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CITY OF PORT MOODY

v.

PARK LANE HOMES LTD.

v.

ASSESSOR OF AREA 12 - COQUITLAM

Supreme Court of British Columbia (A911854) Vancouver Registry

Before the HONOURABLE MR. JUSTICE ESSON

Vancouver, June 13, 1991

G. Anderson for the Appellant
P. S. Grahame for the Respondent, Park Lane Homes Ltd.
J. E. D. Savage for the Respondent, Assessor of Area 12-Coquitlam

Reasons for Judgment July 16, 1991

The Assessment Appeal Board, reversing the decision of the Court of Revision and restoring that of the Assessor, held a large area of land within the City of Port Moody not to be assessable. The land is owned by the Crown. The issue is whether it is "held or occupied" by Park Lane Homes Ltd. within the meaning of s. 34 (1) of the Assessment Act and thus liable to assessment in accordance with that section.

The Board has stated a case for the opinion of this Court. The facts, issues and questions are set out in the Stated Case which, excluding only the attachments, I reproduce:

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. The formula sets the purchase price at the higher of:

(i) a pre-determined purchase price set out in a schedule to the agreement, or

(ii) a value which is 90% of the appraised value of the parcel at the time of purchase.

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."

"4.03 (c) The Company acknowledges that . . .

(ii) its obligation hereunder shall not be satisfied until such time as it has purchased all the land within the Parent Parcel from the Province, pursuant to the terms of this Agreement, unless this agreement is terminated pursuant to s. 10.03."

"10.03 For the purpose of this agreement, each party shall establish, keep and maintain books of accounts and shall cause to be made therein entries of all matters, terms, transactions and items relating to the works which each party is required to construct pursuant to this agreement and shall keep those books of account together with copies of all tender calls, quotations, contracts, correspondence, invoices, vouchers and other documents relating thereto intact for a period of not less than two years after such works have been fully completed."

"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 land 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." (Note: Appendix 'ii' not attached.)

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:

Folio: 12-225-10518-000. Land, $3,075,000, Class 1.
Folio: 12-225-10518-050. Land, $6,063,500, Class 1.
Folio: 12-225-10519-200. Land, $2,861,500, Class 1.

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;

(b) the person in possession of Crown land that is held under a homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement or other record from the Crown, or who simply occupies the land."

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 or 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."

16. The City of Port Moody submitted that in the case of vacant land, "evidence of ownership" is sufficient evidence of possession and "constructive possession" and will support a trespass action.

17. The Board found that:

(a) Park Lane has the right to enter onto the Land only for the purposes stipulated in the licence and, by implication the right to possess and occupy only the lands specifically required for those purposes. Park Lane has not yet reduced any of the land to possession and could not maintain an action for trespass with respect to any part of the lands on that ground.

(b) Park Lane would not qualify as an occupier because it would not, by reason of being a purchaser under an interim agreement, have the same untrammelled right as the registered owner of the land to maintain the proceedings for recovery of possession or for trespass.

(c) The Board held that the lands were not "held" by Park Lane within the meaning of that term in section 34 (1) of the Assessment Act.

18. The Board ordered the Assessor to remove the lands contained in the three folios in dispute from the 1990 Assessment Roll because these lands were not assessable.

19. The agreement between Park Lane Homes Ltd. and Her Majesty is attached hereto as Schedule "A", the Licence of Occupation between the Province of British Columbia and Park Lane Homes Ltd. is attached hereto as Schedule "B", and the decision of the Board dated April 5, 1991 is attached hereto and marked as Schedule "C". (Note: Schedules A, B and C not attached, for Schedule C see 1990 A.A.B. Decisions Blue Book.)

The questions which the Board is required to ask for the opinion of the Supreme Court are:

1. Did the Board err in finding that the land which is the subject of the appeal (the "parent parcel") is not "held" by Park Lane Homes Ltd. ("Park Lane") pursuant to section 34 (1) of the Assessment Act by virtue of the agreement and licence of occupation of December 8, 1988 between the Crown Provincial and Park Lane?

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 either:

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

(b) Park Lane's entry on the parent parcel combined with its rights as a purchaser of the parent parcel under the agreement?

Dated at Maple Ridge, B.C., this 16th day of May, 1991.

(Signed)
Lawrence A. King, Chairman,
ASSESSMENT APPEAL BOARD

I will consider first the second question posed by the Board which is whether it erred in finding that Park Lane is not an occupier within paragraph (a) of the definition of that word in s. 1 of the Assessment Act (quoted in para. 12 of the Stated Case). The City of Port Moody concedes that

the lands are vacant and have not been reduced to possession by Park Lane. It therefore recognizes that, if Park Lane is an occupier, it can be so only upon the statutory definition of the word.

