority turns on the relationship between the principal and agent. Apparent or ostensible authority is concerned primarily with representations and manifestations made by the principal to third parties such as the appellant in this case...

[79] Here, before Ms. Wan bought the Property, she got notice that the Encroachments encroached on the Foreshore and signed a Licence acknowledging that she was not obtaining an interest in the Foreshore. There was no representation by the Province on which Ms. Wan could rely to argue that she believed that the District was acting as the Province's agent. The Province took steps to protect its title to the Foreshore and the Head Lease specifically prevents the District from binding the Province through its actions. Ms. Wan was told about the existence of the Head Lease in the letter from the District on November 5, 2014.

[80] There is no evidence that Ms. Wan or the prior owners ever believed that they owned the Foreshore. This takes Ms. Wan's claim outside the plain language of s. 36, which allows for orders where "on the survey of land, it is found that a building on it encroaches on adjoining land". It does not enable a landowner, or their successors, who knowingly encroached on their neighbour's land, under a contract, to revisit the terms of the bargain. Here, Ms. Wan had an agreement with the District, which clearly defined the scope of her interest in the Foreshore. This petition is an attempt by her to renegotiate the scope of that interest.

[81] Although it may not be necessary for me to move on to the second and third Vineberg considerations, they do not support Ms. Wan's position or an exercise of discretion in her favour.

Are the Encroachments lasting?

[82] With respect to the second Vineberg consideration, there is no evidence that the Encroachments are of a permanent nature.

[83] There is little helpful evidence about the cost of removing the Encroachments. Ms. Wan filed a March 25, 2019 expert opinion from Clara Hartree, the West Vancouver RE/MAX agent who listed the Property for sale.

[84] Ms. Hartree's opinion took the form of a letter written "To Whom it May Concern". In it, she refers to a quote from Deerwood Landscaping, of approximately $69,000, for the removal of the pool and boat ramp. Ms. Hartree does not describe the circumstances of the quote and does not attach a copy of it.

[85] In her submissions, Ms. Wan estimates the demolition cost at $66,000. She also says that it would cost $150,000 to build a pool elsewhere on her Property.

[86] The pool and the boat ramp are clearly capable of being removed, and a cost of between $66,000 and $69,000 is not significant when compared to the $7.2 million purchase price for the Property. After closing, Ms. Wan demolished the home that was on the Property and rebuilt.

[87] In Mr. Foreman's second affidavit, he says that he received a "rough" estimated that the "the demolition of the ramp and the cost to bring in a barge to remove the concrete debris from any removal of the boat ramp will involve a cost in the range of $20,000 or more, as a separate cost from any demolition and removal of debris from the Pool".

[88] There is no evidence that it would be cumbersome to remove the Encroachments from the Foreshore. The relatively modest estimates do not suggest that it would be.

How do the Encroachments affect the properties in terms of present and future value?

[89] With respect to the third Vineberg consideration, the only evidence is that provided by Ms. Hartree. I have grave concerns about Ms. Hartree's "opinion". Ms. Hartree specifically says that she did not conduct any research in preparing her opinion but that she relied on her

experience as a realtor and her familiarity with "this unique property". She does not set out the basis of her familiarity. On the record before me, it is based on her role as the selling agent. She thereby benefited from the sale and, potentially, has an interest in the outcome of this dispute. The following examples identify my concerns.

[90] First, Ms. Hartree says that she marketed the "pool, boat ramp, and gardens as truly unique features of exceptional value for the property". I accept Ms. Wan's evidence that the Encroachments were of value to her and think it is likely that the Encroachments would have been appealing to some other purchasers. Ms. Hartree does not say whether she was aware that the pool and boat ramp were built on land that did not belong to the Russells.

[91] Second, Ms. Hartree "ventured" to say that the Property was historic and "needs to be protected as such, in the same way that heritage houses are respected". There was no basis for her opinion and it was pure speculation on her part.

