COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tylon Steepe Homes Ltd. v. Landon,*
2011 BCCA 162

Date: 20110330
Docket: CA038857; CA038858

CA038857

Between:

Tylon Steepe Homes Ltd.

Appellant
(Plaintiff)

And

Heidi Landon

Respondent
(Defendant)

And

1216393 Ontario Inc., Tylon Steepe Development Corporation and
Dennis Krestchmer

Appellants
(Defendants by Counterclaim)

CA038858

Between:

Tylon Steepe Homes Ltd.

Appellant
(Plaintiff)

And

Charles Eli Pont and Jill C. Pont

Respondents
(Defendants)

And

1216393 Ontario Inc., Tylon Steepe Development Corporation and
Dennis Krestchmer

Appellants
(Defendants by Counterclaim)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Levine
The Honourable Madam Justice Garson

On appeal from Supreme Court of British Columbia, February 9, 2011

(*Tylon Steepe Homes Ltd. v. Pont*, Vancouver Registry S091578)

Oral Reasons for Judgment

Counsel for the Appellant:	D. Le Dressay
Counsel for the Respondent:	F.G. Potts T.D. Goepel
Place and Date of Hearing:	Vancouver, British Columbia March 28, 2011
Place and Date of Judgment:	Vancouver, British Columbia March 30, 2011

[1] LEVINE J.A.: These are applications to quash appeals brought from a decision of Madam Justice Ballance made February 9, 2011. Madam Justice Ballance is the case management judge in two actions to be heard together commencing April 4, 2011. She ordered, on applications brought under Rule 9-7 of the Supreme Court Civil Rules, that the parties are bound by certain findings of fact and law made in a trial heard by Mr. Justice Myers in 2007, and the appellants are estopped from raising certain matters.

[2] The applicants (Charles and Jill Pont and Heidi Landon) take the position that this Court does not have jurisdiction to entertain the appeals because Ballance J.'s decision was an evidentiary ruling made during the course of a trial which may only be appealed at the conclusion of the trial. In the alternative, they say the appeals should be quashed because leave was required and was not sought.

Factual Background and Procedural History

[3] The applicants and others purchased bare strata lots in a development in Vernon, British Columbia from 1216393 Ontario Inc. and Tylon Steepe Development Corporation (the "Vendors") in 2003. Tylon's agent and director is Mr. Kretschmer. At the time all purchasers paid a 10% deposit.

[4] Under the terms of the agreements, the Vendors retained the right to cancel the purchase agreement if the subdivision strata plan was not registered in the land title office by a certain date. The relevant date was subject to extension if the delay was outside the power of the Vendors, including government delay. If the contract was cancelled by the Vendors, the purchasers would be entitled only to repayment of their deposit with interest.

[5] Substantial delays took place and by August 2005 the strata plan remained unregistered. The Vendors opted to cancel the contracts. The reason given by the Vendors for the failure to register was government delay.

[6] Concurrent with the cancellation, the Vendors offered the purchasers the opportunity to re-purchase their respective lots for an increased price and on the condition that they enter into a contract with Tylon Steepe Homes Ltd. for the construction of a home on the lot. Mr. Kretschmer is the principle of Tylon Homes.

The applicants entered into new purchase agreements and construction contracts with Tylon Homes by the end of 2005.

[7] Not all purchasers had the same response to the offer to re-purchase their lots. Other purchasers commenced an action against the Vendors seeking specific performance of their original purchase contracts (the "Romfo Action"). The applicants did not take part in the Romfo Action.

[8] The strata subdivision was finally approved and registered by January 16, 2006.

The Romfo Action

[9] The Romfo Action was heard by Myers J. and concluded with extensive reasons on September 14, 2007. He ruled in favour of the plaintiffs and ordered specific performance of the purchase of their respective lots under the original agreements (*Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1375). His judgment was upheld on appeal (*Carlson v. Tylon Steepe Development Corp.*, 2008 BCCA 179).

