In the Court of Appeal of Alberta

Citation: Liu v Hamptons Golf Course Ltd., 2017 ABCA 303

Date: 20170922
Docket: 1701-0118-AC;
1701-0136-AC
Registry: Calgary

Between:

Jiamei Liu

Respondent
(Plaintiff)

- and -

Hamptons Golf Course Ltd.

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Michelle Crighton

Memorandum of Judgment

Appeal from the Orders by
The Honourable Madam Justice K.D. Nixon
Dated the 29th day of March, 2017
Filed on the 5th day of April, 2017 and
Dated the 9th day of May, 2017
(Docket: 1601-03940)

Memorandum of Judgment

The Court:

[1] These two appeals concern an injunction restraining the appellant from using the 10th hole of its golf course, which was granted to reduce the risk of golf balls entering the respondent's property.

Facts

[2] The respondent is the co-owner of a property adjacent to the 10th fairway of the appellant's golf course. Errant golf balls have been entering the respondent's property since she purchased it in 2014. She estimates over 100 golf balls enter her property per season. Some of those golf balls arrive with sufficient velocity and height to break windows and glass doors. The risk presented by the golf balls has prevented the respondent and her family from using the backyard during the golf season. As a result, she obtained an injunction limiting the use of the 10th hole of the golf course until corrective action was taken.

[3] The golf course in question is now owned by the appellant. There were five restrictive covenants registered against the titles to the adjoining houses on November 29, 1995 by the original developer of the subdivision and the golf course, at which time the developer owned all of the lands. Four are relevant:

> *Restrictive covenant 951 273 692* (the "development agreement" covenant). This restrictive covenant was registered to give notice of the provisions of a development agreement between the developer and the City of Calgary. It provides, in part:
>
> > 3. The Developer, at no expense to the City of Calgary and to the satisfaction of the City of Calgary Engineer, shall construct a 1.5 meter high chain link fence, as shown on the construction drawings approved by the Engineer. Inside the property line of the Lots described in the Schedule attached hereto as Schedule "B" (the "Schedule "B" Lots") and the owner or owners from time to time of each of the Schedule "B" Lots shall not permit any fence to be constructed, erected or replaced on such Schedule "B" Lot(s) unless the same complies with the aforesaid specifications. The location of the fence shall be maintained in the location in which it was originally installed by the Developer.
>
> *Restrictive covenant 951 273 695* (the "building scheme" covenant). This restrictive covenant imposed a building scheme on the subdivision, including

architectural guidelines, to control the general character of the neighbourhood. It provides in part:

> 5. The construction of fences is prohibited except for chain link fences and which may be constructed and maintained on the property lines common to the lots.

Restrictive covenant 951 273 697 (the "golf ball" covenant). This restrictive covenant confirmed that some of the residential lots were adjacent to the golf course. It described the golf course and those residential lots as the "Dominant Tenement", and also described those residential lots as the "Servient Tenement" (all of them being then owned by the developer). It dealt more specifically with the passage of golf balls onto the residential lots:

> 1. The Developer, for itself and its successors in title, shall not erect, construct, build, install or maintain upon the Servient Tenement any structure, screen or netting of any type, barrier or the like for the purpose of preventing golf balls or golf equipment from passing over or entering upon the Servient Tenement so as not to interfere with or degrade the architectural elements of the golf course and the Dominant Tenement and the residences constructed thereon.
>
> 2. The Developer, for itself and its successors in title, hereby acknowledges that the Servient Tenement is located in part adjacent to a golf course and which is part of the Dominant Tenement and that certain risks to both property and person are attendant with the game of golf and the Servient Tenement and further acknowledges that the residences constructed thereon may from time to time be subject to golf balls straying onto the Servient Tenement.
>
> 3. The Developer, for itself and its successors in the title to the Servient Tenement, hereby waives and relinquishes any claims which it may have as against the owner, lessee, licensees, invitees, members, users or occupiers of the golf course from time to time of any claims which the Developer or its successors in title to the Servient Tenement may have as a result of activities carried on the golf course.
>
> 4 The Developer, for itself and for its successors in title to the Servient Tenement, acknowledges that from time to time golf balls and golf equipment may from time to time trespass upon the Servient Tenement and the Developer, for itself and for its

