Citation: Miquelon Properties Ltd. v. District of Squamish. 2001 BCSC 598

Date: 20010420
Docket: C985634
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MIQUELON PROPERTIES LTD.

PLAINTIFF

AND:

DISTRICT OF SQUAMISH

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LOO

Counsel for the Plaintiff J.A. Adelaar

Counsel for Defendant J.M. Poole

Date and Place of Hearing/Trial: 28 August to 1 September 2000
Vancouver, B.C.

Introduction

[1] The issue in this case is whether a municipality is under a duty to ensure that a by-law is passed within a reasonable period of time. The plaintiff wanted to buy land and construct a building which required both relaxing and amending certain by-laws. The plaintiff alleges that the municipality was negligent in failing to pass the requisite by-law within a reasonable period of time, and as a result, the plaintiff could not complete the land purchase and suffered damages. For reasons which follow, I find that the action must fail.

Background

[2] Tom Jarvis is the president and director of Miquelon Properties Ltd. ("Miquelon"), and his wife Betty Jarvis is the secretary and treasurer. Mrs. Jarvis is also a realtor. Mr. Jarvis was interested in developing a mixed commercial and residential building on two and a half lots on Cleveland Avenue in downtown Squamish ("the District"). Mr. Jarvis had experience building residential homes and single family dwellings, but had no experience in developing commercial properties. With Mrs. Jarvis acting as the realtor, on July 10, 1997, Miquelon entered into a contract of purchase and sale to purchase the lands for $190,000, subject to the following conditions for its benefit:

* Completing a feasibility study by July 25, 1997.
* Receiving an acceptable parking by-law amendment and/or variance by September 15, 1997.
* Receiving a development permit by December 15, 1997.
* Receiving satisfactory construction financing by January 15, 1998.

[3] The completion date was February 6, 1998.

[4] Mr. Jarvis retained Alpine Architecture & Planning Inc. to prepare a feasibility study. The architect from that firm, Brigitte Loranger, determined that the District's existing zoning by-law required 45 parking stalls for the development but there was only enough space for 19 stalls. On August 7, 1997 Ms. Loranger met with Frank Limshue, the District's Deputy Community Planner. She followed up with a letter to him seeking a relaxation of the parking requirements:

> ...in order that this type of density and mix of use be accommodated on site, the parking requirements as per the bylaw cannot be met. Our preliminary analysis indicates that for the proposed development, the current parking Bylaw would require 45 stalls. We can only fit 19 stalls in the current scheme. Our purpose in presenting this scheme to the Committee of the Whole is to determine whether the Committee would support a relaxation of the parking requirements. We need to resolve the parking requirements before we can proceed any further with the Development Permit process. Our client will not pursue the option to buy and develop this piece of property if the parking requirements cannot be relaxed.

[5] On August 10, 1997 Miquelon removed the feasibility "subject to" clause.

[6] On August 12, 1997 the District's Committee of the Whole passed a motion recommending that Council consider a partial relaxation of the parking requirements and that the entire issue of downtown parking requirements be re-examined. The minutes read:

> 4. PLANNING DEPARTMENT
>
> a) Mixed Use Development on 38148 Cleveland Ave. (Wigan Pier Site)
>
> The Committee of the Whole considered the Deputy Community Planner's August 7, 1997 report regarding the proposed commercial/residential development along Cleveland Avenue. Tom Jarvis, proponent and Brigitte Loranger, architect were in attendance to answer the Committee's questions. The Committee discussed the following:
>
> - proposed development of ground oriented commercial with fourteen residential units;
> - parking required for the development proposed is 45 parking stalls, 24.5 commercial, 17 residential, 3.5 visitors, the proponent is requesting a relaxation to 19 stalls total;
> - underground parking and related drainage issues for the area;
> - current parking locations and the purchase of four additional parking spaces in municipal parking lots;
>
> …

> - the proponent to have a Geotechincal [*sic*] Engineer complete a study into the feasibility of the underground parking. The proponent is to notify the Planning Department if it is feasible for them to proceed with the development by way of putting in underground parking; and
> - staff were requested to do a parking study for the downtown corridor.
>
> It was moved by Mayor Lonsdale, seconded by Councillor Young, that the Committee of the Whole recommends to Council **that Council consider a partial relaxation of parking requirements through the development process under Section 920 of the Municipal Act; AND FURTHER THAT Council provide direction to District Staff to re-examine the parking requirements for the Downtown area.**
>
> CARRIED
>
> …
>
> [bolding and underlining in original]

[7] Miquelon retained consulting geotechnical engineers who found that underground parking was not feasible.

[8] On October 7, 1997 the Committee of the Whole passed a motion directing that the Planning Department report on the downtown parking requirements, and that the Department of Public Works report on the cost of off-site parking stalls which was covered by Off-Street Parking Facility By-Law No. 1103. That by-law provided that any building downtown:

> … may supplement their offstreet parking requirements by the acquisition of a maximum of

> four (4) parking spaces of the required parking spaces in undesignated spaces in a municipal offstreet parking facility for a non-refundable fee of six thousand dollars ($6,000.00) per space.