[92] Third, Ms. Hartree advocates for Ms. Wan. She says that to quantify the loss of value based on the sale of similar properties is "impossible" as she does not recall similar properties being sold. Nevertheless, she opines that the "loss of property value by removing the encroachments would have to be in the millions of dollars, if you purchase special and the [D]istrict turns it into average". She provides no basis for arriving at her opinion of a loss in value of "millions of dollars", a task she earlier described as impossible.

[93] In the BC Assessment, attached as Ex. A of Mr. Foreman's 1st affidavit, the "Foreshore Encroachment directly in front of [the Property]" is assessed at $99,600 as of July 1, 2018.

[94] Fourth, Ms. Hartree goes on to say that the encroachments are grandfathered and the fact that the owners hold a licence agreement for the encroachment and "the [D]istrict collects taxes on it may imply that this property legally belongs to owners". Ms. Hartree is clearly not qualified to opine on grandfathering or on legal ownership. In doing so, she is an advocate for Ms. Wan's position.

[95] In a similar vein, Ms. Hartree says, "I don't see any advantage for the Crown in this situation as the value of an inaccessible small portion of foreshore land would be negligible, not to mention the loss of taxes being currently paid". Her opinion advocates for Ms. Wan's position and she has no expertise as to the value of foreshore land.

[96] Overall, there is no reliable evidence on which I can determine the impact of the removal of the Encroachments on the present or future value of the Property.

[97] Ms. Wan argues that the minimal area occupied by the Encroachments, as compared to the Foreshore area within 500 meters on either side of her Property, or to the total Crown Foreshore under the Head Lease, is a factor I should consider. The extent of an encroachment is often a factor considered in balancing the equities between adjoining property owners. I do not accept that it should be a factor in this case because of the nature and importance of the Foreshore to the Province and to the public, as discussed below when considering the terms of the Land Act.

[98] In my view, it is also not appropriate to consider that the pool is located on an elevated plateau with steep walls as argued by Ms. Wan. The steep walls are the seawall constructed around the pool, and which form part of the Encroachments. There is no evidence showing what the Foreshore looked like before the seawall and the pool were built, or how accessible it would be without the pool. As discussed below, the Foreshore's importance to the Province is not just limited to public accessibility.

[99] In all the circumstances, I find that the balance of convenience does not favour Ms. Wan. As it relates to a claim for a vesting order or an easement, the balance that is to be considered is not between Ms. Wan and the District, who is not the encroached upon landowner, but between Ms. Wan and the Crown. The equities strongly favour the Province.

Does the PLA apply to public land?

[100] In this case, there is also another difficulty with Ms. Wan's position. For the most part, earlier decisions under s. 36 of the PLA involve disputes between adjoining private landowners. Until the Court of Appeal's decision in District of West Vancouver (Corporation of) v. Liu, 2016 BCCA 96 [Liu], it was not clear that the PLA applied to disputes between private and public owners of land.

[101] In Ferguson v. Lepine (1982), 41 B.C.L.R. 263, 1982 CanLII 502 (C.A.), the Court of Appeal proceeded on the basis that s. 36 of the PLA applied to public lands. At para. 8, it said:

[8] [Section] 32 [now s. 36] was enacted to provide a basis, on equitable grounds, for resolving disputes over encroachments. If this case had involved an encroachment on Crown land, which was the circumstance when Ferguson purchased the property without knowledge of the encroachment, then relief would, in my opinion, have been granted to Ferguson.

[102] In Liu, Ms. Liu owned a residential waterfront property, the western boundary of which abutted an undeveloped portion of a District road allowance, running south to the Burrard Inlet. Structures on Ms. Liu's property encroached significantly on the District's road allowance. The District maintained a public footpath on the road allowance to permit access to the waterfront. Ms. Liu's property did not encroach on the footpath or otherwise impair public access to the waterfront.

