

CITATION: Sandbanks Summer Village Resort Management Inc. v. Prince Edward Vacant
Land Condominium Corporation No. 10, 2021 ONSC 989
COURT FILE NO.: CV-20-652215
DATE: 20210208

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SANDBANKS SUMMER VILLAGE RESORT MANAGEMENT INC.,
COTTAGE ADVISORS OF CANADA INC., SANDBANKS VILLAGE
DEVELOPERS INC., AND SANDBANKS TELECOMMUNICATIONS INC.,
Applicants

AND:

PRINCE EDWARD VACANT LAND CONDOMINIUM CORPORATION NO.
10, Respondent

BEFORE: Paul B. Schabas J.

COUNSEL: John De Vellis and Jonathan Miller for the Applicants

Christy Allen and Victoria Craine for the Respondent

HEARD: February 3, 2021

REASONS ON MOTION FOR INJUNCTION

[1] This is a motion for an interim or permanent injunction to restrain the respondent from evicting the applicants from its Visitor Centre, which the applicants leased from the respondent. The request for injunctive relief arises in the context of the breakdown in the relationship between the applicants, which are all related parties and were, among other things, the developer and manager of the respondent condominium corporation, and the Board of the respondent. The respondent has terminated its management agreements with the first-named applicant Sandbanks Summer Village Resort Management Inc. As a result of this parting of the ways, the respondent has also terminated the lease of the Visitor Centre, which the respondent now requires to manage the property.

[2] For the reasons that follow, the motion is dismissed. The test for injunctive relief, either interim/interlocutory or permanent, is not established. The management agreements have, rightly or wrongly, been terminated, as has the lease. Liability for those terminations of the agreements will be determined later. There are many facts in dispute which cannot be finally determined on this motion; indeed, it is questionable whether they can be determined by way of application, as the applicants propose. However, as the agreements which were the reason for the lease are over, and it is necessary for the respondent to regain possession of the Visitor Centre to continue its operations, the balance of convenience strongly favours the respondent, and the applicants will not suffer irreparable harm if they

are required to move out. This is a commercial dispute for which damages is an effective remedy.

Background

The parties and the property

- [3] The applicants are all Ontario corporations that are affiliated with one another and controlled by Mr. Howard Johnstone Hall (“Hall”). Sandbanks Village Developers Inc. (“Sandbanks Village Developers”) constructed the condominium development that is now the respondent, Prince Edward Vacant Land Condominium Corporation No. 10 (“PEVLCC 10”). Cottage Advisors of Canada Inc. (“Cottage Advisors”) was the developer and declarant of the condominium development. Sandbanks Summer Village Resort Management Inc. (“SSVRM”) has, for a fee, since 2011 provided condominium and resort management services to PEVLCC 10. Sandbanks Telecommunications Inc. (“Sandbanks Telecomm”) contracted with SSVRM to provide telecommunication services to PEVLCC 10, which SSVRM was required to provide under its management agreement with PEVLCC 10.
- [4] PEVLCC 10 is comprised of 237 cottage units and common elements. Each unit has a lot and a private cottage. The common elements include a gatehouse and Visitor Centre at the entrance to the property, a pavilion, fitness centre, lodge/restaurant, swimming pools, sports facilities, water and sewage systems, a beach house, waterfront, and roadways. The property is only open from April 1 to October 31 each year. Owners may not make their cottage their principal residence, and owners have the option to rent out their units.
- [5] PEVLCC 10 was created on July 6, 2011. The first Board of Directors of PEVLCC 10 was appointed by the declarant, Cottage Advisors, which controlled the condominium until the Board was turned over to the owners of PEVLCC 10 on June 12, 2016 in accordance with the *Condominium Act*, S.O. 1998, c. 19. However, as Cottage Advisors continued to own some of the units, Hall remained on the Board until October 30, 2018. Today, Cottage Advisors still owns approximately 25 units which it is trying to sell but which, in the meantime, it rents out for short stays.

