Citation: Lost Lake Properties Ltd. v City of Parksville 2000 BCSC 475

Date:20000317

Docket: S22167
Registry: Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LOST LAKE PROPERTIES LTD.

PLAINTIFF

AND:

CITY OF PARKSVILLE

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR JUSTICE HUTCHINSON

Counsel for the plaintiff	B.K. Soloway
Counsel for the defendant	R.S. Brown
Date and Place of Hearing:	14 March 2000
	Nanaimo, BC

[1] The defendant applies to dismiss the plaintiff's claims pursuant to Rule 18A. The plaintiff commenced this action on 22 December 1998. The statement of claim alleges that the defendant placed unlawful restrictions or conditions on the plaintiff's application for approval of the subdivision of property owned by the plaintiff and within the defendant's jurisdiction. The plaintiff alleges that it incurred unnecessary costs in trying to obtain the defendant's approval of the subdivision.

[2] In this application the defendant submits that the plaintiff failed to comply with s. 286 of The Municipal Act, R.S. c. 323 which provides as follows:

> **286**(1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.
>
> (2) In case of the death of a person injured, the failure to give notice required by this section is not a bar to the maintenance of the action.
>
> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes
>
> (a) there was reasonable excuse, and
> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

[3] In 1994 and 1995 representatives of the plaintiff and defendant corresponded and met to settle the issues of off-site services and road access to adjacent properties that could be affected by the proposed subdivision that could be affected. On 11 December 1995 the defendant's approving officer wrote to the plaintiff to say:

> Further to our meeting of December 15, 1995 and your decision not to proceed with this application, this file is now closed.

[4] The plaintiff has not provided any evidence to establish the fact that the notice required by s.286 was given. The Clerk of the defendant said in her affidavit that the defendant received no communication from the plaintiff from 11 December 1995 until 6 November 1998 when it wrote to the defendant purporting to give notice under s.286. From the material filed and the way the statement of claim is drawn, the damage alleged was sustained in 1994 and 1995, so the plaintiff is outside the time period prescribed by the s.286.

[5] Plaintiff's counsel argued that the defendant has not been prejudiced in its defence by the failure to give timely notice, and there was reasonable excuse for its failure, he invokes s.286(3).

[6] The plaintiff's president, Hans Heringa, in an affidavit sworn on 24 February 2000, said:

> 6. In December 1995, the Defendant herein was made aware that the Plaintiff would not be proceeding with the subdivision application on the terms demanded by the Defendant.
>
> 7. During 1994 to 1996 Hans and Alfred Heringa were also advancing claims against the Defendant herein, similar to the claim advanced by the Plaintiff herein, and eventually filed a Writ on September 24, 1996.
>
> 8. Between January 1996 and December 1998, Hans Heringa, the principal of Ballenas Engineering Ltd., Sound Contracting Ltd., H & F Ventures Ltd., and the Plaintiff herein, met on numerous occasions with agents acting on behalf of the Defendant herein. Numerous attempts were made to negotiate all of the outstanding claims of the various companies.
>
> 9. In or about December 14, 1998, certain claims were settled between the Defendant herein, and the Company Ballenas Engineering Ltd., and Hans & Alfred Heringa, and Hans Heringa. The principal of the Plaintiff and the Defendant herein were unable to negotiate a resolution to the Plaintiff's outstanding claims.

[7] Counsel for the defendant argued that since Mr. Heringa was personally negotiating with the defendant to resolve similar issues outstanding between him and other companies in which he had an interest he could not determine whether he would have to pursue this claim through the courts until all possibilities of settlement had been exhausted. This,

however, does not meet the test established in the past to interpret the meaning of reasonable excuse.

[8] In ***Bissel v Kochester*** (1930), 65 O.L.R. 310 the court said at page 15:

> It is exceedingly difficult to lay down any general rule, as the circumstances in each particular case must in the last analysis be the guide to the decision, but I venture to suggest that if there is any principle to be extracted from the decisions, it is that to constitute reasonable excuse there must be such incapacity, either mental or physical, on the part of the injured party, as to incapacity, either mental or physical, on the part of the injured party, as to incapacitate him from discussing business affairs or from being able to give instructions for the notice.