[9] The District was trying to attract development downtown, but recognized that By-Law No. 1103 could be an impediment.

[10] On December 2, 1997 Council passed a motion relaxing the parking requirements for Miquelon's development to 20 parking stalls; there had to be a minimum of 10 on-site stalls and the remaining stalls could be off-site. The motion reads:

> THAT the District of Squamish relax the parking requirement for the property located at 38148 Cleveland Ave. having fourteen residential units and 3000 square feet of office floor area to a total of twenty parking stalls including a minimum ten residential stalls provided on site and all other parking stalls offsite with four dedicated for residential use; AND THAT this relaxation be dealt with through a Development Permit application.

[11] Mr. Jarvis thought the parking problem had been resolved, and removed the "subject to" clause relating to the parking by-law, extended the completion date to May 16, 1998, and arranged to pay a $5,000 non-refundable deposit to the vendors. What Mr. Jarvis failed to appreciate was that an amendment to By-Law No. 1103 was still required. While the zoning by-law had been relaxed from 45 parking stalls to 20,

including ten off-site stalls, the maximum number of off-site stalls that could be purchased from the District under By-Law No. 1103 was limited to four.

[12] On February 3, 1998, Council passed a motion directing staff to bring forward for its consideration, an amendment to By-Law No. 1103 increasing the maximum number of off-site stalls that could be purchased from the District from four to ten.

[13] On February 12, 1998 Miquelon submitted its Development Permit Application and amended the “subject to” clause with the vendors so that the development permit had to be received by March 31, 1998.

[14] On March 19, 1998, Mr. Jarvis and Ms. Loranger reviewed the project drawings with the District’s Technical Planning Committee Meeting. A number of the technical aspects of the development were also discussed, including the material and appearance of the front facade, landscaping, signs, fire alarm and sprinkler requirements. In addition, Mr. Jarvis was told at the meeting that on April 14, 1998 the Clerk’s Department was presenting to the Committee of the Whole an amendment to By-Law No. 1103.

[15] On March 31, 1998, feeling confident that the District was on side with the project, Mr. Jarvis removed the “subject to” clause relating to the development permit.

[16] On April 8, 1998, the District wrote to Mr. Jarvis informing him that there had been an error in the February 3, 1998 Council minutes. Instead of passing a motion directing staff to bring forward an amendment to By-Law No. 1103 for Council’s consideration, the motion had been deferred. The letter of April 8, 1998 reads:

> Further to a review of the Deputy Community Planner's Memorandum of March 13, 1998 by Joe Barry, Clerk of the District of Squamish, it has been confirmed that the Council motion pertaining to Municipal Off-Street Parking Facility Bylaw No. 1103, as noted at the end of Section 8 - "Parking", was not passed by Council at its regular meeting on February 3, 1998 as indicated. In fact, on this date, Council decided to refer this motion and the Minutes of the Technical Planning Committee ("TPC) meeting held January 15, 1998 to a future Committee of the Whole meeting. A copy of the relevant TPC minutes and February 3, 1998 Council Minutes have been attached for your information.
>
> Please be advised that it is Mr. Barry's intention to bring the issue of Downtown Parking back to the Committee of the Whole on April 14, 1998 for further discussion. You may wish to contact Mr. Barry directly at (604) 815-5003 concerning this presentation.

[17] When Mr. Jarvis read the letter, he thought that the District had “reversed” itself. However, from discussions with the Municipal Clerk, and various documents that the District had sent him, he was aware that the District was still reviewing the downtown parking issues. On April 30, 1998 Mr. Jarvis extended the parking “subject to” clause to June 15, and the completion date to June 30.

[18] Mr. Jarvis complains that in June, he heard nothing from the District about any progress towards amending By-Law No. 1103. He also says that by then the vendors were getting "fed-up" with all of the extensions for time. On July 15, Mr. Jarvis collapsed the sale. The reason given on the Collapsed Sale Report is “subjects not removed”. This action was commenced on November 23, 1998.

[19] The District led much evidence, including the evidence of five employees or former employees who testified about the reasons for the delay in amending By-Law No. 1103. The reasons included an upcoming election, the municipal budget, a shortage of staff, a turnover of staff, and a new District Administrator who wanted a more in-depth review of the issues, including the financial implications of off-site parking fees and their impact on municipal revenue. As of the date of trial, more than two years after the collapsed sale, By-Law

No. 1103 had still not been amended. The reason now given for the delay is that Miquelon's development was the only development affected by the by-law and no other development has been proposed that would be affected by the by-law.

