

Court of Queen's Bench of Alberta

Citation: Hall v. Tieken Estate, 2008 ABQB 646

Date: 20081020
Docket: 0803 08722
Registry: Edmonton

Between:

Brett Douglas Hall and Joan Marie Hall

Applicants

- and -

The Estate of John Tieken

Respondent

- and -

Penn West Petroleum Ltd.

Third Party
(Not Appearing)

**Reasons for Judgment
of the
Honourable Mr. Justice J.J. Gill**

Summary

[1] The Applicants seek a declaration that they are entitled to all rental payments under certain surface leases (the surface leases). The Applicants also seek orders directing all monies previously paid by the Third Party Penn West Petroleum Ltd. under the surface leases be paid to them by the recipients of such funds.

Background

[2] In 1989 Marathon Realty Co. Ltd. (Marathon) sold to Wayne and Brenda Cooper lands legally described as:

THE NORTHWEST QUARTER OF SECTION FIFTEEN (15)
TOWNSHIP FORTY-NINE (49)
WEST OF THE FIFTH MERIDIAN
CONTAINING 65.2 HECTARES (161 ACRES) MORE OR LESS

EXCEPTING THEREOUT ALL MINES AND MINERALS AND THE RIGHT
TO WORK THE SAME
(the “lands”)

[3] The offer of purchase excluded and reserved to Marathon for a period of 25 years all right, title and interest in Marathon’s lease interest as lessor in the surface leases on the lands. Marathon filed a caveat at the time to protect its interest under the surface leases.

[4] In 1991 Marathon assigned its interest under the surface lease interests to Mr. Tieken (the “assignment”) and discharged the caveat it had registered on the lands.

[5] Since that time, Mr. Tieken, or his estate (the Respondent), has received the rental payments under the surface leases.

[6] On June 19, 2001 the Applicant Brett Hall (Hall) entered into a real estate purchase contract (the “Agreement for Sale”) with the Vendor Brenda Cooper, to purchase the lands.

[7] The Agreement for Sale was:

“For the property in Alsike, Alberta subject to the reservations and exceptions appearing in the existing Certificate of Title or being described in Schedule ____ in which Schedule ____ shall constitute part of this agreement”.

[8] There was no schedule to the Agreement for Sale.

[9] At the time of sale to Hall there was no caveat on title relating to the assignment of the leasehold interests by Marathon by John Tieken.

[10] Since purchasing the lands on the 14th of August, 2001, the Applicants have not received the payments under the surface leases other than some portion of the payments for the 2007 year.

[11] The Applicant Hall was examined on Affidavit on September 22, 2008. He recalled meeting twice with the Vendor, Brenda Cooper. At the first meeting a real estate agent was also present. He recalls the real estate agent advising him that there was one well on the property and that the lease payments from that lease were being paid to a party other than the vendor.

[12] He testified as follows:

Q Okay, prior to the closing of the transaction, did the real estate agent for the vendor only mention one time that the surface lease rental income did not come with the property?

A She didn't say that it didn't come. She said it was being paid to somebody else.

[13] He also testified that:

- a) he was never asked to acknowledge that he was purchasing the property knowing that he had no right to this surface lease rental income;
- b) at no time did he have negotiations with the vendor's lawyer with respect to the surface lease rental income;
- c) at no time prior to the closing of the transaction did he ever contact Penn West nor did anybody contact Penn West on his behalf;
- d) at the second meeting with the vendor he did not discuss the terms of the offer.

The Issues

1. Are the Applicants entitled to the payments under the surface lease?
2. Are the Applicants entitled to a remedial order under s. 3(1) of the *Limitations Act*, RSA 2000, c.L-12?

The Applicants' Submissions

[14] The land was transferred to the Applicants without an agreement that the assignment would be binding upon the Applicant and without a caveat being registered against title identifying the existence of the assignment. In the absence of an agreement or a caveat registered against title, ss. 62(1) and 203 of the *Land Titles Act*, RSA 2000, c. L-4 render the assignment not being binding upon the Applicants.

The Respondent's Submissions

[15] The Applicant is bound by the unregistered assignment of the surface leases, as the circumstances essentially amount to fraud under section 203 of the *Land Titles Act*. As a result, the Applicant took the title to the property subject to the unregistered assignment of surface lease.