[103] As it relates to this case, the majority of the Court of Appeal overturned the chambers judge's finding that the District had authorized the encroachments and set aside the resulting easement granted by the chambers judge. At para. 73, the Court went on to consider whether s. 36 of the PLA applied to public lands.

[104] At para. 82, the majority agreed that, on its face, the PLA was not limited to disputes over encroachments involving two private property owners but said that the Court must be very cautious about making an order that eliminates a public consultation process (in Liu about the closing of a road allowance), and discretionary decisions made by elected municipal representatives about the future of public land.

[105] Both the District and Ms. Liu had expressed interest in a sale of the land encroached upon, at fair market value. At para. 86, the majority wrote:

[86] [A]ny order this Court makes should respect the public consultation process and decision-making authority of the District's municipal council. It should also establish a framework that facilitates the fair, principled and timely achievement of the goal shared by the parties - the sale of the land encroached at fair market value. The District should be held to its commitment to take steps necessary to sell the land encroached to Ms. Liu. Ms. Liu has maintained all along her preparedness to buy the land encroached at fair market value should she be required to do so. If Ms. Liu is unprepared to do so, she must accept that the exceptional circumstances motivating dismissal of the District's application for a statutory injunction at this time are most unlikely to be found to be operative then. To preserve the District's ability to seek an appropriate remedy should Ms. Liu fail to acquire the land encroached at fair market value within a reasonable time, I would grant the District leave to renew its application for statutory injunction in the Supreme Court of British Columbia on the terms and conditions set out below.

[106] The majority structured an order that permitted the District to pass the necessary bylaw to close the road allowance, after which negotiations could occur between Ms. Liu and the District for the transfer of the encroached land, on payment of fair market value. If an agreement was reached, the Supreme Court was ordered to vest title to the land encroached to Ms. Liu. Failing agreement, the District was permitted to renew its application for a statutory injunction.

[107] In his dissenting reasons, Justice Frankel stated that Ms. Liu was not entitled to equitable relief as she was well-aware of the encroachments prior to purchasing her residence and failed to take reasonable steps to ascertain whether the encroachments were authorized.

[108] While it is clear that the PLA may apply to public lands, in my view, the Court of Appeal's decision in Liu is not determinative of the issues in this case.

[109] As discussed below, the scheme of the Land Act elevates the process for foreshore grants beyond the municipal procedures discussed in Liu. Under the Land Act, the Minister is charged with exercising discretion to dispose of Crown land as "advisable in the public interest" and to attach conditions to the grant as considered advisable: s. 11. For foreshore grants, s. 18 of the Land Act reserves additional powers to the Lieutenant Governor in Council.

Applicable Legislation and Statutory Contexts

[110] Generally, under the common law, the Crown is exempt from statutes purporting to regulate its land use. This principle has been codified in s. 14 of the Interpretation Act, R.S.B.C. 1996, c. 238:

Government bound by enactments; exception

14(1) Unless it specifically provides otherwise, an enactment is binding on the government.

(2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the Assessment Act, does not bind or affect the government.

[111] Under s. 55 of the Land Act and s. 109 of the Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.), the Province holds all land below the natural water boundary in British Columbia that is not reserved to the Federal Crown or has, otherwise, been disposed of by Crown grant.

[112] "Natural boundary" is defined in s. 1 of the Land Act to mean:

the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself.

[113] It is not in dispute that these provisions include the Foreshore along English Bay, the area at issue in this case: Lawrence v. British Columbia, 2010 BCSC 309 at paras. 48-52.

[114] The Land Act sets up an exclusive legislative regime for transferring interests in the Crown foreshore. Section 8 of the Land Act outlines the process for granting Crown land to applicants:

If no disposition

8 (1) A person may not acquire by prescription, occupation not lawfully authorized or a colour of right, an interest in Crown land, or in any land as against the government's interest in it.

