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CITY OF PORT MOODY

v.

PARK LANE HOMES LTD.

v.

ASSESSOR OF AREA 12 - COQUITLAM

British Columbia Court of Appeal (CA014404) Vancouver Registry

Before the HONOURABLE MR. JUSTICE HINKSON,
the HONOURABLE MADAM JUSTICE PROUDFOOT and
the HONOURABLE MADAM JUSTICE PROWSE

Vancouver, October 7, 1992

G. Anderson for the Appellant, City of Port Moody
P. Grahame for the Respondent, Park Lane Homes Ltd.
J. Savage for the Respondent, Assessor of Area 12

Reasons for judgment

November 6, 1992

NATURE OF APPEAL

This is an appeal from the decision of a Chambers judge made pursuant to a case stated by the Assessment Appeal Board which resulted in the Respondent, Park Lane Homes Ltd. ("Park Lane"), being found non-assessable for taxes on a tract of land within the City of Port Moody (the "City"). Leave to appeal from the decision of the learned Chambers judge was granted with respect to only one of the questions raised in the Stated Case. That question is as follows:

2. Did the Board err in finding that Park Lane is not an "occupier" of the parent parcel within para. (a) of the definition of "occupier" in section 1 of the Assessment Act by virtue of a right to bring trespass proceedings pursuant to ...

(a) Park Lane's rights under the licence of occupation and section 60 of the Land Act;

THE FACTS

In order to analyze the result reached by the learned Chambers judge, it is useful to set out the portions of the Stated Case which are relevant to the issue before us:

STATED CASE

THIS CASE STATED by the Board, pursuant to Section 74(2) of the Assessment Act, at the requirement of the CITY OF PORT MOODY, seeks the opinion of the Supreme Court on the questions of law set out below in respect to which are the material facts:

FACTS

1. The respondent, PARK LANE HOMES LTD. (PARK LANE) is a company which is involved in land development.

2. In 1988 it entered into an agreement with the Province of British Columbia to purchase a large block of land in phases, by way of a comprehensive scheme, whereby Park Lane would progressively survey out of the parent parcel (the entire block - which consists of vacant land (other than phase 1)) eight smaller parcels, developing the first into residential lots, then surveying and developing the next, according to a schedule, until the entire parcel was developed.

The agreement requires Park Lane to purchase each of the eight smaller parcels on entering into each successive phase of the development at a price to be determined according to a formula

3. Provisions of the agreement (referred to in paragraph 2) include the following:

"4.01 The Province hereby agrees to sell and the Company agrees to purchase all the Province's right, title and interest in fee simple in and to the Parent Parcel, for the Purchase Price, on the terms and conditions herein set forth."

"19.04 This agreement creates contractual rights only between the parties, does not create any equitable or legal interest in the land and shall not be registered by the Company at any land title office at any time."

4. Ancillary to the agreement is a licence of occupation empowering PARK LANE to enter onto the portions of the parent parcel still owned by the Crown for the purpose of carrying out the required surveys and for the work necessary to bring services through the parent parcel to the lands under development and empowers Park Lane to service all the land within the parent parcel.

In the grant of licence was included the following provisions:

"1.01 The Owner, on the terms set forth herein, hereby grants to the Licensee a licence to enter on the Land for the purpose of surveying and servicing the Land for subdivision in accordance with an agreement between the parties dated the 8th day of December, 1988 (herein called the `Sale Agreement') and the plan attached as Appendix `ii' hereto."

5. The lands comprising the first phase of the development have been purchased by PARK LANE and are not in issue in this appeal.

6. Preliminary work has been commenced regarding the development of Phase 2. Employees of PARK LANE and surveyors and engineers engaged by it have gone onto Phase 2 lands to delineate the borderlines and take elevations. No structures have been erected.

7. Principals of PARK LANE have entered upon the parent parcel upon two occasions and there have been numerous entries by engineers, planners and tree consultants engaged by PARK LANE.