> successors in title hereby agrees to assume and be responsible for any loss, damage or personal injury which may be occasioned to or suffered by the Servient Tenement or the owners, lessees, licensees, invitees, users or occupiers thereof as a result of activities carried on upon the golf course and hereby agrees to insure itself as against such loss, damage or personal injury and specifically waives and relinquishes any claims it might have as against the owner, lessee, licensees, invitees, members, users or occupiers of the golf course.

Restrictive covenant 951 273 698 (the "clubhouse" covenant). This restrictive covenant is very similar to covenant 951 273 697. It specifically deals with the point that "from time to time" activities such as golf tournaments, banquets, wedding receptions, and the like would be held in the golf course clubhouse. The Servient Tenement covenanted to tolerate noise, traffic, parking, odours, and other consequences of those activities. It also repeats, *verbatim*, clauses 1-4 of the golf ball covenant.

The respondent acknowledges that these restrictive covenants are registered against her title, and she does not dispute that she is bound by them. Whether she had "notice in fact" of the risk and had implicitly "waived" it are not determinative, as the covenants run with the land.

[4] A few observations may be made about these restrictive covenants:

- The golf course property is not itself a "servient tenement" under any of them.[1]
- The development agreement covenant only requires the "Developer" to build fences, and only requires the "Servient Tenement" to maintain them. It does not appear to require the owner of the golf course to do anything, as the golf course property is not one of the properties listed in the covenant.
- The golf course property is not covered by the building scheme covenant, which does not appear to limit the construction of fences on the golf course property.
- Clause 1 of the golf ball covenant prevents the construction on the Servient Tenement of nets or barriers. It does not, on its face, appear to prevent the construction of such nets and barriers on the golf course itself.
- Clause 2 of the golf ball covenant is primarily a recital, as it does not itself contain any express covenants. It "acknowledges" the risks associated with living adjacent to a golf course, including that golf balls may stray "from time to time".

[1] Counsel suggested that the description of the golf course in some of the covenants as "lot 4" is in error, as this part of the course is actually lot 9, but nothing turns on that.

- Clause 3 of the golf ball covenant is the primary operative clause: it waives "any claims" arising from the "activities carried on the golf course". It recognizes that those claims may arise "from time to time", but the reference arguably relates to "any claims", not necessarily just those that may arise from "golf balls straying . . . from time to time".
- Clause 4 of the golf ball covenant contains both a recital and a covenant. It too "acknowledges" the possibility of golf balls entering upon the Servient Tenement, and finishes with the covenant that the Servient Tenement will be responsible for and will insure against any damage that might result.
- The clubhouse covenant also uses the phrase "from time to time", when referring to weddings and other festivities. That would appear to recognize that weddings would occur on an irregular basis, rather than being an attempt to limit the number of weddings that could be held.

The clauses providing that the Servient Tenement must tolerate straying golf balls, when coupled with the prohibition on installing any netting to mitigate that risk, is what has generated this litigation.

[5] The parties disagree fundamentally on the interpretation of the covenants, not only as to what they cover but as to who or what is bound by them. During the hearing, it was noted that while the covenants require the Servient Tenement to insure against the risk and relinquish any claims, they do not include indemnification of the Dominant Tenement for claims by third parties. Similarly, while presumably some sort of barrier might resolve the specific concern of the respondent relative to straying golf balls, and while both parties profess a desire to be neighbourly about the matter, both seem to have been inclined to settle into dogmatism in their reading of the covenants when the legal situation was to their advantage.

The Proceedings in Chambers

[6] The respondent commenced proceedings by statement of claim seeking a permanent injunction against the appellant, plus damages. She named the appellant as defendant, but she did not name or serve any of the other owners of lots covered by the restrictive covenants. An application was brought on April 1, 2016 for an interim injunction, and when (through miscommunication) the appellant did not appear, an injunction was granted. That injunction was subsequently set aside. It was directed that the claim should proceed "in the ordinary course under the Rules of Court", and that the application for an injunction be set over to Special Chambers.

