COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Park v. 1096303 B.C. Ltd.*,
2023 BCCA 78

Date: 20230216
Docket: CA47549

Between:

Hyun-Joo Park and Heejoo Christina Park

Appellants
(Defendants)

And

1096303 B.C. Ltd.

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Hunter
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated May 26, 2021 (*1096303 B.C. Ltd. v. Park*, 2021 BCSC 960, New Westminster Docket S202418).

Counsel for the Appellants:	N.A. Mulholland J.M. Jutras
Counsel for the Respondent:	S. Johal N. Prihar
Place and Date of Hearing:	Vancouver, British Columbia January 19, 2023
Place and Date of Judgment:	Vancouver, British Columbia February 16, 2023

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Voith

Summary:

After the closing of a contract for purchase and sale of a property including a house, the buyer sued the sellers for breach of the warranty that the property would be in substantially the same condition at closing as it had been when the buyer viewed the property. The buyer claimed special damages for loss of value and specific expenses, but made no claim for lost rental income, nor were any material facts pleaded that the buyer intended to rent the property to a third party. The theory of the plaintiff was that the plaintiff's principal would have moved into the house with his family. The trial judge found the sellers had breached the contract of sale, but rejected the evidence of the buyer's principal that he would have occupied the house with his family. Instead, the judge concluded that the buyer would have rented the house to a third party, and awarded damages of $50,000 for lost rental income. The sellers appealed, submitting among other things that the pleadings provided no notice to them that a claim for lost rental income was being advanced, and the judge's conclusion that the buyer would have rented the property to a third party was speculative and contrary to the evidence of the buyer.

Held: Appeal allowed. Breach of contract was established, but the buyer failed to prove a loss that had been pleaded. The purpose of pleadings was to define the issues in the case and to give the defendant fair notice of the case to be met. The pleadings in this case gave no notice that a claim for lost rental income would be made. The sellers were unfairly disadvantaged by the failure of the buyer to raise the issue of renting the property in the pleadings and to make a claim for lost rental income. In addition, the judge's finding that the buyer would have rented the house to a third party was not reasonably supported by the evidence. The damages award is set aside and an order for nominal damages made in substitution.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] The purpose of pleadings is to define the issues and give the opposing party fair notice of the case they have to meet. This appeal requires consideration of the result when the plaintiff in a breach of contract case fails to plead the relief sought and the trial judge awards damages based on a theory of loss not advanced by the plaintiff.

[2] The respondent buyer purchased a property from the appellants (the "Property") under a contract that contained a warranty clause providing that the property would be in substantially the same condition at closing as it was when viewed by the buyer. Shortly before closing, the Property was vandalised to such an extent that the house on the Property was rendered uninhabitable. The parties

closed the transaction, but the buyer subsequently sued the sellers successfully for breach of contract.

[3] The loss claimed in the pleadings was loss of value of the property and various expenses alleged to have been caused by the vandalism, as well as expenses for alternate accommodation based on the theory that the principal of the respondent would have moved into the house following the closing of the transaction. The trial judge rejected the evidence of the plaintiff's principal that he would have moved into the house, but awarded damages on the theory that the plaintiff would have rented the house to a third party. This theory was contrary to the evidence of the plaintiff, and nothing in the pleadings would have alerted the defendants that this was the case they had to meet.

[4] In my opinion, it was not open to the respondent to recover damages for lost rental income without any allegation in the pleadings that this was the relief sought, and contrary to the evidence led by the respondent. No evidence was led as to the loss that was pleaded. The respondent plaintiff, not having proved its loss, should receive nominal damages only.

Background

[5] The contract for purchase and sale (the "Contract") was initially made between Mr. Jatinder Pal Singh Sidhu, the plaintiff company's principal, and the appellants on October 14, 2016. The purchase price was $2.45 million and the completion and possession date was October 31, 2017. Mr. Sidhu subsequently assigned the contract to the respondent company. The Property was a one-acre lot that contained a house in which one of the appellants, Ms. Hyun-Joo Park, was residing and was zoned as a single family residential property (the "House"). Mr. Sidhu purchased the Property with the intention of redeveloping it, an intention known to all parties.

[6] The Contract contained a subject clause to the effect that the Contract was subject to the buyer conducting a feasibility study of the subject property, satisfactory to the buyer, by November 30, 2016. The plaintiff removed the subject

clause on November 28, 2016, following which the plaintiff submitted its application for rezoning, nearly a year before the closing of the transaction.

