IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bonavista Management Inc. v. Absolute Star Design Ltd.,* 2015 BCSC 1002

Date: 20150611
Docket: S150986
Registry: Vancouver

Between:

Bonavista Management Ltd.
Jila Mahinfar,
Otto and Associates Insurance Agency Ltd.

Plaintiffs

And

Absolute Star Design Ltd.
Taline Giragosian and
Gino Giragosian

Defendants

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for the Plaintiffs:	W.G. Mazzei
No one appearing for the Defendants:	
Place and Date of Hearing:	Vancouver, B.C. May 6, 2015
Place and Date of Judgment:	Vancouver, B.C. June 11, 2015

I. INTRODUCTION

[1] This matter concerns a problem with tobacco smoke at a two-storey commercial building located in the 2400 block of Marine Drive, in West Vancouver, British Columbia (the "Building"). There are 20 units in the Building which are rented out to various small businesses. There are no residential units in the Building. Tobacco smoke emanating from one of the businesses has for quite some time been bothering the owners of the other businesses in the Building, and they would like it to stop.

[2] Accordingly, the plaintiffs apply for a permanent injunction restraining the defendants, their employees and their customers from smoking cigars or any other tobacco or marihuana products at their rented business premises located at 2430 Marine Drive, West Vancouver, British Columbia.

[3] The plaintiffs commenced this action by filing a notice of civil claim on February 4, 2015, seeking an injunction, general and punitive damages, and special costs.

[4] On April 9, 2015, the plaintiffs filed the present notice of application, which seeks only an injunction and special costs, to be determined by way of summary trial under Rule 9-7 of the Supreme Court Civil Rules.

[5] Despite being served with all the materials, none of the defendants have responded either to the notice of civil claim or to the notice of application. None of the defendants appeared at the hearing of this application, and they have not filed any evidence or submissions.

[6] The materials filed by the plaintiffs on the summary trial application include:

Affidavit #1 of Lina Marinelli sworn February 13, 2015;

Affidavit #2 of Lina Marinelli sworn April 7, 2015

Affidavit #1 of Nastaran Bastami sworn March 6, 2015;

Affidavit #1 of Jila Mahinfar sworn February 4, 2015;

Affidavit #2 of Jila Mahinfar sworn May 4, 2015;

Affidavit #1 of Kenneth Paul Mendham sworn February 5, 2015;

Affidavit #1 of Akbar Tajseknadar sworn February 4, 2015;

Affidavit #1 of John Jahanshahi sworn February 5, 2015; and

Affidavit #1 of Janusz Grabianowski sworn March 18, 2015.

[7] I am satisfied that this application is suitable for determination by summary trial, despite the fact that the relief requested is a permanent injunction: *Qureshi v. Gooch*, 2005 BCSC 1584.

II. THE FACTS

[8] From the affidavit evidence filed, I find the following facts.

[9] The plaintiff, Bonavista Management Ltd. ("Bonavista"), is a duly incorporated British Columbia company carrying on business as a property manager. It has the authority of the registered owners of the Building to enter into leases and to conduct and manage the rental business on behalf of the owners.

[10] The Building is a two-storey building with retail rental units on the bottom floor and office rental units on the second floor. Each rental unit has individual heating and ventilation systems that vent out the back of the Building. The civic addresses associated with the Building are 2428 thru 2448 Marine Drive, West Vancouver, British Columbia.

[11] The defendant, Absolute Star Design Ltd. is a tenant of Bonavista in the Building. It occupies the unit at 2430 Marine Drive (the "Absolute Unit").

[12] The defendant Taline Giragosian ("Taline") is the sole director of the defendant Absolute Star Design Ltd.

[13] The defendant Gino Giragosian ("Gino") is the person who operates the business of Absolute Star Design Ltd. on a day-to-day basis.

[14] The plaintiff Jila Mahinfar ("Jila") is the owner of a business called Elegant Alterations and Dry Cleaning. Her unit is at 2428 Marine Drive (the "Elegant Unit").

[15] The Elegant Unit is adjacent to and immediately to the east of the Absolute Unit.

[16] The plaintiff Otto and Associates Insurance Agency Ltd. ("Otto") is a tenant of Bonavista in the Building at 204-2438 Marine Drive (the "Otto Unit"). The Otto Unit is above Absolute Unit.

[17] The Absolute Unit and the Elegant Unit are on the main floor. The Otto Unit is on the second floor.

[18] The defendant Absolute Star Design Ltd. entered into a lease with the plaintiff Bonavista on February 19, 2004 (the "Absolute Lease") for a term of seven years. On December 15, 2011 the Absolute Lease was extended for a further term of five years.

[19] The plaintiffs Jila and Otto also have leases with the plaintiff Bonavista. Except for the particulars as to term and rent, the leases of Jila, Otto and Absolute are substantially the same.