(3) A disposition of Crown land is not binding on the government until the certificate of purchase, grant, lease, licence of occupation, right of way or easement is executed by the government under this Act.

[115] Section 1 of the Land Act broadly defines "interest" in Crown land. It includes a right or estate in that land.

[116] Section 10 deals with applications for Crown land, and s. 11 sets out how the responsible Minister may dispose of Crown Land.

[117] Most importantly, s. 18 of the Land Act prohibits the disposal of Crown foreshore. It assigns the power to dispose of unfilled foreshore to the Lieutenant Governor in Council and the power to dispose of filled foreshore land to the Minister.

[118] Under s. 55 of the Land Act, no one can gain title to the Crown foreshore outside the Land Act process:

Bodies of water

55 (1) If Crown land is or has, before March 27, 1961, been disposed of by the government by Crown grant, and the map or plan attached to the grant shows a lake, river, stream or other body of water coloured, outlined or designated in a colour other than red, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the grant unless

(a) there is express provision in the grant to the contrary, or

(b) the minister endorses a declaration on the plan under section 58.

(2) Nothing in any Act or rule of law to the contrary is to be construed to vest or to have vested in any person the land that comprises the bed or shore of the body of water below the natural boundary, and despite an indefeasible or absolute title to land, the title must be construed accordingly.

(3) When land, the title to which has been forfeited, reverted or otherwise returned to the government, is or has been granted by the government and the grant does not have a map or plan attached but describes the land granted by reference to its official plan, the description used is deemed not to include or to have included any land below the natural boundary of the body of water coloured, outlined or designated in a colour other than red on the map or plan attached to the last preceding Crown grant of that land, and the grant must be construed accordingly.

(4) Despite a rule of law to the contrary, if Crown land bordering on a lake, river, stream or a body of water is or has been granted by the government, in the absence of an express provision in the Crown grant to the contrary, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the land, and the Crown grant must be construed accordingly.

[119] On a plain reading, s. 55 extends to Ms. Wan's application for a vesting of title or an easement over the Foreshore. In this case, the terms of the Land Act exempt the Foreshore from the provisions of the PLA.

[120] There is a clear legislative intent not to permit the PLA's vesting and entry orders to provide applicants a back door to circumvent the formal Crown grant process. The Land Act:

1. prohibits the acquisition of Crown land through unauthorized occupation, or colour of right, both of which are at the foundation of PLA vesting orders; and

2. sets up an exclusive statutory regime governing how individuals can gain an interest in the foreshore, to the exclusion of the PLA.

[121] Although Ms. Wan relies on Justice Fitzpatrick's discussion of proprietary estoppel in Reum Holdings Ltd. v. 0893178 B.C. Ltd., 2015 BCSC 2022 [Reum], I do not agree that it stands for the broad principle proposed by Ms. Wan.

[122] In Reum, the plaintiff's claim was based on equitable proprietary estoppel based on representations made by government officials that Reum Holdings Ltd. ("Reum") was entitled to continue to use an access road it had constructed on the Crown foreshore, with government approval. Without the access road, property owned by Reum was otherwise inaccessible. Reum sought an easement and/or right-of-way capable of being registered against a lot owned by the Province and registered under the Land Title Act, R.S.B.C. 1996, c. 250 [LTA]. It was not a claim to an interest in the foreshore.

[123] Further, Justice Fitzpatrick's decision dealt with the Province's preliminary application to discharge a certificate of pending litigation ("CPL") registered against the Province's lot. The Province argued that Reum did not claim an interest in land, a precondition to registering a CPL.

[124] Justice Fitzpatrick determined that Reum was not seeking a permanent interest in the access road. Rather, Reum sought an easement over the lot registered in the Province's name. Reum's claim to an easement or right-of-way was for the purposes of obtaining rights to the Province's lot, as part of the access road, and amounted to a claim for an interest in land within the meaning of s. 215 of the LTA.

