Court of Queen's Bench of Alberta

Citation: Condominium Corporation No 0626935 v Stenzel, 2021 ABQB 733

Date: 20210913
Docket: 1703 04491
Registry: Edmonton

Between:

Condominium Corporation No. 0626935

Plaintiff

- and -

Natasha Stenzel and Richard Bourbeau

Defendants

Reasons for Decision
of
W.S. Schlosser, Master of the Court of Queen's Bench of Alberta

---

[1] This is a limitations issue on somewhat unusual facts. The lawsuit has to do with a structure built by a unit-owner on the top of a condominium building.

Facts

[2] In 2006, when the Defendants/Applicants were one-third owners of the company that owned a walk-up apartment building, they cut a hole through the roof of their top-floor apartment and installed a spiral staircase leading up to a den-loft balcony room which they had constructed. The room featured sliding patio doors that opened onto a rooftop patio with plexiglass railings. No development or building permits were issued by the City of Edmonton prior to construction of the rooftop structure.

[3] The apartment building became a condominium complex later that same year. The condominium plan was drawn up in May but the offending structure was not on it. The plan was registered at Land Titles in November. Nothing was done about the structure. A number of the condominium owners were supportive of it, or at least did not object to it, and an after-the-fact development permit was issued by the City in 2009.

[4] Roughly 10 years later, in August, 2016, the Board met to discuss the situation. They commissioned an engineering report that showed that the structure exceeded the load-bearing capability of the roof, causing it to sag. On September 22, 2016, the Board passed a resolution to recover possession of the roof; being common property. They filed a Statement of Claim on October 21, 2016 to recover possession of the roof plus the remediation costs associated with returning the roof to its original condition.

[5] In June 2018, the City issued an Order to remove the rooftop addition. Five days later, the Condominium Corporation removed the addition; replacing the roof supports and restoring the area where the structure had been. The work was completed July 17, 2018.

[6] Now that the common property has been recovered, that part of the relief is moot. All that remains at issue is the expense of removal and remediation. The 2016 Statement of Claim seeks 'special damages' of up to $125, 000 plus interest and costs.

[7] The Defendants argue that it is too late for the special damages claim and that what remains of the lawsuit should be dismissed. The facts are a bit thin in places but not really in dispute.

Analysis

[8] Section 3(1)(a)(b) of the *Limitations Act* provides:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[9] We do not know what permission the Defendants may have had from the other two owners of the walk-up apartment building to build the roof structure before the building became a condominium. A new entity, the Condominium Corporation, came into being on registration of the plan. The Corporation was undecided about the rooftop structure, sometimes charging rent or condominium fees. We do not know precisely when the Board was appointed (s 10.1 of the current *Act* mandates appointment of an interim Board within 30 days of registration, but that subsection of the *Act* was not in force at the time). It appears that there was a Board in place in

2007, but the exact date is unknown. Regardless, the Board had the power and the duty to deal with the offending structure from the start.

The Path not Taken

[10] The fall of 2006 marks a fork in the road. One path would have been to seek to amend the condominium plan to include the roof top structure (and presumably to adjust the unit factors to take the extra space into account). The other path would have been to start a claim for a remedial action; essentially in the same terms as the claim issued in 2016.

[11] The Board did not take either path. It did not apply to amend the plan or demand that the structure be removed.

[12] The Corporation plainly knew that it had suffered an injury: either in terms of a structure that did not conform to the condominium plan, a trespass, or a breach of the by-laws. It knew that the injury was due to the conduct of the Defendants. There was indecision and vacillation on the part of the Board about whether to start a proceeding which would have been warranted from an objective perspective. ***Grant Thornton LLP v New Brunswick,*** 2021 SCC 31 at para 7.

[13] Section 3(5)(a) of the *Limitations Act* provides that the onus is on the Corporation that the proceedings were started in time.

[14] On these facts, the limitation for all except the recovery of land would have expired some time in late 2008 or possibly into 2009: roughly eight years before the action was started. The engineering report in 2016 that the structure exceeded the load-bearing capacity of the roof does not restart the clock. It merely provides evidence of damages in addition to those already suffered. This is not one of those situations described by the Institute of Law Research and Reform in their *Report for Discussion No. 4, Limitations* (at p 207) where a trivial or *de minimis* injury to property would not start the clock in the face of a significant latent (personal) injury that is not discovered until later.