[20] I was left with the impression that, at times, the District’s left hand did not know what its right hand was doing. For example, the person responsible for dealing with the development permit said that the “intent was for the development permit application to proceed to Council" at the same time as the amendment to By-Law No. 1103, in order to streamline the process for Miquelon. Yet she did not know the status of the amendment, even though the person responsible for amending the by-law sat in the next office. All she could say was that she asked him if he was handling it, and he said yes. The same could be said of him. He has no recollection if he ever asked her about the status of the development permit application and I doubt that he did. It was apparent to me that dealing with the District must have been extremely frustrating for Mr. Jarvis, but that does not give rise to a cause of action.

The Issue: Is a municipality under a duty to ensure that a by-law is passed within a reasonable period of time?

[21] Mr. Jarvis says that in August 1997, he was told by the District's Deputy Community Planner that the development permit application would take six to nine months. However, that discussion would have occurred after Miquelon had offered to purchase the lands. No application was made until February 11, 1998, and five months later, Mr. Jarvis collapsed the sale. It is unreasonable to maintain that the Municipality's duty, if any, started to run from the time he started talking to the District in August 1997. In any event, it does not answer what counsel for the Miquelon says is the issue that I must decide: whether a municipality is under a duty to pass a by-law within a reasonable period of time.

[22] Miquelon relies on ***Cook v. Bowen Island Realty Limited et al.*** (22 October 1997) Vancouver Registry, C933096 (B.C.S.C.), and the cases referred to in that decision: ***Kamloops v. Nielsen,*** [1984] 2 S.C.R. 2 (S.C.C.); ***Rothfield v. Manolakos***, [1989] 2 S.C.R. 1259 (S.C.C.); and ***Just v. British Columbia,*** [1989] 2 S.C.R. 1228 (S.C.C.). Miquelon argues that the December 2, 1997 motion relaxing the parking requirements from 45 stalls to 20 stalls was a policy decision that gave rise to a duty of care to pass a by-law within a reasonable period of time. However, in my view, ***Kamloops v. Nielsen***, ***Rothfield v. Manolakos***, and ***Just v. British Columbia*** all deal with

negligent inspection by a municipality, and that largely involves the operational area of decision making. If, as Miquelon argues, the relaxation of the parking requirements and the amendment of By-Law No. 1103 falls within the area of policy, then an element of discretion is involved and a municipality cannot be held liable. A municipality for any number of reasons may exercise its discretion not to pass a by-law, including reasons relating to budgetary constraints. Indeed, one of the reasons given for the delay in amending By-Law No. 1103 was the financial implications for the District in deciding whether to lease or to sell parking stalls.

[23] What is not disputed is that at no time did Mr. Jarvis inform the District of any particulars of Miquelon's offer to purchase the lands on Cleveland Avenue. However, I am in no way suggesting that had he done so, it would have imposed a duty on the District to pass any by-law within a reasonable period of time.

[24] Counsel for Miquelon was quite frank when he said that he could find no case dealing with any duty on a municipality to pass a bylaw within a reasonable period of time, and that he had no "clue" where to look. In my view, that is likely because the law has not extended the duties of municipal authorities that far. I conclude that Miquelon has not

established that the District has breached any duty of care owed to it.

Damages

[25] Miquelon claims damages of $30,909.55 in pursuing the development, including the $5,000 non-refundable deposit. In addition, Miquelon claims $285,000 in loss profit it contends it would have made had the development proceeded and the units sold. Alternatively, Miquelon claims a gross profit of $158,000 a year, had the development proceeded and the units rented out. After taking into account financing charges of $120,000, it is claimed that the development would have netted rental income of $38,000 annually.

[26] Had Miquelon convinced me that the District was liable, I would have awarded damages of $30,909.55, but its claim for lost profit and lost revenue is woefully inadequate. The claim is based on Mr. Jarvis' rough hand scratched calculations with bare bone figures; one of the sources for the calculations is an incomplete copy of a March 31, 1998 appraisal by Free Lee & Associates Limited which was prepared in order to obtain financing for the land purchase. The size of the units used in the appraisal are not the same as the size of the units in the development permit plans and the difference impacts on the construction costs. No notice was

given that Miquelon intended to rely on the appraisal and the appraisal meets none of the requirements of a Rule 40A expert report: there are no qualifications of the expert, and no facts or assumptions on which the opinion is based.

[27] The other source of the calculations which consist of just seven lines including $85.00 a square foot for the residential suites, and $65.00 a square foot for the commercial suites were "confirmed" by Mr. Jarvis consulting others, but who they were and what their experience was, I do not know.

[28] Miquelon has not satisfied me on a balance of probabilities of any damages it has suffered but for the $30,909.55. However in view of my other finding on liability, I make no award for damages.

[29] The plaintiff’s claim is dismissed with costs.

"L.A. Loo, J."
The Honourable Madam Justice L.A. Loo

20 April 2001
Vancouver, B.C.