The agreements

- [6] Prior to the turnover of PEVLCC 10 to the new Board, in 2013 and 2014 SSVRM and PEVLCC 10 entered into agreements for the management and operation of the Condominium and Resort. Following the turnover to the new Board, which still included Hall, in December 2016 PEVLCC 10 entered into new management agreements with SSVRM, a Condominium Management Agreement and a Resort Services and Operation Agreement (collectively referred to as the “Management Agreements”). The terms of the Management Agreements were for five years ending on November 30, 2021.
- [7] The applicant companies and PEVLCC 10 also entered into a Visitor Centre and Storage Facility Lease Agreement (the “Lease”) in December 2016 for the use of the Visitor Centre “as a sales, option, resort management and accounting centre,” and the laundry storage

facility at the Pavilion “for the purpose of resort laundry and cleaning operations.” The Lease was also for a term of five years ending on November 30, 2021.

- [8] Although Hall recused himself from the Board vote approving them, the Management Agreements were authored by his lawyer.
- [9] The Management Agreements provided for termination on at least 6 months’ notice, or following notice of deficiencies and an opportunity to rectify them. The agreements could also be terminated on 60 days’ notice by SSVRM if either agreement, or the Lease, was terminated by PEVLCC 10. The Lease is not well-drafted, mis-naming the “Lessor” and “Lessee”; however, it also provided that if the Condominium Management Agreement was terminated then SSVRM could terminate the Lease on 60 days’ notice. As Hall stated: "So if one of the contracts is terminated, we have the right to terminate the other ones because we don't want to be there anymore."
- [10] The Management Agreements required PEVLCC 10 to provide SSVRM with at least one year’s notice of its intention to terminate at the end of the term.

The disputes

- [11] SSVRM also established a rental business, which offers rental services to owners who choose to rent their cottages at PEVLCC 10. That service is arranged between individual unit owners and SSRVM, and was operated out of the Visitor Centre. Additionally, Sandbanks Telecomm, which stores its telecommunications equipment in the basement of the Visitor Centre, placed an antenna on the roof of the Visitor Centre to service other customers on neighbouring properties.
- [12] Beginning in about 2018, differences arose between the Board and SSVRM over the distinction between SSRVM’s role in providing management services and its rental business, including concerns that SSRVM was inappropriately using its role as manager and its use of PEVLCC 10 facilities to operate its rental business. The concern about a conflict of interest led Hall to inform PEVLCC 10 that in 2021 the rental program will be handled by a different corporate entity, Sandbanks Summer Village Resort Inc. (“SSVRI”).
- [13] At the same time, concerns were growing among owners about the management and use of the common elements by renters and the strain it was putting on PEVLCC 10’s facilities and infrastructure, and whether SSVRM was fulfilling its obligations under the Management Agreements.
- [14] The relationship between the Board of PEVLCC 10 and SSVRM has continued to deteriorate. The Board states that SSVRM has failed to provide tenancy information which PEVLCC 10 is obligated to obtain under s. 83 of the *Condominium Act*, and has failed to follow Board instructions and appropriately maintain and repair common elements including the wastewater treatment plant, and that SSVRM has failed to ensure that the reserve fund is properly funded. The Board has also raised concerns that SSVRM has been improperly attributing costs to PEVLCC 10 which ought to have been covered by

management fees paid under the terms of the Management Agreements. There have also been disputes over other financial matters.