[125] The Province argued, in the alternative, that Reum's claim was without merit, a nuisance or frivolous action, or an abuse of process. Justice Fitzpatrick considered the merits of Reum's claim only to the extent necessary to determine whether it was frivolous, a nuisance, an abuse of process, or had no chance of success. The evidence supported that the Province made representations to Reum, on which it relied, and, as a result, Reum was entitled to argue that it would be unconscionable for the Province to now act in a way that would deny it access to the road. Justice Fitzpatrick determined that it was not "plain and obvious" that Reum's action would fail. Its claim for an easement or right-of-way over the lands held by the Province, on the basis of equitable proprietary estoppel, raised a triable issue and was not bound to fail.

[126] In the final alternative, the Province argued that Reum's CPL should be cancelled because it was experiencing hardship and inconvenience as a result of the registration. Justice Fitzpatrick determined that the Province had not met its burden of proving hardship to the standard required.

[127] The decision did not deal with whether Reum was entitled to an easement or right-of-way over the foreshore in question.

[128] Even if the Land Act is not a complete bar to Ms. Wan's claim under s. 36 of the PLA, the statutory contexts demonstrate a high legislative priority on the Foreshore remaining with the Crown. In particular, the following provisions support this priority:

1. Section 55 of the Land Act bars foreshore transfers outside the Land Act and retroactively reclaims foreshore lands;

2. Section 18 applies to any transfer of foreshore lands and requires the approval of the Lieutenant Governor in Council; and

3. Section 23(a) and (e) of the LTA provides that the Crown foreshore is one of the few exceptions to indefeasible title.

[129] There are also good policy reasons for the legislative priority given to the foreshore.

[130] First, in the Lower Mainland, where land has not been ceded by treaty, the Crown has broad obligations to consult with Indigenous peoples who may have title, or rights claims, to the foreshore or its resources. Those consultations require a political process that the PLA is not designed to address.

[131] Second, the Province maintains the foreshore to the benefit of the public, under the British Columbia, Ministry of Forests, Lands and Natural Resource Operations, Permission Land Use Policy, effective May 16, 2014. On June 18, 2019, the Crown had provided the public with a bare licence to use Crown land, including the foreshore. Unless the Crown exercises its power to exclude the public under the Land Act, the public may freely use that permission for transitory uses. In this case, Ms. Wan's pool, as described in the Russell affidavit, obstructs the Foreshore, cutting off public access. Given that the pool impedes a public right, and that the Legislature has confirmed the importance of foreshore land remaining public, this is another factor weighing in favour of the Province on the balance of convenience.

[132] Finally, there are important environmental concerns affecting the use and preservation of the foreshore.

[133] For all these reasons, Ms. Wan cannot succeed on her application for a vesting order or an easement.

Estoppel

[134] Since the District rescinded its termination of the Licence and revoked its order requiring Ms. Wan to remove the Encroachments, a current declaration that the District is estopped from terminating the Licence Agreement is moot, and I need not deal with it. After considering Ms. Wan's submissions, the District will issue a new decision.

[135] I am also not persuaded that it is appropriate to estop the District from issuing a future order that Ms. Wan demolish the Encroachments. The terms of her current Licence do not entitle her to such an order.

[136] As Mr. Nelson deposes in his affidavit, filed on February 26, 2021, the October 4, 2018 notice of termination has been rescinded, and he will consider Ms. Wan's submissions in making a future decision regarding the Foreshore Licence.

[137] The District is entitled to consider all appropriate factors, and Ms. Wan's submissions, in coming to its decision, which should not be restricted by a court order.

[138] If the decision confirms that the Licence is revoked and the Encroachments are to be removed, Ms. Wan will then be able to decide whether and how to challenge that decision.

Costs

[139] Both the District and the Province seek their costs of this petition. In light of the outcome, they are entitled to their costs at scale B. As this decision brings these petition proceedings to an end, costs should be paid forthwith.

"MacNaughton J."

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