[7] After the filing of further material and cross-examination on the affidavits, the matter was set down for argument in Special Chambers on March 6, 2017. The appellant raised a number of procedural objections: a) a permanent injunction should not be granted summarily, but only after a trial, b) the respondent was relying on hearsay evidence, and c) the other owners of the Servient

Tenement had not been joined or served. The appellant defended on the basis that the restrictive covenants were a complete bar to the claim; no attempt was made to disprove the underlying facts alleged by the respondent. The appellant's position is that the value of the Servient Tenement lies in the views of the golf course, which are not to be obstructed by nets or fences, and that it is implicit that the rear yards may not be used by the residents or their children if they are not prepared to accept the risk of errant golf balls.

[8] In oral reasons given on March 29, 2017, the chambers judge rejected the procedural points. She noted that the previous order had specifically directed that the issue of a permanent injunction be set down in Special Chambers, and that the appellant had fair notice of the remedy requested. Further, the issue was suitable for summary disposition because there were no disputed issues of fact or credibility or other factors that would require a trial. The precise number of golf balls entering the respondent's property was not relevant, because it was clear that a significant number did so. Speculation that expert evidence might be led at trial about the number of golf balls was not sufficient to prevent summary disposition.

[9] The chambers judge accepted the respondent's evidence that a large number of golf balls were entering her property, damaging windows, and preventing her and her family from using the backyard. Relying on cases like ***Cattell v Great Plains Leaseholds Ltd.***, 2008 SKCA 71, [2008] 7 WWR 577; ***Segal v Derrick Golf & Winter Club*** (1977), 6 AR 6, [1977] 4 WWR 101; ***Carley v Willow Park Golf Course Ltd.***, 2002 ABQB 813, 6 Alta LR (4th) 54; and ***Schneider v Royal Wayne Motel Ltd.*** (1995), 27 Alta LR (3d) 18, 164 AR 68 (PC), the chambers judge held that having golf balls stray onto adjoining property constituted a private nuisance if the damage caused or the danger posed by the golf balls was serious and substantial.

[10] With respect to the waivers in the restrictive covenants, the chambers judge recognized that an effective waiver would be a complete defence to the claim. She held, however, that the wording of the restrictive covenants was not sufficiently clear to excuse the kind of nuisance that was being experienced. The wording "straying" and "from time to time" found in the golf ball covenant meant "occasionally, on occasion, or at intervals." A trial was not required to determine the meaning of those phrases. She concluded that the volume of golf balls entering the respondent's property extended beyond the proper scope of the wording used. As such, it amounted to a nuisance, and was not something permitted by the restrictive covenant.

[11] The chambers judge did not find the absence of the other owners of the Servient Tenement from the litigation to be an impediment to granting an injunction, ruling that the appellant "did not explain why the issue of interpretation of the scope of the restrictive covenants requires the involvement of other property owners whose property is not being subjected to a nuisance". The Court was able to fashion a remedy in the absence of those other property owners, since there was no application to modify the restrictive covenants under s. 48(4) of the *Land Titles Act*, RSA 2000, c. L-4.

[12] Whether to grant an injunction depended on a balancing of interests. The chambers judge concluded that the appellant had provided "no evidence" that it would be onerous to make changes to the golf course that would prevent the problem and be compliant with the restrictive covenants. Further, there was no evidence that the appellant had taken the respondent's complaints seriously, or tried to remedy them. The appellant had not provided any evidence that closing one of the holes on the golf course (leaving only 17 holes operational) would have any effect on its operation. She granted an injunction which provided:

> 1. The Application is granted, such that the Respondent is enjoined from permitting its members and guests to hit golf balls into the Plaintiff's property in numbers exceeding the number of balls that enter the properties of the neighbours and from permitting hard driven balls onto the Plaintiff's property that are capable of causing injuries to persons or significant damage to property.