- [15] Hall, for SSVRM, disputes these claims. He asserts that the Board's actions are motivated by a desire to take control of the rental business for the benefit of PEVLCC 10.
- [16] On or about August 25, 2020, PEVLCC 10 provided written notice to SSVRM of its intention to terminate the Management Agreements effective November 30, 2021. However, in October and November 2020, the relationship deteriorated further, which led PEVLCC 10 to take the position that the Management Agreements had been repudiated by SSVRM. Therefore, PEVLCC 10 terminated the Management Agreements, effective immediately, on November 19, 2020.
- [17] PEVLCC 10 claims that SSVRM has refused to provide it with the condominium corporation's books and records, in breach of s. 54 of the *Condominium Management Services Act*, 2015, SO 2015, c. 28, Sch 2, s. 35 of O.Reg. 123/17, and s. 6(c) of O.Reg. 4/18. This has required the Board to commence a court application to obtain them. In addition, after raising concerns about improper attribution of costs by SSVRM to PEVLCC 10, the Board requested arbitration, to which SSVRM did not respond.
- [18] PEVLCC 10 has also taken steps to amend its by-laws to address rental issues which are opposed by SSVRM. SSVRM's opposition to the new by-law has included actively urging owners to vote against the by-law changes. SSVRM's efforts were unsuccessful, as the owners voted overwhelmingly in favour of the new by-law; however, Cottage Advisors, Hall's company that continues to own about 25 units, has challenged the validity of the by-law in a separate court application which was heard by me on the same day as this motion for an injunction. My judgment in that matter is under reserve.
- [19] On November 19, 2020, PEVLCC 10 also terminated the Lease, January 19, 2020. The applicants then commenced this application. As the motion for injunctive relief relating to the lease was scheduled to be heard on February 3, 2021, PEVLCC 10 agreed to extend the termination date pending the hearing of the motion.

Issues

- [20] The issue on this motion is whether the respondent should be prohibited from evicting the applicants from the Visitor Centre¹. This involves consideration of whether the applicants have met the tests for an interlocutory or permanent injunction as requested in paragraph 1(a) of their Notice of Application.²

¹ The use of the laundry facilities has ceased and is not an issue.

² Although the applicants sought to have me consider other issues in the Notice of Application, the only issue that was properly before me, and which had been ordered to be heard on an urgent basis, was the motion for an injunction relating to the Lease, and the hearing was confined to that issue.

The test for an interlocutory injunction

[21] Pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Court may grant an interlocutory injunction where it appears to the Court to be “just or convenient to do so.” A party seeking an interlocutory injunction must address the three-part test stated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 (“*RJR*”) at p. 334:

(1) is there a serious issue to be tried?

(2) will the applicant suffer irreparable harm if the injunction is not granted? and

(3) which party will suffer the greater harm if the injunction is granted or refused – a balance of inconvenience test?

[22] The three questions must be assessed as a whole. Strength on one branch may compensate for weakness on another branch. However, in *RJR* the Supreme Court recognized exceptions to this rule in situations “when the result of the interlocutory motion will in effect amount to a final determination of the action.” In such situations, the “serious issue to be tried” test may be elevated to a “strong *prima facie* case” test or a “strong chance of success” test.

[23] In my view, however, this is not a situation where the determination of the motion for an injunction will effectively end the dispute. The applicants seek damages for breach of contract and other relief, and those claims can proceed regardless of my determination of the narrow issue before the court on this motion.

[24] As a motion for an injunction is typically brought at an early stage of litigation, “a prolonged examination of the merits is generally neither necessary nor desirable.” While *RJR* identifies two exceptions to this general rule – when the result will effectively determine the case or impose such hardship that the action will not continue – neither applies here. For this reason, I have not engaged in a detailed review of the evidence, much of which is conflicting and will need to be resolved at a full hearing, likely a trial.

Serious issue to be tried

[25] The “serious issue to be tried” test for an injunction is low. As the Supreme Court put in *RJR* at pp. 337-338:

There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the case... Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial.

[26] The applicants strongly dispute that SSVRM repudiated the Management Agreements, noting that the test for repudiation is a high one, requiring PEVLCC 10 to establish that

SSVRM committed a breach that goes to the root of the contract which deprived the condominium corporation of substantially the whole benefit of the contracts. In *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, the Court of Appeal summarized five factors to be considered, at para. 36: (1) the ratio of the party's obligations not performed to that party's obligations as a whole; (2) the seriousness of the breach to the innocent party; (3) the likelihood of repetition of such breach; (4) the seriousness of the consequences of the breach; and (5) the relationship of the part of the obligation performed to the whole obligation. See also: *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576 at paras. 42, 50.

