

CANADA / JUDGMENT

Webber v. Worthington

2023 BCSC 223

COURT

Supreme Court of British Columbia

DECIDED

15 February 2023

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2023 BCSC 223 Webber v. Worthington

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Webber v. Worthington,

2023 BCSC 223

Date: 20230215

Docket: S46945

Registry: Penticton

Between:

Robert Bruce Webber and Sandra Jean Webber

Petitioners

And

Dallas John Worthington

Respondent

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Petitioners:

J. Kitsul

Counsel for the Respondent:

K. Hamilton

Place and Date of Trial/Hearing:

Kelowna, B.C.

February 2, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 15, 2023

Introduction

- [1] On October 6, 2021, the petitioners filed a petition with regard to the construction of a coach house on the respondent's property.
- [2] The petition was heard on June 27-30, 2022, in the City of Kelowna, BC.
- [3] In the Judgment issued on August 31, 2022, indexed at 2022 BCSC 1526, the court granted the petition of Robert and Sandra Webber against Dallas Worthington; ordered the continuation of an interim injunction; and directed that if the respondent wished to pursue the matter further, he would be at liberty to file a petition under s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377, with notice to the affected parties.
- [4] If the parties were unable to agree on costs, they were at liberty to apply to have that matter determined. They have been unable to do so. The petitioners now apply for costs, in particular special costs in this matter.
- [5] The parties also seek to settle the terms of the order. The petitioners maintain the order is final with specific terms, including the direction that should the respondent wished to pursue the matter further, the respondent should do so by petition under s. 35 of the Property Law Act with notice to the affected parties. In contrast, the respondent maintains the order is an interim order continuing the interim injunction granted by Justice Brown.
- [6] The petitioners also seek a term imposing a time limit upon the respondent to file the application under s. 35 of the Property Law Act as directed in para. 34 of the reasons for judgment. As part of that term, the petitioners seek the direction that if the respondent does not file a petition within the specified time limit, the respondent be required to demolish what is built of the coach house such that it conforms with the petitioners' interpretation of the alleged restrictive covenant.

Issues

- [7] The issues are:
 - 1. What are the terms of the order?
 - 2. Should special costs be awarded in this case?

Background and Overview

- [8] My reasons will be brief.
- [9] The background of this matter has largely been set out in my reasons for judgement indexed at 2022 BCSC 1526.
- [10] The dispute between the parties arose around May 6, 2021, when the petitioners became aware that the respondent had obtained a permit from the City of Penticton to construct a coach house on Lot 36. The petitioners retained counsel to write a letter to the respondent bringing the alleged restrictive covenant on title to Lot 36 to his attention, and warning that construction of the coach house violated the conditions of the restrictive covenant. A similar letter was also sent to Jenish Home Design Ltd., who was listed on the respondent's development application as the "Coordinating Professional".
- [11] The respondent declined to halt construction on Lot 36. The respondent maintained that there were no charges, liens, or interests registered against title to Lot 36, other than a water agreement and a number of mortgages.
- [12] The respondent maintained the restrictive covenant is noted under title to Lot 36 as an "appurtenant" under the heading "Legal Notations". The respondent submits this notation only states the restrictive covenant is registered against two other nearby lots--Lots 5 and 6 and is for the benefit of the respondent.
- [13] The petitioners asserted however that there was a restrictive covenant registered against title to the respondent's property in favour of the petitioners' property. They maintained the respondent has constructed additional structures on the respondent's property in contravention of the alleged restrictive covenant.
- [14] The petitioners sought a declaration that the respondent was in breach of the restrictive covenant; an interim injunction restraining the respondent from further construction until the conclusion of the hearing of the petition; a permanent injunction restraining the respondent from further construction; and a mandatory injunction that the respondent demolish the construction undertaken to date.
- [15] On December 9, 2021, Justice Brown granted an interim injunction restraining the respondent from further construction until the conclusion of the hearing of the petition.
- [16] The petition hearing for the remainder of the relief was heard in Kelowna from June 27 to June 30, 2022.
- [17] At para. 34 of the reasons for judgment, the court granted the petition and further indicated that if the respondent wished to pursue the matter of the restrictive covenant further, he was at liberty to file a petition under s. 35 of the Property Law Act, with notice to the affected parties.