The implementation of the injunction was suspended for six weeks (until May 11, 2017), to allow the golf course to "consider, test, and implement changes that would permit it to comply with the injunction". The appellant appealed the injunction: appeal 1701-0118-AC.

[13] On May 5, 2017 the appellant applied to the chambers judge for "advice and directions". Specifically, it asked for an order directing it to "install and erect permanent netting" to prevent golf balls from entering the respondent's property. Alternatively, it requested a further suspension of the injunction to allow time for it to study and assess the problem. The chambers judge rejected that application. She held that this was essentially a request to modify the restrictive covenants, and that the court was not prepared to approve solutions proposed by the appellant. A further suspension of the injunction was also denied, because the appellant had known about the problem for a long time, had done nothing about it, and had done little since the injunction was granted. The appellant also appealed that order: appeal 1701-0136-AC.

Issues on Appeal

[14] The appellant argues that the decisions below reflect a number of reviewable errors, including:

(a) Finding facts and drawing inferences unsupported by the record, and failing to recognize that there were material facts in dispute that required a trial. A permanent injunction should not have been granted summarily;

(b) A permanent injunction should not have been granted since notice was not given to the owners of other property encumbered by the restrictive covenants;

(c) Incorrectly interpreting the restrictive covenants in finding that they did not bar a permanent injunction;

(d) Granting an injunction reliant for implementation and enforcement on uncertain and subjective terms;

(e) Failing to give effect to the appellant's proposal to install netting which would protect the safety interests of the respondent without requiring closure of the 10th hole, or alternatively in failing to give the appellant more time to explore other options.

It is not necessary to resolve all of these issues in order to dispose of these two appeals.

Proceeding Summarily

[15] Litigation can be disposed of summarily when the court is able to reach a fair and just determination on the merits using a summary process. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: ***Hryniak v Mauldin***, 2014 SCC 7 at para. 49, [2014] 1 SCR 87. In principle, a permanent injunction can be granted summarily when these conditions are all met.

[16] In this case there was some uncertainty between the parties as to whether the special chambers application was to consider an interlocutory injunction or a permanent injunction, although it was clear that the appellant would oppose both based on the same arguments. The chambers judge purported to grant a permanent injunction, although even it contemplated the appellant returning for advice and directions.

[17] The biggest problem was perhaps a failure to focus on the fact that the test for an interlocutory injunction and a permanent injunction differ in some important respects***: Irving Oil Ltd. v Ashar***, 2016 ABCA 15 at paras. 17-8, 609 AR 388; ***1711811 Ontario Ltd. v Buckley Insurance Brokers Ltd.***, 2014 ONCA 125 at paras. 77-9, 371 DLR (4th) 643; ***Cambie Surgeries Corp. v British Columbia (Medical Services Commission)***, 2010 BCCA 396 at paras. 27-8, 323 DLR (4th) 680; ***NunatuKavut Community Council Inc. v Nalcor Energy***, 2014 NLCA 46 at paras. 60-4, 60 CPC (7th) 246. Since an interlocutory injunction is, by definition, only in place until trial, it involves a consideration of the prospect of irreparable harm occurring before trial, and the balance of convenience. On the other hand, before a permanent injunction can be granted, whether summarily or after trial, the plaintiff must fully prove its rights; demonstrating a "serious issue to be tried" is not sufficient. Once it has conclusively established its rights, the plaintiff must also demonstrate that it is entitled to the equitable remedy of a permanent injunction.

[18] While there are clearly some factors that are relevant to deciding both if an interlocutory injunction should be granted, and to deciding if the plaintiff is entitled to equitable relief after trial, the two tests are distinct. Granting a permanent injunction does not truly involve a "balancing of interests" as the reasons below suggest.

[19] As this dispute must be remitted back to the trial court, it is not necessary to say anything more about the appropriate procedures that should be followed going forward.