[20] Under the terms of the Absolute Lease, the premises were originally to be used for the purpose of a jewelry retail store and related activities. The defendant Absolute sold some cigars in the store, but over the

years the sale of cigars has become a more prominent business for Absolute.

[21] In 2009, Bonavista started to receive complaints that cigar smoke and cigar fumes were coming from the Absolute Unit.

[22] Bonavista determined the cigars were being smoked in or around the Absolute Unit by the defendant Gino and his customers, his invitees and his friends.

[23] Bonavista attempted on many occasions to get the defendants to stop smoking cigars in the Absolute Unit, but all such attempts have failed. In the affidavit of Lina Marinelli, general manager of Bonavista, she deposed that she started to get complaints from tenants in 2009 that a strong odor of cigar smoke was coming from the Absolute Unit. She wrote to the defendants on October 15, 2009, July 7, 2011, August 2, 2011, August 30, 2012, and July 8, 2013, advising them that smoking was strictly prohibited and was in breach both of the lease and of West Vancouver bylaws.

[24] Bonavista retained its solicitors to correspond with the defendants. Despite a letter sent December 2, 2013, the smoking of cigars in the Absolute Unit did not stop. Bonavista received numerous complaints about the cigar smoke in July 2014 and November 2014. The cigar smoking in the Absolute Unit continued until an action was commenced against the defendants, at which time it temporarily ceased.

[25] Recently, however, the smoking has resumed. In the affidavit of Janusz Grabianowski sworn March 18, 2015, he deposed that the defendant Gino was smoking a cigar on the balcony at the back of the rented premises on January 29, 2015, and that the ventilation systems intake air from the ceiling area of the balcony.

[26] As well, in her affidavit #2, Jila Mahinfar deposed that she smelled cigar smoke coming from the neighbouring shop as recently as April 29, 2015. In that affidavit she also deposed that she is in the process of selling her business, but she remains liable to the landlord on the lease of her shop.

[27] The emission of the cigar smoke and the cigar fumes may have interfered economically with the business of the plaintiff Jila as her customers have complained that their clothes smell like smoke.

[28] Article 6.08 of the Absolute Lease prohibits activities that constitute a nuisance, are annoying to the Landlord or other tenants or the public, or that are contrary to any bylaw. That article provides as follows:

> 6.08 Not to do, suffer or permit any act or neglect which may in any manner directly or indirectly cause injury to the Premises or to the Building of which the Premises form a part or to any fixtures or appurtenances thereof, or which may be or become a nuisance or which may be offensive or annoying to the Landlord or to any other tenant or to the public, or be improper, noisy or contrary to any law, by-law, ordinance or regulation of a competent government authority.

[29] Part 5 of the District of West Vancouver Smoking Regulation Bylaw 4607, 2009 prohibits smoking in certain areas in and around buildings. Section 5.1 provides:

> 5.1 A person shall not smoke:
>
> 5.1.1 In a building, except in:

> (a) A dwelling unit defined under the Zoning Bylaw including a dwelling unit in which an owner or occupier also carries on a business:
>
> (b) A hotel or motel room or suite designated for smoking by a responsible person, or
>
> (c) Enclosed premises:
>
> (i) That are not open to the public;
>
> (ii) Where the only occupants are the owner or owners of the business carried on in the premises;
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> 5.1.2 In a vehicle for hire;
>
> 5.1.3 On public transit including a school bus, passenger bus, ferry or rapid transit;
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> 5.1.4 In, or within six (6) metres of, an enclosed or partially enclosed shelter where people wait to board a vehicle for hire or public transit;
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> 5.1.5 In a customer service area;
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> 5.1.7 Within six (6) metres of the perimeter of a customer service area;
>
> 5.1.8 Within six (6) metres measured on the ground from a point of any opening into any building including any door or window that opens or any air intake.

[30] That bylaw defines “building” and “premises” in the Part 4 Definitions:

> 4.1 In this bylaw:
>
> “building” means a portion of a building or structure which is used or intended for supporting or sheltering any use or occupancy and includes premises;
>
> “premises” means a portion of a building in respect of which a person has exclusive possession;

[31] From the affidavit evidence, I am satisfied that the emission of cigar smoke and cigar fumes from the Absolute Unit unreasonably interferes with the use and enjoyment of the rental units by the plaintiffs Jila and Otto.

[32] The emission of cigar smoke and cigar fumes from the Absolute Unit also unreasonably interferes with the use and enjoyment of the Building by the plaintiff Bonavista. The evidence shows that Bonavista has repeatedly had to deal with complaints from its tenants regarding the cigar smoke and cigar fumes.

[33] The tort of nuisance involves the unreasonable interference with the enjoyment of land. It need not be accompanied by negligence. It may result from the escape of smoke or fumes that impairs the enjoyment of neighbouring properties to an unreasonable degree. This is clear from the decision of the British Columbia Court of Appeal in *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 (B.C.C.A.) at pp. 759-760:

> As has been said: "The essence of the tort of nuisance is interference with the enjoyment of land." (Street, *Law of Torts*, at p. 212.) That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land, in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if for example effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree: see *Lord Mayor, Aldermen & Citizens of City of Manchester v. Farnworth*, [1930] A.C. 171, and *Walker v. McKinnon Industries Ltd.*, [1949] 4 D.L.R.