- [18] The court further ordered the continuation of the injunction granted in favour of the petitioners by Justice Brown on December 9, 2021.
- [19] This injunction remains in full force and effect, until such time as the respondent is successful in having another Justice of this Court order that the injunction be vacated as part of a s. 35 action or as a result of the respondent successfully obtaining a similar order of the BC Court of Appeal if the respondent chooses to litigate this matter at that level.
1. What are the terms of the order?
- [20] The petitioners say para. 37 of the reasons for judgment provide that this Court is not seized of this matter. Accordingly, based on the court having granted the petition, and the fact that it is not seized in this matter, the case has been fully decided by the court, and the petitioners are in a position to make an application for the costs of the petition.
- [21] The respondent, however, points out that none of the relief sought by the petitioners was granted with the exception of the interim injunction. The respondent maintains that the court specifically granted the continuation of the December 9, 2021 interim injunction, the language of which reads that the respondent be restrained from continuing construction until the trial or other disposition of this proceeding or until further order of this Court. The court specifically noted it was not making a decision with regards to the interpretation of the restrictive covenant.
- [22] The respondent says the court essentially granted the interim injunction and adjourned the remainder of the relief sought in the petition. If that is not the case, and the court intended to grant final order, the respondent submits the court dismissed the remainder of the relief sought in the petition.
- [23] In settling the terms of the order, I note first, the court at para. 34 of the Reasons for judgment granted a final order that the injunction should continue, and indicated that if the respondent wished to pursue the matter of the restrictive covenant further, it was at liberty to file a petition under s. 35 of the Property Law Act, with notice to the affected parties. As the court specifically declined to make a decision on the interpretation of the restrictive covenant, the requirement to demolish or modify the improvement was not granted.
- [24] With respect to the proposed deadline for a s. 35 application, as the respondent maintains, s. 35 grants an owner the right to modify or cancel a charge at any time. The court has specifically stated it is not making a decision on the interpretation of the restrictive covenant. There is, therefore, no basis for an automatic default provision requiring the respondent to demolish or, otherwise, modify the improvement.

- [25] While the respondent is at liberty to file a petition under s. 35 of the Property Law Act with notice to the affected parties, the court cannot impose a time limit because, as the respondent has pointed out, that is not expressed in the statute. One would, however, assume there is incentive for the respondent to pursue a s. 35 application, in order to complete the structure on the property. The court is however not in a position to impose a time limit to this effect.
2. Should special costs be awarded in this matter?
- [26] As the petitioners have maintained, and I have concluded, this is a final order, costs are accordingly awarded to the successful party.
- [27] The petitioners' position however is that the respondent's conduct was reprehensible, and therefore an order of special costs is appropriate. The petitioners say the respondent engaged in misconduct by constructing a coach house, despite being on notice by the City of Penticton and others concerning the restrictive covenant applicable to their property.
- [28] The petitioners say the respondent was required under British Columbia law to strictly follow the codified procedure on legal requirements of s. 35 of the Property Law Act to modify or cancel the restrictive covenant. Section 35 is a complete codification of the law with respect to a litigant's ability to obtain a court order to cancel or modify a restrictive covenant and the procedure to be followed to obtain an order.
- [29] The petitioners maintain that the respondent did not comply with the codified procedural requirements of s. 35. This resulted in the petitioners being forced to file their own petition seeking interlocutory injunctive relief as well as declaratory order upholding the validity of the restrictive covenant, when the law clearly required the respondent to file a petition under s. 35 and serve it on the petitioners and other affected parties to cancel or modify the restrictive covenant.
- [30] The petitioners provided a detailed argument, which referenced documents from the City of Penticton, to point out that the respondent had notice of the restrictive covenant on title to their property and chose to ignore it at his risk.
- [31] Essentially, the petitioners maintain the respondent's conduct forced the petitioners to commence an action when, in fact and law, they never should have had to do so.
- [32] The respondent denies his conduct during the litigation was reprehensible and opposes the order sought. He says, among other things, that he should not be faulted for having concluded the restrictive covenant did not apply. He simply replied to and contested the claims in the petition. More importantly, the respondent points out that these actions are allegations of pre-litigation misconduct which cannot be considered in assessing special costs as per the jurisprudence.
- [33] I agree with this latter point.

- [34] The Court of Appeal reaffirmed in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 [Smithies], that an order for special costs requires some form of "reprehensible conduct", which can include "scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke": at paras. 57, 132. It said:
- [132] Special costs are intended to punish reprehensible conduct which as per *Garcia* includes scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke.
- [35] Most importantly, the Court of Appeal definitively concluded that pre-litigation conduct should not be considered in awarding special costs: *Smithies* at para. 133. The Court of Appeal said at para. 134, "Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation" (emphasis added).
- [36] That is the focus of the inquiry that must be undertaken.
- [37] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Gropper J. summarized the principles for awarding special costs at para. 73:
- a) the court must exercise restraint in awarding special costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
 - d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
 - e) special costs can be ordered against parties and non-parties alike; and
 - f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.
- [38] I conclude special costs should not be awarded against the respondent in this matter. It is apparent that much of the conduct complained of is pre-litigation conduct. Such conduct, as the respondent noted, may be considered if a request for punitive damages is to be considered, but not with respect to special costs.
- [39] Cases in which special costs are awarded involve reprehensible conduct which may occur during the course of this litigation. They may include actions such as a respondent misleading the court and/or abusing the court processes, including by persistently breaching the Rules of Court.

- [40] None of such conduct is alleged or noted in this case. As per the jurisprudence articulated by the Court of Appeal in *Smithies*, I am therefore unable to award special costs in this matter.
- [41] While the respondent argues that any costs order is premature as the results of any s. 35 application will be determinative of the relative success of the petition, I disagree. Even if an application under s. 35 results in the court determining that there is no charge on the respondent's property, the petitioners were put in the position of having to bring this application by the respondent's actions, rather than the respondent bringing a s. 35 application, with its concomitant onus and process.
- [42] Accordingly, I award costs to the petitioners in this matter. I conclude this was a matter that was more than ordinarily difficult and which may be significance beyond the interests of the parties. That was certainly evident in the detailed arguments made by each of the parties. I therefore award costs at Scale C for the petition proceedings and this application.

"Burke J."

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