[16] The fact that the Applicant Hall remained silent and never indicated in writing or otherwise that the purchase of the lands was not subject to the assignment despite being advised that a third party was receiving the payments under the surface leases, amounts to fraud under section 203 of the Act. The Respondent refers to the case of *1198952 Alberta Ltd. v. 1356472 Alberta Ltd.* 2008 ABQB 386.

[17] If there is not fraud under the *Land Titles Act*, the Respondent submits that under section 3(1) of the *Limitations Act* the Applicants are not entitled to a remedial order for any period beyond August 2006, two years before this action was commenced. The Respondent points to the fact that the Applicants had knowledge that the surface payments were being paid to a third party at the time they purchased the lands in August 2001.

[18] In response the Applicants submit that the action seeks a declaration and is not a remedial order. As a result 3(1) of the *Limitations Act* does not apply. In support it refers to the case of *Brennenstuhl v. Trynchy*, [2002] A.J. No. 582, 2002 CarswellAlta 1857 (QB).

[19] The Applicants additionally submit that a declaration runs from the time of declaration and therefore the two year period under the *Limitations Act* would run from the time that the Court makes the declaration.

Analysis and Decision

[20] The Respondent acknowledges that if the Applicants have not participated or colluded in a fraud as referred to in s. 203 of the *Land Titles Act*, they are entitled to a declaration confirming their entitlement to the payments under the surface leases.

[21] The relevant sections of the *Land Titles Act* provide:

Certificate as evidence of title

62(1) Every certificate of title granted under this Act (except in case of fraud in which the owner has participated or colluded), so long as it remains in force and uncanceled under this Act, is conclusive proof in all courts as against Her Majesty and all persons whomsoever that the person named in the certificate is entitled to the land included in the certificate for the estate or interest specified in the certificate, subject to the exceptions and reservations mentioned in section 61, except so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land.

Protection of person accepting transfer, etc.

203(1) In this section,

- (a) “interest” includes any estate or interest in land;
- (b) “owner” means
 - (i) the owner of an interest in whose name a certificate of title has been granted,
 - (ii) the owner of any other registered interest in whose name the interest is registered, or
 - (iii) the caveator or transferee of a caveat in whose name the caveat is registered.

(2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,

- (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or
- (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.

(3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.

[22] The issue of fraud arose in *Darnley v. Tennant* 2006 ABQB 575. At paragraphs 30 and 31, Mr. Justice Slatter addressed the concept of “fraud” under the *Land Titles Act*:

¶ 30 The *Land Titles Act* does not define ‘fraud.’ The outer boundaries of the concept are established:

- (a) Fraud includes deceit and dishonesty and other forms of common law fraud;
- (b) Fraud does not include mere knowledge of an unregistered interest, even when combined with the knowledge that registration will defeat that interest: s. 203(3); *Holt Renfrew & Co. v. Henry Singer Ltd.* (1982), 37 A.R. 90, 20 Alta. L.R. (2d) 97 (C.A.).

Within these broad boundaries, the courts have not attempted to define fraud. It has been said that fraud requires ‘something more’ than mere notice, amounting to injustice, dishonesty, or inequity: *Holt Renfrew, supra; Boulter-Waugh & Co. v. Phillips*, [1919] 1 W.W.R. 1046, 58 S.C.R. 385, 46 D.L.R. 41.

¶ 31 The question, then, is whether the conduct of the Applicant amounts to “something more” than mere notice, which could amount to fraud within the meaning of the *Act*.

[23] In this case we have the following evidence:

- (a) before the sale the Applicants had knowledge that the payments under the surface leases were being paid to a third party;
- (b) in the purchase contract the Applicants agreed that he was buying the lands “subject to the reservations and exceptions appearing in the existing certificate of title”. Those reservations and exceptions did not include a caveat relating to the assignment; and
- (c) there was no agreement with the Mr. Tieken or the vendor relating to the assignment.

[24] The Respondent points to the fact that the Applicants remained silent and never indicated either verbally or in writing that he did not intend to be bound by the payments to the third party. It is suggested that the Applicants left the impression that he would be bound.

[25] The Respondent referred to the decision of *1198952 Alberta Ltd. v. 1356472 Alberta Ltd.*, 2008 ABQB 386. In that case Mr. Justice Nielsen found at para. 39:

...the additional element as referred to in ‘*Holt Renfrew*’ exists in this case and the Respondents in each of the applications before this Court cannot rely on s. 203 of the *Act* to defeat the unregistered leasehold interests of the Tenants.