Failure to Give Notice to Other Owners

[20] Restrictive covenants are an unusual type of agreement. They are not just binding on those who enter into them, but they are also binding on successors in title of the original covenantors. They are, as a result, registrable against titles under the *Land Titles Act*, and the covenants "run with the lands".

[21] The provisions of a restrictive covenant imposing a building scheme are both enforceable by and enforceable against all of the property owners bound by the covenant. To illustrate, in the building scheme covenant and the golf ball covenant, all of the residential lots are part of both the Dominant Tenement and the Servient Tenement. They can, for example, enforce the architectural guidelines found in the covenant, but they are also obliged to comply with those architectural guidelines themselves.

[22] Since all of the owners of lots bound by the covenants are parties to those agreements, it follows that they are all presumptively entitled to notice of court proceedings which will have the effect of modifying, discharging, interpreting, or enforcing the covenants: ***Vallieres v Vozniak***, 2014 ABCA 290 at para. 23, 5 Alta LR (6th) 28, 580 AR 326; ***Potts v McCann***, 2002 ABQB 734 at para. 12, 5 Alta LR (4th) 269, 325 AR 137. As noted in ***Potts v McCann*** at para. 14:

> . . . It is a fundamental principle of the *in personam* jurisdiction of the Court that the rights of parties are not taken away except on proper notice to them, which in court proceedings generally means that the interested parties must be served with court process. It is difficult to see what justification there ever was for removing restrictive covenants from properties without serving the other owners of properties encumbered by the covenant.

Ensuring that notice is given before rights are affected has been called a "salutary and important principle": ***National Commercial Bank Jamaica v Olint Corporation***, [2009] UKPC 16 at para. 13, 1 WLR 1405. Section 48(4) of the *Act*, which permits the modification of restrictive covenants, specifically engages the interests of all those who are "principally interested in the enforcement of the condition or covenant". There may be exceptional cases where the interests of all of the owners are not impacted, but the general rule is that notice must be given to all.

[23] ***Vallieres*** and ***Potts*** concerned applications to discharge restrictive covenants, but the same principles apply when those covenants are to be modified, interpreted or enforced. All of the owners have an interest in the outcome. For example, in this appeal the chambers judge adopted a particular interpretation of what would constitute a "private nuisance". The appellant proposes a different and much stricter definition. Likewise, the chambers judge adopted a particular interpretation of the phrase "from time to time" found in the covenants. The appellant proposes a

different interpretation. All of the owners have an interest in those issues, and may take a different view of which approach is correct. Some may agree with the appellant that preserving the view is the primary consideration. The wording of the injunction granted implies that none of the other neighbours are experiencing nuisances that exceed "straying beyond from time to time"; some of them may disagree. The other property owners bound by the restrictive covenant should have been given notice of these proceedings. That, in itself, is sufficient to set aside the orders granted, and refer the matter back for a rehearing on proper notice.

Enforceability of the Injunction

[24] Injunctions are serious matters. They are court orders, and accordingly a breach of an injunction is not merely a "breach of contract", but will generally amount to contempt of court. The importance of the precise wording of injunctions was discussed in ***Nova Scotia v Doucet-Boudreau***, 2003 SCC 62 at para. 97, [2003] 3 SCR 3:

> . . . The exercise of the court power to grant injunctions may lead, from time to time, to situations of non-compliance where it may be necessary to call upon the drastic exercise of courts' powers to impose civil or criminal penalties, including imprisonment . . . Therefore, proper notice to the parties of the obligations imposed upon them and clarity in defining the standard of compliance expected of them must be essential requirements of a court's intervention. Vague or ambiguous language should be strictly avoided . . .

Injunctions must be cautiously worded, and an injunction should not be granted unless it is capable of clear interpretation: ***Carey v Laiken***, 2015 SCC 17 at para. 33, [2015] 2 SCR 79. The parties cannot be expected to comply with uncertain or imprecise obligations where a breach is punishable in a quasi-criminal procedure. A court cannot enforce the impossible even against a wrongdoer: ***Broder Estate v Broder***, 2005 ABCA 442 at para. 22, 51 Alta LR (4th) 203, 376 AR 180.