[10] According to the reasons of Ballance J. (at para. 21), "document production was a contentious issue" in the Romfo Action. When faced with a motion to produce all of the documents surrounding their dealings with the District, the defendants (the Vendors) abandoned their defence that government delay caused the delay in registering the subdivision strata plan and justified cancellation of the contracts, and amended their defence to remove this plea. They took the position that the documents were no longer relevant. They essentially admitted the breach of contract and defended the action on the basis that the plaintiffs were only entitled to the return of their deposits.

[11] Mr. Justice Myers determined that there had been a fundamental breach of the contract and it would be unfair and unreasonable to enforce the deposit clause.

The Application before Ballance J.

[12] Meanwhile, the applicants encountered problems with the construction of their homes. They became dissatisfied with the pace and quality of the construction and refused to pay advances called for in the construction contracts. Tylon Homes sued for breach of contract. The applicants counterclaimed against the Vendors, Tylon Homes and Mr. Kretschmer (collectively the "Counterclaim Defendants"). The allegations in the counterclaim were that misrepresentations were made regarding the delays in the registration of the strata plan, and that Mr. Kretschmer made misrepresentations to induce the applicants to enter into the second purchase contracts and construction contracts with Tylon Homes. Several allegations relating to the delay in the registration of the subdivision strata plan overlap with findings made by Myers J. in the Romfo Action.

[13] The applicants seek rescission of the second purchase contracts and a general declaration that the terms of the original sales agreement as interpreted in the Romfo Action remain in full force and effect and therefore govern the relationship of the parties. The Counterclaim Defendants seek to rely on the government delay clause and the deposit clause as defences -- the government delay defence that was

abandoned and the deposit clause defence that was rejected in the Romfo Action. Their argument centres on the assertion that the doctrines of *res judicata* and issue estoppel do not apply because there are factual differences between the present action and the Romfo Action. The applicants disagree and sought to prevent the Counterclaim Defendants from using the government delay defence they abandoned in the Romfo Action.

[14] The applicants sought a summary disposition of these issues pursuant to Rule 9-7 or, alternatively partial relief under Rule 9-4 asking that, as a point of law, the respondents be precluded from raising certain defences based on the findings of fact in the Romfo Action.

[15] Madam Justice Ballance considered at length the doctrines of issue estoppel and abuse of process. She concluded that it was not possible to accept all of the findings made by Myers J. because some were specific to the facts of that case. She found, however, that issue estoppel applied to certain of Myers J.'s findings of fact and the parties would be bound by them (at paras. 93-94). She determined that it would be an abuse of process to allow the Counterclaim Defendants to rely on the defence of government delay they had abandoned in the Romfo Action (at paras 96-98 and 101). She ordered that the Vendors were estopped from raising certain matters at the trial (at para. 102).

[16] The terms of the entered orders are:

> THIS COURT ORDERS that:
>
> 1. the parties hereto and in *Tylon Steepe Homes Ltd. v. Pont*, British Columbia Supreme Court Action No. S09 1578, Vancouver Registry (the "Pont Action") are bound by the findings of fact and law made by the Honourable Mr. Justice Myers in *Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1375 (the "Romfo Action"), as follows:
>
>   a) the decision to cancel the original purchase contracts of Charles Eli Pont and Jill C. Pont ("the Ponts") and Heidi Landon ("Ms. Landon") was made some time between July and November 2004;
>
>   b) the Respondents refrained from informing the purchasers of the decision to cancel the original purchase contracts until mid-August 2005; and
>
>   c) the Respondents knew that approval of the subdivision was imminent at the same time that Dennis Kretschmer ("Mr. Kretschmer") was representing that the vendors could not proceed because of governmental delay.
>
> 2. The Respondents are estopped from the following:
>
>   a) asserting that they had the right to cancel the Applicants' original purchase contracts because the development of Crystal Waters subdivision had been delayed by an act of government authority;
>
>   b) relying on the cancellation or delay clauses in the original contracts;
>
>   c) denying that they failed to make reasonable efforts to effect the subdivision;
>
>   d) denying that the representations made to the Ponts and Ms. Landon to the effect that the cancellation of the original purchase contracts was due to governmental delay was false; and
>
>   e) denying that any representations to the Ponts or Ms. Landon that the subdivision registration was delayed because of difficulties with the District, has no factual foundation.