Question 2 has two parts. Question 2 (a) asks whether Park Lane is an occupier under the licence of occupation (summarized in para. 4 of the Stated Case) combined with s. 60 of the Land Act which is set out in para. 13 of the Stated Case. 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.

Turning to question 2 (b), I cannot find that Park Lane has a right to bring trespass proceedings pursuant to its entry combined with its rights as a purchaser. Port Moody concedes that those rights do not confer a right to possession. The general law is stated this way by Brooke, J.A. for the Ontario Court of Appeal in Townsview Properties Ltd. v. Sun Construction and Equipment Co. Ltd. (1974), 7 O.R. (2d) 666, 56 D.L.R. (3d) 330. At p. 333 (D.L.R.) he said:

> Counsel submits that at the time of the excavation Plaintiffs were not entitled to possession, and so, they were not entitled to claim for that trespass. We agree. The essence of the action of trespass is a wrongful interference with possession and to succeed the Plaintiff must show that he was in possession or in the case of vacant land that he was entitled to enter into possession.
>
> [Citations omitted.] No provisions of the agreement of purchase of sale under which the Plaintiffs claim, provide that they or the offeror were entitled to possession before closing, and in the absence of such provision the vendor retains possession until the payment of purchase moneys or the closing of the transaction.

It is suggested on behalf of the Appellant that the law of British Columbia is somewhat different and that it is correctly stated in Di Castri, The Law of Vendor and Purchaser, (3d) Vol. 2, pp. 13-5, where the following statement appears:

> p468 Purchaser Maintain Trespass Against Third Parties.
>
> As the loss for any deterioration of the property after the sale but before delivery of the conveyance, and not attributable to the vendor, falls upon the purchaser, it follows that, providing entry on the land is made prior to action, a purchaser, either in his own right or in the name of his vendor, can maintain trespass against a third person for the deterioration of the property, and a fortiori, where the person in possession is a wrongdoer.

The Board expressed some doubt regarding the correctness of that statement but went on to observe that the right postulated in that passage "falls far short of the general right of the registered owner or other person lawfully in possession of land to maintain an action for any interference with that lawful possession." Without the benefit of much more complete arguments than I had here, I would not venture to reconcile the views expressed in the two passages or decide, if they are in conflict, which represents the law. Nor would I accept the view, implicit in the language of the Board, that the words "person . . . entitled to maintain an action for trespass" excludes anyone other than registered owners or others lawfully in possession.

For present purposes, I find it unnecessary to resolve those questions, because I find that, even on the law as stated by Mr. Di Castri, Park Lane has no right to maintain an action for trespass. The proposition stated by Mr. Di Castri in p468 follows on from that stated at p466 where it is said that, unless there is an express agreement to the contrary, the property at common law is,

pending the completion of the sale, at the risk of the purchaser. That proposition rests, in turn, on the premise that a purchaser pending completion has an equitable interest in the land. For reasons which I will explain in discussing question 1 of the Stated Case, I find that this purchaser has no legal or equitable interest in the land pending completion. To put it in the language of Mr. Di Castri in p466, as this contract expressly provides that no equitable or legal interest in land is created in favour of the purchaser, this is a case where there is an express agreement to the contrary with respect to the risk.

I turn to the first question asked by the Board; that as to whether it erred in finding that the land was not "held" by Park Lane within the meaning of s. 34 (1). It is clear that one can be a holder although not an occupier. A decision of the Supreme Court of Canada which arose upon statutory provisions and facts very similar to those in the present case is The Southern Alberta Land Company and The Rural Municipality of McLean (1916), 53 S.C.R. 151. The company had entered into an agreement for purchase and sale with the federal Crown for a very large block of land. The purchase price was to be payable in six annual instalments, the contract providing that part of the price could be offset by construction of irrigation works. The company did construct substantial works but was never in actual occupation of the land. It was assessed as an occupier under the statutory definition which included the words "person holding under an agreement of sale". In considering those words, Anglin J. who gave one of the majority judgments, said at pp. 165-66: . . .

> the company is likewise a "person holding under an agreement of sale".
>
> > A person may hold though he does not occupy. A tenant of a freehold is a person who holds of another; he does not necessarily occupy. Rex v. Ditcheat.
>
> Two persons may be "holding" the same lands in distinct rights and with distinct interests. Ward v. Const. Under an agreement to purchase land the interest of the purchaser is "held" by him although he should have neither possession nor an immediate and unconditional right to possession; and it is unquestionably an interest in the land. Williams v. Papworth [1900] A.C., 563, at 568.