[15] The structure had to be removed or approved by the Board. The time for dealing with this started at the earliest, with the registration of the condominium plan or, at the latest, from the appointment of the Board. If it was not approved, the structure would have had to be removed and the roof restored to its original condition. Whether this amounted to patching the hole in the roof or remediating the roof supports is really just a question of degree.

Continuing trespass

[16] The Plaintiffs argue that the claim is based on a continuing trespass and that the cause of action accrues day-to-day.

[17] Trespass is entry upon land without permission. We do not know whether the original owners granted permission. There is no evidence that the Condominium Corporation granted permission for a continuing encroachment, and at some points they seemed to tolerate it. As there is no evidence to the contrary, I am going to assume that there was never any formal approval given that later may have been withdrawn.

[18] The Plaintiffs cite: ***Truro (Town) v Archibald (1901***), 31 S.C.R. 380 (SCC), ***Earle v Martin***, [1998] N.J. No. 353 (Nfld. T.D.), ***Langille v Schwisberg,*** 2010 CarswellOnt 10561 (Ont S.C.J.), ***Williams v Mulgrave (Town),*** 2000 Carswell NS, 2000 NSCA 24 and ***Ghalioungui v***

Mississauga (City), 2005 CanLII 9333 (ON SC), for the proposition that there is continuing trespass as long as the offending structure remains. The failure to remove the structure constitutes a fresh cause of action that accrues daily.

[19] Only one Alberta case was cited, and it is to the contrary. In ***Schmidt v Twin Butte Energy Ltd***, 2012 ABQB 649 (at paras 37, 38) Master Laycock held that when the trespass is known from the beginning, the continuing existence of the trespass does not restart the limitations clock. Presumably, the continuing nature of the offence just goes to the measure of the damages.

[20] The Plaintiff argues that Master Laycock's decision is *per incuriam* and that I should not be persuaded by it.

[21] The Court referred the parties to Master Birkett's decision in ***L Egoroff Transport Ltd v Green Leaf Fuel Distributors Inc***, 2020 ABQB 360, which, to my mind, determines the issue. Despite Mr. Forgues' very able supplementary argument, I am satisfied that Master Birkett's analysis in the ***L Egoroff*** case should apply here as well. The limitation does not remain open so long as the trespass continues.

[22] There is another reason. Since the *Limitations Act* was passed in 2000, limitations are not cause-of-action based as they were under the predecessor *Act.* Currently, what is required is the coincidence of the three elements set out in s 3(1) of the *Act*. The *Act* requires reasonable knowledge of an injury, that the injury was attributable to the conduct of the Defendant and that a claim is warranted. The difference between this regime and a cause-of-action limitations regime may be illustrated with an example.

[23] A cause of action in contract runs from the breach. Damages, or knowledge of the damages is not required to complete the cause of action: see ***Costigan v Ruzicka,*** 1984 ABCA 234, 33 Alta LR (2d) 21(CA) and Perell and Engell: *Remedies for the Sale of Land*, 2nd ed, Butterworths at p 126 (and the cases cited there). The *Limitations Act* requires not only an injury to start the limitations clock but reasonable knowledge of the injury; all of which is two steps removed from what it would take to start the limitations clock for a contract action in a cause-of-action based limitations regime. While it may be theoretically correct to say that a cause of action in trespass accrues day-to-day, and while a cause of action is a prerequisite for a claim, this is not determinative of the time for an action under the present limitations regime. This approach, generally, is affirmed by the ***Weir Jones*** decision at paras 51 and 52.

[24] In my view, the situation is analogous to a continuing business interruption loss. Master Birkett in ***L Egoroff*** (at paras 54 and 136) affirms that each new day of damages does not restart the clock. I agree that the continuing nature of the trespass, which started in 2006, does not extend the claim for damages in an open-ended way until the trespass is abated. What matters is the coincidence of the three elements in s 3 of the *Limitations Act*, all of which were present in 2006.