[25] As previously noted, the injunction in this case provided:

> . . . the Respondent is enjoined from permitting its members and guests to hit golf balls into the Plaintiff's property in numbers exceeding the number of balls that enter the properties of the neighbours and from permitting hard driven balls onto the Plaintiff's property that are capable of causing injuries to persons or significant damage to property.

The appellant properly argues that this form of injunction is improper as it is incapable of enforcement and compliance.

[26] For one thing, requiring the appellant to calculate the "number of balls entering neighbouring properties" sets an impossible standard. Is the standard the average number of balls experienced by neighbouring properties, or that of the neighbouring property which receives the

most number of golf balls? What if it was shown that there is a neighbouring property that receives the same, or even more, stray golf balls? What constitutes a "hard driven" ball? How does one determine which balls are "capable" of injuries, and how much damage is "significant"? The original developer imposed this covenant on the Servient Tenement at the time that it owned both the Dominant and Servient Tenement. It is unreasonable to think that it was imposing on itself such a vague and imprecise obligation.

[27] The only way that the appellant could effectively comply with this injunction to "not permit its members" to drive balls onto the respondent's property would be to stop using the 10th hole as it is presently configured. That, however, is not relief to which the respondent is entitled: ***Cattell v Great Plains*** at paras. 8, 11, 19-20. Even the chambers judge recognized that the Servient Tenement had agreed to tolerate a certain amount of inconvenience and disruption caused by golfing activities. The form of the injunction granted represents an unreasonable exercise of the discretion to grant equitable remedies, and this form of injunction must be set aside.

[28] The chambers judge suspended the operation of the injunction for six weeks to allow the appellant to explore remedies. This suspension, coupled with the vagueness of the terms of the injunction, the ongoing obligation of the court to supervise injunctions, and the serious nature of injunctions, made it reasonable for the appellant to seek advice and directions on whether the identified solution would comply with the order granted by the court. Ongoing judicial supervision requires precision in the drafting of injunctions, but it also effectuates the right of the defendant to seek the court's direction on whether proposed solutions or activities are consistent with the injunction. In the absence of further guidance from the chambers judge, these appeals were inevitable.

Interpretation of the Covenants

[29] The restrictive covenants must be interpreted in context, and having regard to the expressed intent of the signatory. They were created by the original developer at the time when it owned all the lands. They are, in form, an agreement by the developer with itself, something that is expressly permitted by s. 68 of the *Land Titles Act.* The intent of the developer was obviously to limit resistance by the neighbouring property owners to the operation of the golf course. Since "reasonable" impacts on neighbouring property are not a tort, and therefore not actionable, the restrictive covenants must have been aimed at something more than that.

[30] As previously noted, it was inappropriate for the court to attempt to interpret various provisions of the restrictive covenants without giving all of the owners of the Servient Tenement notice of the proceedings. As such, further comment by this Court at this time would be inappropriate.

Conclusion

[31] In conclusion, appeal 1701-0118-AC is allowed, the injunction is set aside, and the matter is remitted back to the Court of Queen's Bench. Appeal 1701-0136-AC is moot. The parties are encouraged to pursue a reasonable solution to the underlying problem in a less adversarial context. If the respondent wishes to pursue this matter further, steps must be taken to give notice to the other owners of the Servient Tenement. If the appellant believes that the restrictive covenants preclude it from erecting barriers on the golf course itself that would eliminate or mitigate the risk created by golf balls entering the Servient Tenement, it can consider bringing a cross-application to modify one or all of the covenants. If a solution cannot be found, the litigation will have to be pursued in the normal course.

Appeal heard on September 11, 2017

Memorandum filed at Calgary, Alberta
this 22nd day of September, 2017

Watson J.A.

Slatter J.A.

Crighton J.A.

Appearances:

M.A. Lowenstein
for the Respondent

W.E.B. Code, Q.C. and A.M. Cooper
for the Appellant