[17] Madam Justice Ballance decided that the complex and controversial nature of the remaining factual issues could not be determined on a summary trial.

Applications to Quash the Appeals

[18] The Counterclaim Defendants filed notices of appeal from the decision of Ballance J. The applicants seek orders that the appeals be quashed on the basis that the decision was a ruling made during the course of a trial respecting admissibility of evidence, a decision that is appealable only at the conclusion of the trials. They rely on the decisions of this Court in *Rahmatian v. H.F.H. Video Biz Inc.*(1991), 55 B.C.L.R. (2d) 270; *Yewdale v. ICBC* (1995), 3 B.C.L.R. (3d) 247; *Stanley v. Goodwin*, 2002 BCCA 166, *Danicek v. Poole*, 2009 BCCA 456, and also cite *Prince Albert Credit Union Limited v. Diehl et al*, [1986] 3 W.W.R. 543 (Sask. C.A.) and *Mary and David Goodine Dairy Farm v. New Brunswick (Milk Marketing Board)*, 2002 NBCA 38.

[19] In the alternative, they claim that leave to appeal was required and was not obtained.

[20] The Counterclaim Defendants argue that the ruling that they may not assert the defence of government delay has the effect of partially disposing of a substantive issue in the litigation, and is therefore a final order, appealable as of right, in accordance with the analysis of this Court concerning final and interlocutory orders in *Forest Glen Wood Products Ltd. v. British Columbia (Minister of Forests)*, 2008 BCCA 480 at para. 34.

Analysis

[21] I will deal at the outset with the argument of the Counterclaim Defendants that the analysis of final and interlocutory orders in *Forest Glen* has application here. These applications to quash the appeals raise a different issue, requiring, as Huddart J.A. said in *Stanley* (at para. 7), consideration from a different perspective.

[22] Rulings on the admissibility of evidence at a trial are not appealable until the conclusion of the trial as part of the final judgment. An application to quash an appeal is made on the basis that the Court does not have jurisdiction to hear an appeal. There is no right of appeal because the decision appealed from is not an "order" within the meaning of s. 6 of the *Court of Appeal Act*: *see Rahmatian* at para. 7; *New Brunswick (Milk Marketing Board)* at paras. 5-7, 18.

[23] The question of whether such an "order" is final or interlocutory (within the meaning of s. 7 of the *Act*), and whether an appeal requires leave or may be brought as of right, which is the question addressed in *Forest Glen*, is a different question. The issue on these applications is whether the "order" is an evidentiary ruling made during the course of the trial.

[24] The law is clear that issue estoppel is not a rule of substantive law; it is an exclusionary rule of evidence: see *Production Equipment Ltd. v. Clayton & Lambert Manufacturing Co.* (1984), 66 N.S.R. (2d) 328 (NSSC, Appeal Division); *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d)

171 at para. 35 (C.A.).

[25] Thus there can be no dispute that the part of the order that declares that certain findings of fact and law made by Myers J. are binding on the parties (para. 1), made on the basis of issue estoppel, are evidentiary rulings, as are the parts of the order (paras. 2 (b) through (e)) estopping the Counterclaim Defendants from making certain claims at the trial.

[26] The contentious issue is whether the part of the order estopping the Counterclaim Defendants from asserting the defence of government delay (para. 2 (a)) is an evidentiary ruling. This is the part of the ruling that the Counterclaim Defendants say effectively disposes of a substantive part of their case, relying on the *Forest Glen* principles.

[27] There is no bright line between pre-trial rulings which are appealable, either with leave or as of right, and pre-trial evidentiary rulings which are not appealable as a matter of jurisdiction. In these circumstances, when the trial judge's analysis is examined, it becomes clear that the part of the ruling that precludes the Counterclaim Defendants from asserting the defence of government delay is an evidentiary ruling that falls on the not appealable side.