8. The folios under appeal consist of the following ... [folios listed]

9. The 1990 Court of Revision found that these folios were assessable for the 1990 Assessment Roll.

10. At the hearing before the Assessment Appeal Board both the Assessor of Area 12 - Coquitlam and PARK LANE took the view that these lands are not assessable.

11. Section 34 of the Assessment Act which provides for the assessment of land the fee of which is in the Crown states in part as follows:

"34. (1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of, the Crown is, with the improvements on it, liable to assessment in accordance with this section.

(2) The land referred to in subsection (1) with the improvements on it shall be entered in the assessment roll in the name of the holder or occupier, whose interest shall be valued at the actual value of the land and improvements determined under section 26"

12. Section 1 (the definition section) of the Assessment Act provides the following definition of an occupier:

"'occupier' means

(a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass ..."

13. Section 60 of the Land Act R.S.B.C. provides:

"60. Except as otherwise provided in this Act, a person lawfully entitled to occupy Crown land by virtue of a certificate of purchase, lease, right of way, easement or licence of occupation may for the land take proceedings against any person for recovery of possession of or for trespass to the interest in the land in the same manner and to the same extent as if he were the registered owner of the land."

14. The issue before the Board was whether the Lands are "held or occupied" by PARK LANE by reason of the agreement, the licence, entry onto the property or a combination of any or all of these factors.

15. The City of Port Moody conceded that the lands are vacant and have not been reduced to possession by PARK LANE but maintained that PARK LANE falls within the first part of the definition of "occupier" (Section 1, Assessment Act), being "a person who, if a trespass has occurred, is entitled to maintain an action for trespass".

DECISION AT TRIAL

The learned Chambers judge held that the Board did not err in concluding that Park Lane was not an "occupier" of the land within the meaning of s. 1 of the Assessment Act, R.S.B.C. 1979, Chap. 21, taken in the context of the licence of occupation and s. 60 of the Land Act, R.S.B.C. 1979, Chap. 214. His conclusions in that regard are contained in the following excerpt at page 8 of his reasons for judgment:

The rights conferred by the licence of occupation are a mere licence to enter for specified purposes. Park Lane cannot thereby, in the words of s. 60, become "lawfully entitled to occupy". It follows, in my view, that s. 60 confers no right upon Park Lane to sue for trespass.

The fact that the parties chose to entitle the document a "licence of occupation" does not make it in substance what it is not by its clear language.

GROUNDS OF APPEAL

The City alleges the following errors on the part of the learned Chambers judge:

- (1) The learned Chambers judge erred in holding that the Licence of Occupation is not a licence of occupation and that Park Lane is not "lawfully entitled to occupy" the Land.
- (2) The learned Chambers judge further erred in not holding that Park Lane is an "occupier" of the Land as a person "entitled to maintain an action for trespass" and is thus assessable in respect of the Land.

The essence of the City's position is captured in the following statements, paraphrased from its Factum:

- (1) Under s. 34 of the Assessment Act Crown land is liable to assessment if the land is "occupied otherwise than by, or on behalf of the Crown".
- (2) In s. 1 of the Assessment Act, an "occupier" is defined as including a person in actual occupation or possession of Crown land. However, occupier also means:
 - (a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass;
- (3) Park Lane's entitlement to maintain trespass proceedings arises from a combination of its licence of occupation and s. 60 of the Land Act.
- (4) Because Park Lane is entitled to bring an action for trespass by virtue of its licence of occupation, it follows that Park Lane is an occupier within the meaning of s. 34 of the Assessment Act and is, therefore, assessable.

ANALYSIS

The City's submission proceeds on the assumption that the licence of occupation in this case is a licence of occupation under s. 36 of the Land Act. The relationship between the licence of occupation and s. 36 of the Land Act is referred to at para. 28 of the City's Factum in the following statements:

28. A "licence of occupation" is a purely statutory creation under Section 36 of the Land Act ... Only a licence of occupation under Section 36 corresponds with the nature of the document issued to Park Lane.