[25] This leaves us with the argument that an action for the recovery of land is subject to a 10-year limitation period. Sections 3(6), (7) and (8) of the *Limitations Act* provide:

> 3(6) The re-entry of a claimant to real property in order to recover possession of that real property is effective only if it occurs prior to the end of the 10-year limitation period provided by subsection (1)(b).

> (7) If a person in possession of real property has given to the person entitled to possession of the real property an acknowledgment in writing of that person's title to the real property prior to the expiry of the 10-year limitation period provided by subsection (1)(b),
>
> > (a) possession of the real property by the person who has given the acknowledgment is deemed, for the purposes of this Act, to have been possession by the person to whom the acknowledgment was given, and
> >
> > (b) the right of the person to whom the acknowledgment was given, or of a successor in title to that person, to take proceedings to recover possession of the real property is deemed to have arisen at the time at which the acknowledgment, or the last of the acknowledgments if there was more than one, was given.
>
> (8) If the right to recover possession of real property first accrued to a predecessor in title of the claimant from whom the claimant acquired the title as a donee, proceedings to recover possession of the real property may not be taken by the claimant except within 10 years after the right accrued to that predecessor.

As noted above, this action was started just under 10 years after the condominium plan was filed with Land Titles.

[26] The crucial issue is whether a claimant can tack on damages to a claim for recovery of land when those damages could have been claimed earlier by a remedial action.

[27] Land is defined by the *Land Titles Act* as follows:

> 1(m) "land" means land, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether the estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto and trees and timber thereon, and mines, minerals and quarries thereon or thereunder

The definition does not include damages (or damages in lieu of matters mentioned in the definition).

[28] From an owner's perspective, the failure to take steps to recover real property within 10 years, when another has occupied it (without the owner's permission) in an open, continuous, and notorious way, may result in title going to the adverse possessor. See ***Verhulst Estate v Denesik***, 2016 ABQB 668 per Shelley J (affirming the Master) for a good review of this statutory claim.

[29] It is important that the distinction between *in rem* and *in personam* claims be recognized in this context. The *Limitations Act* notes the distinction by making an *in rem* claim for the recovery of land an exception to the rule that the time for an action would otherwise be proscribed after two years. However, the ability to claim for the recovery of land does not resurrect an expired claim for *in personam* relief that expired long ago.

[30] It was incumbent on the Board to decide about the rooftop structure right from the start; either by approving it and amending the condominium plan, or by denying it and acting. The Board's decision to take action to get the land back, and thereby avoid a claim for adverse possession, does not entitle them to add on relief associated with roof remediation that could have been claimed much earlier. Calling the cost of remediation special damages does not detract from the fact that this is an *in personam* claim that has expired. The *in rem* portion of the claim is now moot, although it was not when the action was started.

[31] The Court invited the parties to address section 69 of the *Law of Property Act*, RSA 2000, c L-7, which provides:

> 69(1) When a person at any time has made lasting improvements on land under the belief that the land was the person's own, the person or the person's assigns
>
> > (a) are entitled to a lien on the land to the extent of the amount by which the value of the land is enhanced by the improvements, or
> >
> > (b) are entitled to or may be required to retain the land if the Court is of the opinion or requires that this should be done having regard to what is just under all circumstances of the case.
>
> (2) The person entitled or required to retain the land shall pay any compensation that the Court may direct.
>
> (3) No right to the access and use of light or any other easement, right in gross or profit a prendre shall be acquired by a person by prescription, and no such right is deemed to have ever been so acquired.

That statutory cause of action is preserved by section 3(4) of the *Limitations Act* and might have allowed the Court to weigh in on compensation to either side. Both sides have denied that it is applicable.

Disposition

[32] The application is allowed. What remains of the action is dismissed. The parties may speak to costs if they are not agreed.

Heard on the 17th day of June, 2021. Additional written submissions June 25 (Applicant), July 9 (Respondent) and August 30 (Applicant and Respondent).

Dated at the City of Edmonton, Alberta this 13th day of September 2021.

W.S. Schlosser
M.C.Q.B.A.

Appearances:

Chris Forgues
C.E. Forgues & Company
for the Plaintiff

Jason Thomas
Hladun & Company
for the Defendants