> 739, [1949] O.R. 549 [affirmed [1950] 3 D.L.R. 159 [1950] O.W.N. 309; affirmed [1951] 3 D.L.R. 577], as examples.
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> When then can it be said that the tort of nuisance has been committed? A helpful proposition is advanced by the learned author of Street, *Law of Torts*, at p. 215 in these terms:
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> > A person then, may be said to have committed the tort of private nuisance *when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable*.
>
> This proposition stated in a variety of ways has been accepted generally in the authorities.
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> The test then is, has the defendant's use of this land interfered with the use and enjoyment of the plaintiffs' land and is that interference unreasonable? Where, as in the case at bar, actual physical damage occurs it is not difficult to decide that the interference is in fact unreasonable. Greater difficulty will be found where the interference results in lesser or no physical injury but may give offence by reason of smells, noise, vibration or other intangible causes. No finding is required regarding the exercise of care by the defendant and while its conduct may frequently be such that a finding of negligence could be made it is not necessary and the existence of due care will afford no defence if the other ingredients are present. Again this is well rooted in authority. For example see the words of Lord Simonds in *Read v. J. Lyons & Co. Ltd*., [1947] A.C. 156 at pp. 182-3, where the principles laid down in *Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330, were under discussion:
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> > My Lords, it was urged by counsel for the appellant that a decision against her when the plaintiff in the *Rainham* case, [1921] 2 A.C. 465, succeeded would show a strange lack of symmetry in the law. There is some force in the observation. But your Lordships will not fail to observe that such a decision is in harmony with the development of a strictly analogous branch of the law, the law of nuisance, in which also negligence is not a necessary ingredient in the case. For if a man commits a legal nuisance it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict, and there he alone has a lawful claim who has suffered an invasion of some proprietary or other interest in land.
>
> In my opinion the *rationale* for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land.
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> [Emphasis in original.]

[34] I am satisfied that in the circumstances, the smoking of cigars in the Absolute Unit constitutes a nuisance. It is also in violation of the West Vancouver Smoking Regulation Bylaw. For both these reasons, it is in violation of the terms of the Absolute lease.

[35] The granting of an injunction is a discretionary remedy. The principles to be applied in exercising that discretion were discussed in *Suzuki v. Munroe*, 2009 BCSC 1403, where Verhoeven J. wrote at paras. 110-113:

> [109] An injunction is an equitable remedy, and therefore the granting of one is discretionary: R.J. Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora: Canada Law Book Inc., 2000) at para. 4.10, *Boggs v. Harrison*, 2009 BCSC 789 at para. 141.
>
> [110] A number of factors are relevant in determining whether or not to grant an injunction. The inadequacy of damages is frequently considered, along with the nature of the plaintiff's injury and the balance of convenience between the parties: Sharpe, *Injunctions and Specific Performance* at paras. 1.60-1.140, *Boggs* at para. 141, A.M. Linden & B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Canada Inc., 2006) at 594.

> [111] In situations where the nuisance is likely to continue without the granting of the injunction, as is the case here once the interlocutory order ends and the Munroes are no longer enjoined from operating the air conditioner at night, the inadequacy of damages is easily satisfied: Linden & Feldthusen, *Canadian Tort Law* at 594.
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> [112] In terms of the damage to the plaintiffs, I have already found that the noise from the air conditioner has caused the Suzukis considerable distress and suffering: see para. 103 of these reasons. The distress is likely to continue if no injunction is granted.
>
> [113] Regarding the balance of convenience, the harm to the plaintiffs is compared against the reasonableness of the efforts the defendants have made and could make to eliminate the nuisance caused by their air conditioner.

[36] Because the emanation of smoke from the Absolute Unit has continued despite the defendants having been repeatedly asked to stop the smoking activity, I am satisfied that damages would not be an adequate remedy. I am also satisfied that the balance of convenience favours the granting of an injunction.

III. COSTS

[37] The plaintiffs seek an order for special costs on the basis that the defendants' behaviour is deserving of reproof or rebuke.

[38] I am not satisfied that this is a case that calls for special costs.

[39] The plaintiffs are entitled to their ordinary costs on scale B.

IV. CONCLUSION

[40] There shall be a permanent injunction restraining the defendants from smoking cigars or any other tobacco or marihuana products at their rented business premises located at 2430 Marine Drive, West Vancouver, British Columbia. The defendants are also restrained from permitting their employees and their customers from smoking cigars or any other tobacco or marihuana products at the rented business premises.

[41] The plaintiffs shall have their costs on scale B.

The Honourable Mr. Justice W.F. Ehrcke