Section 36 of the Land Act provides that:

36. (1) The minister may issue a licence to occupy and use Crown land, called a "licence of occupation", subject to the terms and reservations he considers advisable.

Section 36 is found in Part 3 of the Land Act which is headed "Disposition of Crown Land - Application Procedure". A licence of occupation under s. 36 of the Land Act falls within the definition of a disposition of Crown land under s. 1 of that Act.

The inherent weakness in the City's submission is that the licence of occupation in this case is expressly stated to be made pursuant to the Ministry of Lands, Parks and Housing Act, R.S.B.C. 1979, Chap. 277. This is clearly stated in capital letters at the top of page one of the licence. In other words, this is not a licence of occupation issued under s. 36 of the Land Act. That being so, it cannot be said to be a disposition of land under that Act. Following the City's submission at para. 28 of its Factum, it would follow that the appeal could be dismissed on this ground alone.

Apart from the fact that the licence here is not a disposition of land contemplated by s. 36 of the Land Act, however, I conclude that the question still remains as to whether the licence gives Park Lane an interest in land which could sustain an action in trespass so as to make Park Lane an occupier of the land.

In order to determine the nature and effect of the licence of occupation, it is important to review it in the context of the Agreement, to which it is ancillary. The licence was described as being ancillary to the Agreement in para. 4 of the Stated Case, *supra*, which I will quote again for convenience:

4. *Ancillary to the agreement* is a licence of occupation empowering PARK LANE to enter onto the portions of the parent parcel still owned by the Crown for the purpose of carrying out the required surveys and for the work necessary to bring services through the parent parcel to the lands under development and empowers Park Lane to service all the land within the parent parcel.

(emphasis added)

According to The Concise Oxford Dictionary, New Edition, (Oxford: Clarendon Press, 1991), "ancillary" means "subservient" or "subordinate to". Thus, the licence must be viewed as subordinate to the Agreement. This is important, because there are provisions in the licence which appear to be inconsistent with the language of the Agreement.

In reviewing both the Agreement and the licence of occupation, I conclude that the most significant provision of either document in relation to the issue before us is s. 19.04 of the Agreement, *supra*, which provides that:

This agreement creates contractual rights only between the parties, does not create any equitable or legal interest in the land and shall not be registered by the Company at any land title office at any time.

Thus, if one looks at the Agreement without regard to the licence, it is evident that Park Lane receives no interest in land under the Agreement, until such time as title to an individual parcel of land is transferred to Park Lane pursuant to the Agreement. It is common ground that Park Lane has no standing to commence an action in trespass in relation to the land unless it has an interest in the land.

The question then arises as to whether the licence of occupation purports to give Park Lane an interest in land that is specifically precluded under s. 19.04 of the Agreement. In analyzing this question, it is important to remember that the licence of occupation is a Schedule to the Agreement, and, as such forms part of the Agreement. In that regard, s. 20.06 of the Agreement is relevant. It provides that:

20.06 This agreement constitutes the entire agreement between the Province and the Company and may not be modified except as herein explicitly provided, or except by subsequent agreement in writing.

As a Schedule to the Agreement, which was executed the same day as the Agreement, the licence of occupation cannot be said to be a "subsequent agreement in writing" which modifies the Agreement.

I concur with the submission of counsel for Park Lane that the most important provision governing the scope of the licence of occupation is Article I, entitled, "GRANT OF LICENSE", which provides:

1.01 The Owner, on the terms set forth herein, hereby grants to the Licensee a license to enter on the Land for the purpose of surveying and servicing the Land for subdivision in accordance with an agreement between the parties dated the 8th day of December, 1988 (herein called the "Sale Agreement") and the plan attached as Appendix "ii" hereto.

Aside from stating the specific purpose for which the licence is granted, s. 1.01 refers to the licence as being "in accordance with the agreement". "Accordance" is defined in The Concise Oxford Dictionary, supra, as meaning, "conformity", "agreement". In other words, s. 1.01 of the licence contemplates that the licence will be in conformity with the Agreement. That being so, it is difficult to accept the City's submission that the licence was intended to give Park Lane an interest in land, since the Agreement specifically provides that no interest in land is created by the Agreement.