Although the other members of the majority did not expressly concur in the reasons of Anglin, J., their reasoning was to the same effect. The Respondents suggest that I should reject that statement of the law and adopt the views of Gould, J. in Construction Aggregates Ltd. v. Corporation of the District of Maple Ridge, [1971] Stated Cases Case 71, 347 (affirmed without reference to this point, [1972] 6 W.W.R. 355). In reference to language similar to that of the present s. 34 (1), Gould, J. said at p. 351:

> As I have found that the plaintiff Permittee is not a lessee, has no interest in the land in the legal sense, is not in possession of it, is not an occupier of it, I refuse to make the semantic leap of finding that, nevertheless, it "holds" the land, whatever may be the precise meaning in law of "holding", per se land.

I do not find the view of Gould, J. to be in conflict with that of Anglin, J. In finding that the purchaser was "holding an agreement of sale" Anglin, J. found that it unquestionably had an interest in the land. One of the reasons which led Gould, J. to conclude that the permittee was not "holding" was that it had "no interest in the land in the legal sense".

The rights conferred upon the purchaser pending completion in this case are sufficiently similar to those conferred on the purchaser in the Southern Alberta case that, but for one circumstance, I would find that the land is "held" by Park Lane within the meaning of s. 34 (1). The distinction lies in this provision of the agreement between the Crown and Park Lane:

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

The distinction is vital because, as I read the decision in Southern Alberta and the authorities upon which it is based, it was fundamental to the conclusion of Anglin, J. in respect of "holder" that the purchaser had an interest in land by reason of the purchase agreement. Absent clause 19.04, I see no reason to think that this purchaser would not have an interest in the land on the basis of the law outlined by Mr. Di Castri in this passage:

> p17 Trust
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> > Ranking high on the list of venerable doctrines postulated by high authority is the equitable landmark decreeing that instanter a valid contract for the sale of land comes into existence the vendor becomes in equity a constructive trustee for the purchaser and (1) the beneficial ownership passes to the purchaser, the vendor retaining a reciprocal right to the purchase money carrying with it and for its security a lien on the premises; (2) the vendor, in the absence of an agreement to the contrary, is entitled to retain possession and is entitled to the rents and profits up to the date fixed for completion.
> >
> > Counsel for Port Moody submits that no effect should be given to clause 19.04. He relies upon Mr. Di Castri's statement of the law:
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> p9 Label Unimportant
>
> > The essential nature of an agreement of sale cannot be changed by any nomenclature, form or subterfuge employed by the parties, whether innocently or by design. Specifically, an agreement of sale and purchase cannot be given the operation of a transfer or conveyance by the ex parte declaration of one of the parties; the redefinition of the law is for the legislature and not private parties.

The answer to that submission is, in my view, that clause 19.04 is not a mere matter of nomenclature, form or subterfuge. Nor is it an attempt to redefine the law. It is, rather, a clear agreement by the parties that the contract will not confer upon the purchaser a species of right which the general law would otherwise imply or impose. They have contracted out of the general rule that, upon the making of the contract, the vendor becomes in equity a constructive trustee for the purchaser and that the beneficial ownership passes to the purchaser. That is quite different from employing a "label" which belies the language of the agreement, as these parties did in labelling the licence to enter a "licence to occupy". Such labels do not affect the true nature of the rights _ they can be ignored. But I have been referred to no authority which would support ignoring the clear language of clause 19.04. I therefore conclude, in agreement with the Board, that clause 19.04 must be given effect according to its plain meaning.

While I do not find that the Board erred in law in concluding that the land is not held or occupied by Park Lane, I think it desirable to express my disagreement with one aspect of the reasoning. In para. 17 (b) of the Stated Case, the Board stated that Park Lane would not qualify as an occupier because it would not, by reason of being a purchaser under an interim agreement, have the same untrammelled right as the registered owner to maintain proceedings for recovery of possession or trespass. That approach, with respect, appears not to apply correctly the language of s. 60 of the Land Act which specifies that a person entitled to occupy by virtue of a certificate of purchase, lease, etc. may take proceedings for recovery of possession or trespass "in the same manner and to the same extent as if he were the registered owner of the land". The rights possessed through a certificate of purchase or any of the other documents referred to in s. 60 could, of

course, never be as great as those of the registered owner. But, for that limited purpose, the section provides that the occupier can take proceedings as if he had held the higher right.

That aspect of the Board's reasoning does not affect the ultimate soundness of its conclusions on the questions posed to this court. It follows that I find the answer to both the questions in the Stated Case to be "no".