- [27] Further, the applicants claim that the respondent had no right to terminate the Lease prior to the completion of its term, and could not do so based solely on the fact that the Management Agreements were terminated.
- [28] PEVLCC 10 does not dispute that there is a serious issue to be tried. However, it submits that the termination of the Lease was justified because the Lease no longer had any purpose once the Management Agreements were terminated. As PEVLCC 10 puts it, the Lease was so that SSVRM could fulfill its management duties, and not for any other purpose, noting that the Lease states that the Visitor Centre was to be used “as a sales, option, resort management and accounting centre,” not for a separate cottage rental or internet business, and the laundry storage facility at the Pavilion was “for the purpose of resort laundry and cleaning operations.” Hall disputes this interpretation of the Lease, arguing that the Lease does not say these were the only uses. He also asserts that if SSVRM was simply the manager it would not have needed a lease at all and would have been granted access to the Visitor Centre to carry out its management functions. On the other hand, Hall’s position that he entered into the Lease in order to run his rental business is not supported by the permitted uses which, presumably, could have easily been added when the Lease was drafted by his lawyers.
- [29] Each case, of course, turns on its specific facts. Contract interpretation requires consideration of the context and surrounding circumstances in order to give effect to the intentions of the parties: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 56-58; *2249778 Ontario Inc. v. Smith*, 2014 ONCA 788 at para. 19. In repudiation cases, Cromwell J. stated that “[t]he focus ... is on what the party's words and/or conduct say about future performance of the contract. For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract”: *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, 381 D.L.R. (4th) 1, at para. 149. While this passage dealt with anticipatory repudiation, the Court of Appeal has stated that “the same principles guide both anticipatory repudiation and repudiation”: *Remedy Drug Store Co. Inc. v. Farnham* at para. 44.
- [30] In determining whether a party has shown an intention to repudiate a contract, the court must assess whether a reasonable person would conclude that the breaching party no longer intends to be bound by the contract. The court must consider the surrounding circumstances, including but not limited to the nature of the contract, the attendant

circumstances, the motives which prompted the breach, the actual breach and the impact of the breaching party's conduct: *Potter v. New Brunswick (Legal Aid Commission)*, at para 164.

- [31] PEVLCC 10 identifies a range of conduct which it says constitutes repudiation of the Management Agreements. Issues relating to the purpose of the Lease and that SSVRM is using the Visitor Centre for impermissible purposes are also raised. Indeed, PEVLCC 10 has raised a concern that the Lease was never properly entered into as it was not ratified by passage of a by-law as required by s. 21 of the *Condominium Act*, which requires a vote of the unit holders – a failure PEVLCC 10 blames on Hall who was advising and managing PEVLCC 10 at that time: *Condominium Act*, ss. 56(10). *Cheung v. York Region Condominium Corporation No. 759*, 2017 ONCA 633, at para 111; *Peel Standard Condominium Corp. No. 668 v. Dayspring Phase 1 Ltd.*, 2006 CarswellOnt 767, at para 7; *York Condominium Corp. No. 288 v. Harbour Square Commercial Inc.*, 1998 CarswellOnt 663, at paras 38 – 43.
- [32] On the facts before me I can readily conclude that there is a serious issue to be tried, but I am not in a position to make any conclusions as to the relative strength of either party's position, which will require a much fuller evidentiary hearing.