Article I provides that the licence creates a right of entry for the specific purposes mentioned namely; surveying and servicing the land. However, later portions of the licence go on to deal with a variety of matters which appear to go far beyond the grant provided in Article I, and which also bring the licence into apparent conflict with the Agreement. In particular, there are provisions in the licence which refer to the licensee's "use" and "occupation" of the land. This can refer only to Park Lane's use and/or occupation of the land for the specific purposes set forth in the Agreement and Article I of the licence, namely, to survey and provide services to the land. These provisions relating to use and occupation in the licence cannot, in and of themselves, create an interest in the land which is not otherwise created by either the Agreement or the licence.

By far the most troublesome provisions of the licence of occupation, in terms of ascertaining its scope and effect, are the provisions contained in Article VII, headed: "MISCELLANEOUS". Those provisions include the following:

7.03 The Owner hereby reserves the right to grant other dispositions of the Land, or any part of it, with the prior consent of the licensee, which consent shall not be unreasonably withheld, by way of easement, right-of-way or statutory right-of-way to

- (i) A Crown corporation or agency,
- (ii) a municipality, or
- (iii) a regional district,

and upon such consent being given, the Licensee shall forthwith execute and deliver to the Owner such instrument as may be necessary to subordinate the Licensee's right and interest in the Land under this agreement to any such grant.

7.07 This licence and the rights herein granted are subject to:

- (a) the exceptions and reservations of rights, interests, privileges and titles referred to in section 47 of the Land Act; and

(b) those encumbrances, rights, exceptions and reservations as set out in Appendix "iii" annexed hereto.

7.09 The Licensee acknowledges and agrees with the Owner that ...

(c) it shall not commence or maintain proceedings under section 60 of the Land Act in respect of any interference with its rights hereunder arising directly or indirectly out of the exercise or operation of the rights, privileges or interests described in sections 7.03 and 7.07.

I note that we have not been provided with any of the three Appendices to the licence, including Appendix (iii) referred to in s. 7.07 (b) of the licence. That being the case, we do not know the full extent of the encumbrances to which the licence is subject.

It is difficult, if not impossible, to read the provisions of Article VII of the licence of occupation in a way which does not conflict with the Agreement, particularly s. 19.04 of the Agreement. Therefore, since the Agreement is the principal document defining the rights of the parties, to which the licence is subordinate, those provisions of the licence which are inconsistent with the Agreement cannot be given effect, to the extent of that inconsistency.

It follows that those provisions of the licence which imply that Park Lane has an interest in land must yield to s. 19.04 of the Agreement which clearly states that the Agreement does not give Park Lane any equitable or legal interest in the land. Park Lane does not obtain any interest in land until such time as title to a particular parcel of land passes to it upon the relevant conditions precedent in the Agreement being met.

In the result, I conclude that the learned Chambers judge was correct in finding that, despite its title, the licence of occupation here is simply a licence giving Park Lane the right to enter upon the land "in accordance with the agreement" and for the limited purpose of surveying and installing services on the land. It does not give Park Lane any interest in land capable of sustaining an interest in trespass. Therefore, Park Lane is not an "occupier" within the meaning of s. 1(a) of the Assessment Act.

Because I am of the view that this appeal turns on the specific wording of the Agreement, the licence of occupation, and the relevant statutory provisions, it is unnecessary for me to canvass the other submissions and authorities referred to by counsel. Suffice it to say that none of them deals with a factual situation sufficiently analogous to the case at bar to be of much assistance.

In the result, I would dismiss the appeal.

THE HONOURABLE MADAM JUSTICE PROWSE

I AGREE:

THE HONOURABLE MR. JUSTICE HINKSON

I AGREE:

THE HONOURABLE MADAM JUSTICE PROUDFOOT