[9] This decision was followed by McDonald J.A. in ***Horie v. Nelson*** (1987), 20 B.C.C.R. (2d) 1 at p. 7. While this is not an exhaustive definition of the phrase in this statute, it indicates the nature of the onus on the plaintiff to establish reasonable excuse.

[10] In this case the evidence relied on by the plaintiff is inconclusive and unsatisfactory. Moreover, it has been countered by material filed by the defendant. In 1996 Mr. Heringa dealt with the defendant regarding land in the defendant's jurisdiction in which he had a personal interest. In a letter dated 18 June 1996 to the defendant he gave notice under s.755 of The Municipal Act of a claim he and his brother

had against the defendant. Section 755 was the section that became section 286 in the later revision of the statute. Mr. Heringa also enclosed a letter from his solicitor, Cox Taylor, in which he received legal advice on his position *vis a vis* the defendant. Mr. Heringa wrote a letter to the defendant on his personal letterhead on 21 December 1998 in which he stated:

> Lost Lake Properties Ltd. will now be proceeding to file a writ against the City of Parksville . . . We had hoped the matter could have been resolved by discussion and agreement, rather than litigation.

[11] The writ was filed the next day and the endorsement was signed “Hans Heringa, P. Eng. President, Lost Lake Properties Ltd.”

[12] In his affidavit filed 28 February 2000 filed in opposition to this motion, Mr. Heringa swore that he was the principal of the plaintiff, and he met often with the agents of the defendants to attempt to negotiate a settlement (paragraph 8 supra). From these facts I infer that Mr. Heringa knew of the novice requirements in The Municipal Act and his knowledge can be imputed to the plaintiff.

[13] Plaintiff’s counsel argued that the time period should not run while negotiations with the city were ongoing, and the

defendant was at all times from 1996 aware of this claim, hence the plaintiff had reasonable excuse for failing to comply with the section. I find no merit in that argument. The rationale for requiring notice was recently affirmed by Burnyeat J. in ***Mulholland v. Zwietering and Powell River*** (unreported), Powell River Registry No. S627, 26 October 1998. Furthermore, in ***Dorion Pizza v Matsqui (District)*** (1991), B.C.J. 3557 MacDonald J. of this court held as follows:

> While there was no prejudice to Matsqui in this case, in that it knew of the occurrence at once and investigated all aspects of it in developing its own claim which led to the $12,000.00 demand against the plaintiff for repair costs, I find that there was no reasonable excuse for the plaintiff's failure to give the required notice.

[14] I follow this reasoning and find in this case the plaintiff has not shown that it had reasonable excuse for failing to give the required notice. That is sufficient to allow the application.

[15] The defendant also argued that it had been prejudiced by the passage of time since the claim arose. In its material it disputes the allegation that there were ongoing negotiations with the plaintiff from 1996 to 1998. Two of the employees with the defendant who dealt with the plaintiff regarding the issues in contention have since left the City's employment,

and one swore he was unable to recall certain facts due to the passage of time. I accept there is prejudice to the defendant arising the failure to give notice, as had it been on notice it would likely have ensured the facts surrounding its dealings with the plaintiff were better preserved by contemporaneous memoranda or notes. I find the plaintiff has failed to discharge the onus on it to show that the defendant has not been prejudiced by the failure to give notice. I allow the application and dismiss the plaintiff's claims with costs against the plaintiff.

[16] The defendant asked for special costs. I do not find the circumstances warrant such an order and order that costs be paid on Scale III. The defendant will recover costs for preparation and the appearance on 28 February 2000 at which time there was insufficient time for the application to be heard as well as the other costs that flow from this order.

"R.M.J. Hutchinson, J."
The Honourable Mr. Justice R.M.J. Hutchinson