[26] That case is clearly distinguishable as Mr. Justice Nielsen made a finding of fact (at paragraph 34) that the purchase was subject to the leases, including unregistered ones, and that the purchaser agreed to this when purchasing the property.

[27] In this case there is no such agreement. The offer of purchase specifies that only the reservations or exceptions that accepted by the Applicants are those appearing on title.

[28] In this case there is evidence that the Plaintiff had knowledge of an unregistered interest ie: that a third party was receiving the payments under the surface leases. But mere knowledge by itself does not constitute fraud under s. 203 of the *Land Titles Act* (even when combined with the knowledge that registration will defeat that interest).

[29] There was no additional conduct by the Applicants that amounted to ‘something more’ than mere notice and amounting to injustice, dishonesty, or inequity.

[30] I find therefore that the Applicants have not participated or colluded in a fraud under section 203 of the *Land Titles Act*, and are entitled to a declaration of entitlement to the payments under the surface leases.

Limitations Act

[31] The Applicants also seek direction that all surface rental payments made to the Respondent since August 14, 2001 be paid to them.

[32] The Respondent points to the evidence that the Applicants knew before, or at the time of, the land purchase that the payments under the surface lease were going to a third party and submits that section 3(1) of the *Limitations Act* restricts the rights of the Applicants to a remedial order for reimbursement of payments to the 2 year time period before the lawsuit was commenced (ie: from August 2006).

[33] Section 3 of the *Limitations Act* provides:

3(1) Subject to section 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.

...

- (3) For the purposes of subsection (1)(b),

- (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;
- (b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;
- (c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;
- (d) a claim in respect of a proceeding under the Fatal Accidents Act arises when the conduct that causes the death, on which the claim is based, occurs;
- (e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever first occurs;
- (f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.

[34] The Respondent submits that s. 3(1) of the *Limitations Act* does not apply in this case as this action is an application for a declaration. In support it refers to the Court of Queen's Bench case of *Brennenstuhl v. Trynchy*, which was also a case involving declaratory relief.

[35] Mr. Justice Murray concluded that the basic thrust of the Statement of Claim in that case was one of declaratory relief and as such it fell within s. 1(i) of the *Limitations Act* and therefore no limitation period applied. Section 1(i) provides:

1 (i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes

- (i) a declaration of rights and duties, legal relations or personal status,...

[36] In coming to that conclusion he referred to Report No. 5 dated December 1989 of the Institute of Law Research and Reform concerning limitation periods. At page 53 it stated:

It will be a question to be decided in the particular case where relief supplementary to a declaration comes within the definition of a remedial order and hence within the scope of the new Alberta Act.

[37] In this case, the Applicants are seeking a declaration concerning entitlement to rental payments and a direction that the rental payments for a period commencing August 14, 2001 be paid to them. The fundamental purpose of this action is to get the monies that were paid under the surface leases repaid. The declaration of rights is a mere preliminary step. As a result, I find that the Applicants' action for return of the monies falls within the definition of remedial order and is subject to the *Limitations Act*.

[38] The Applicants also argue that the limitation period should run from the time that a declaration is made by this Court. Sections 2 and 3 of the *Limitations Act* set out the time from which a limitation is to run. The relevant section in this case is s. 3(1)(i) – two years after the date on which the claimant first knew, or in the circumstances ought to have known, that the injury for which the claimant seeks a remedial order had occurred.

[39] In this case it is that the Applicants were aware in August of 2001 that the payments under the surface lease was being paid to a third party. As a result, the limitation period runs from the time that they purchased the property in August 2001 as this is the date on which the Applicants first knew or in the circumstances ought to have known that they had a claim.

[40] I therefore find that the *Limitations Act* restricts the Applicants' recovery to those payments for the two year period prior to commencement of the action.

Summary

[41] The Applicants are entitled to the payments under the surface leases from August 2006 and the Court directs the recipients of the funds to pay the monies to the Applicants.

Costs

[42] If the parties cannot agree on costs , they can speak to them within 45 days.

Heard on the 3rd day of October, 2008.

Dated at the City of Edmonton, Alberta this 17th day of October, 2008.

J.J. Gill
J.C.Q.B.A.

Appearances:

Sydney A. Sabine
Duncan & Craig LLP
for the Applicants

Shauna N. Finlay
Fraser Milner Casgrain LLP
for the Respondent