Irreparable harm

- [33] Irreparable harm is harm that cannot be quantified in monetary terms, or that cannot be cured, usually because one party cannot collect damages from the other. The Supreme Court also notes that “irreparable” refers to the nature of the harm, not its magnitude: *RJR* at p. 341. Robert Sharpe, formerly Sharpe J.A., writes that “courts should avoid taking a narrow view of irreparable harm...[i]n the context of preliminary relief, the test is a relative and flexible one”: *Injunctions and Specific Performance*, loose-leaf (Toronto: Thomson Reuters Canada, updated November 2019), paras. 2.411, 2.450.
- [34] In my view there is no evidence that the applicant companies will suffer irreparable harm if the injunction is not granted. The applicants are no longer performing the Management Agreements and have no need to be in the Visitor Center to oversee the operations of the property, including entry and security issues. The other uses of the Visitor Centre, for “sale” and “options”, related to the activities when the complex was being developed and marketed by Sandbanks Village Developers and Cottage Advisors. The development company is no longer active, and although Hall has an employee of one of his companies who is involved in trying to sell the remaining units owned by Cottage Advisors, there is no evidence that this person needs, or ever uses, the Visitor Centre.
- [35] The applicants assert that SSVRM continues to require the Visitor Centre for its rental business and that it is required as a location for Sandbanks Telecomm to have its transmission equipment. However, both of those functions are, arguably, not permitted by the Lease as PEVLCC 10 claims that SSVRM was not permitted to use the Visitor Centre for its rental business or to provide internet service to properties other than PEVLCC 10. In any event, the applicants have not stated why those activities cannot be located

elsewhere. Further, if the move of the businesses comes at a cost, the applicants can seek their remedies in damages against PEVLCC 10.

Balance of inconvenience

- [36] This branch of the *RJR* test requires consideration of which party will suffer greater harm if the injunction is granted or refused pending a decision on the merits (*RJR*, p. 342).
- [37] In this case the balance of inconvenience favours PEVLCC 10. It owns the Visitor Centre, which is the welcome building for the property, located by the gate in order to control who can enter the property. It is the only point of entry to the property, where people check-in which includes, for renters, obtaining a parking pass and other information. This summer that may also include COVID-19 screening. PEVLCC 10 also has statutory duties under s. 17 of the *Condominium Act* to manage and control the property and assets on behalf of the owners, which it may not be able to fulfill without the use of the Visitor Centre. PEVLCC 10 will be greatly inconvenienced if, during the 2021 season it, or its new manager, cannot use the building as it was intended to be used.
- [38] On the other hand, the inconvenience to the applicants is limited. They no longer need the Visitor Centre for the uses set out in the Lease. Furthermore, as Hall stated, a different company than SSVRM will be operating his rental business this summer, and that company is not a signatory to the Lease. There is no evidence that the rental business cannot be operated from another location, as it is a different business than managing the property.
- [39] As to Sandbanks Telecomm, while it states it has contracts to provide services to neighbouring properties, no details of those contracts has been produced, and there is no evidence as to what inconvenience Sandbanks Telecomm will be put if it must provide the service from a different location.
- [40] Accordingly, the applicants do not meet the test for an interlocutory injunction.

Permanent Injunction

- [41] To obtain a permanent injunction a party must establish its legal rights which ordinarily can only be done through a final adjudication. If those rights are established the court may consider issues such as irreparable harm and balance of inconvenience in determining whether final injunctive relief is appropriate: *1711811 Ontario Ltd (Adline) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, at paras 79 – 80, quoting Groberman J.A. in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 at paras 27-28.
- [42] In *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 SCR 82 at para. 66, the Supreme Court set out the three-part test for a permanent injunction: a party is required to establish (1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court's discretion to grant an injunction.

- [43] As discussed above, many facts are in dispute and the court requires a complete evidentiary record, and perhaps a trial, to determine the merits of the applicants' position. It is simply premature to decide the issue of whether the respondent has wrongly terminated the Lease, which is inextricably linked to the broader dispute between the parties.
- [44] I have already found that damages are an adequate remedy for the applicants, and that the balance of inconvenience favours the respondent.
- [45] Further, the fact that the Lease may not be valid at all creates a potential legal impediment to enforcing it.

Conclusion

- [46] Accordingly, the motion for an injunction restraining PEVLCC 10 from evicting the applicants and preventing the applicants from entering and using the premises identified in the Lease is dismissed.
- [47] Should the parties be unable to agree on costs, the respondent may provide me with written submissions not exceeding 3 pages double-spaced, not including supporting materials, within 21 days of the release of these Reasons, and the applicants may respond in similarly limited submissions 14 days after the receipt of the respondent's submissions.

Paul B. Schabas J.

Date: February 08, 2021