[28] Madam Justice Ballance decided that the defence of government delay was barred on the basis of abuse of process. She said (at paras. 97-98):

> [97] The stubborn fact remains that the advancement of the government delay excuse and its impact on the interpretation of the original contracts, including the original contracts of the Pants and Ms. Landon, and the entailing ramifications, belonged to the Romfo Action. That remains so even though the Romfo defendants elected to discard that defence as a matter of litigation strategy. They had a full opportunity to defend themselves in the Romfo Action and chose a defence path that they now regret. They ought not be permitted a second kick at the can (to put it crudely) when they had ample opportunity to assert that position in the Romfo Action. It would turn the doctrine of abuse of process on its head to permit them to resurrect that defence in the absence of compelling circumstances.
>
> [98] Facilitating the potential for a finding in these proceedings that there was governmental delay which entitled the vendors to rely on the delay clause, and hence the cancellation and deposit clauses In the original purchase contracts, would fly in the face of the findings of Myers J. and the decision of the Court of Appeal, and would constitute a misuse of this Court`s procedure in a way that would violate the integrity of the judicial decision-making process.

[29] The application of the doctrine of abuse of process has many of the same rationales, constraints and essential policy grounds of issue estoppel: finality to litigation, that no one should be twice vexed by the same cause, and to uphold the integrity of the legal system to avoid inconsistent results: see *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, 3 S.C.R. 77 at para. 38. Madam Justice Arbour expressed the view (at para. 43) that the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of the courts. This was, in the end, the basis on which Ballance J. determined that allowing the Counterclaim Defendants to litigate the defence of government delay that they decided to abandon in the Romfo Action would be an abuse of process in this case (at para. 98).

[30] Madam Justice Ballance also discussed at length the links between the principles of issue estoppel

and abuse of process, in particular noting that the fact that the government delay issue was not litigated in the Romfo Action does not preclude a finding that raising it in these proceedings amounts to an abuse of process, citing the “might and ought” principle of the “Henderson Rule” (derived from *Henderson v. Henderson*, [1843-60] All E.R. 378) that requires “a defendant to bring forward every defence based on the subject matter at one time, once and for all” (at paras. 62, 88).

[31] For these reasons, in the circumstances of this case, I would liken the effect of the finding of abuse of process to a finding of issue estoppel for the purposes of characterizing the ruling barring the defence of government delay as an evidentiary matter.

[32] It is also significant to note that the ruling barring the defence of government delay had its genesis in evidentiary matters: the decision by the Counterclaim Defendants, as defendants in the Romfo Action, to abandon their defence of government delay in order to avoid the production of documents and therefore the evidence to support the defence. In essence, the dispute over the government delay defence started as, and remains, an evidentiary issue.

[33] Some argument was addressed by both parties on these applications to the questions of whether the jurisdiction of this Court to hear an appeal from a ruling on an evidentiary matter turns on whether the ruling was made by the trial judge during the trial. The authorities relied on by the applicants concern such rulings, and both parties appeared to take the position that only rulings made in those particular circumstances are not appealable. I would not impose such strict limits on the application of these jurisdictional principles, though it is important not to expand the denial of appealability too broadly, for obvious reasons.

[34] The circumstances of this case are probably not unique in the context of the way litigation is now conducted, where actions are often the subject of case management by a judge who is intended to be the trial judge, and pre-trial applications are commonly brought to focus and refine the issues for trial and possible settlement discussions. In my opinion, in this context, it would be artificial to draw a line around the question of appealability of an evidentiary ruling based on when the trial starts and which judge makes the ruling. Suffice it to say that in the circumstances of this case it is clear that the evidentiary rulings were made by the trial judge, who has extensive knowledge of the issues to be raised at the trial, and the rulings will impact on the trials that were set for hearing shortly after the rulings were made.

Conclusion

[35] I would grant the applications and quash the appeals.

[36] If the subject matters of these evidentiary rulings impact on the final judgment, this order would not prejudice the rights of the Counterclaim Defendants to raise them as grounds of appeal from that judgment.

[37] ROWLES J.A.: I agree.

[38] GARSON J.A.: I agree.

[39] ROWLES J.A.: The appeals are quashed. Costs will follow the events.

“The Honourable Madam Justice Levine”