[7] The Contract was prepared on the standard form of the BC Real Estate Association and the Canadian Bar Association (BC Branch). It included a warranty clause to the effect that the Property and all included items would be in substantially the same condition on the possession date as when viewed by the buyer. The date of viewing by the buyer is not specified and was in dispute, but the trial judge found that Mr. Sidhu had viewed the Property in mid-November 2016, prior to removing the subject clause. The trial judge found that at that time, the House was in fair condition, with worn carpeting, some water damage, and a shower that did not work. Under the terms of the Contract, the warranty clause survived the completion of the Contract. The judge concluded that the warranty clause was effective, a conclusion open to the judge in the circumstances.

[8] Ms. Park moved out of the House from June to October 2017. Towards the end of October, a few days before the completion date, the House was extensively vandalised, to the point where it was rendered uninhabitable. Mr. Sidhu was advised of the vandalism on October 28, 2017, but decided to complete the purchase of the Property on the closing date, October 31, 2017, without seeking an abatement of the purchase price. The appellants filed an insurance claim as a result of the vandalism, but discontinued the claim after the completion of the sale of the Property. Four weeks later, Mr. Sidhu advised the appellants that he was seeking compensation for the vandalism. On May 23, 2018, the respondent filed a Notice of Civil Claim for breach of contract.

[9] The Notice of Civil Claim recited the basic facts, asserted that the circumstances amounted to a breach of contract by the appellants, and it set out the following claim for damages:

> 15. The Defendants' breach of the Contract has caused the Plaintiff to suffer damages, loss and expense, including but not limited to the following:
>
> (a) Loss of value of the property;
>
> (b) Costs for renting additional accommodation;

(c) Cost of mortgage financing for an uninhabitable Property;

(d) Costs for fencing and securing the Property; and

(e) Other costs as they become known.

[10] The appellants denied liability and the case proceeded to trial. Both parties agreed that the claim was suitable for summary trial, and the trial judge proceeded accordingly. At the summary trial, the evidence consisted of affidavits from the parties, the transcript of Mr. Sidhu's examination for discovery, and cross-examination of Mr. Sidhu on his affidavit.

[11] Mr. Sidhu's evidence was that he had intended to live on the Property with his family after the closing. The claim for costs of renting additional accommodation related to the costs Mr. Sidhu would incur seeking new accommodation for himself and his family in light of the vandalism that had made the House uninhabitable. He agreed that his intention was to redevelop the Property and he had started the application process nearly a year before the completion of the Contract, but testified that he expected the redevelopment process to take two to four years. In the meantime, he intended to live in the Property with his family and pay rent to the respondent company.

[12] The trial judge did not accept this evidence. In cross-examination, Mr. Sidhu agreed that in the month or two prior to the completion date, he had completed the construction of what the trial judge characterized as a fine-quality, seven-bedroom, 5500 square foot home in Delta. He and his family began moving into the Delta home by September or October 2017, prior to the completion date on the Property. The Delta home is registered in the name of Mr. Sidhu and his wife, and they pay the mortgage. The trial judge, in reasons indexed at 2021 BCSC 960, concluded that Mr. Sidhu would not have moved into the House:

> [79] Considering those probabilities and what is reasonable in the circumstances, I agree with the defendants that it is unlikely that Mr. Sidhu and his family were going to rent the House from the plaintiff. It makes little sense that the Sidhu family would move twice in one or two months, and that they would move into an older smaller home that required repairs, when Mr. Sidhu had just built a very nice large home that would accommodate his family. Further, the evidence establishes that the Sidhu family (and not just

> Mr. Sidhu's son and daughter-in-law) had moved into the Delta Home prior to the vandalism taking place. Three and half years later, the family is still all living together in the Delta Home despite that Mr. Sidhu, his wife, and two adult children could have moved to other homes that Mr. Sidhu has since built, purchased and rented out. Further, the Delta Home is registered in the name of Mr. Sidhu and his wife and not his son. I find that it is unlikely Mr. Sidhu and his family would have rented the House from the plaintiff.

[13] The trial judge went on to find, however, that if the Contract had been completed, the respondent would have rented the property to a third party.

[14] The respondent did not lead any evidence on the heads of loss pleaded in the Notice of Civil Claim, namely the loss of value of the Property, the cost of renting additional accommodation, the cost of mortgage financing for an uninhabitable Property, or the costs for fencing and securing the Property. The evidence of loss consisted of the evidence of a professional appraiser who provided an opinion on the market rental costs from 2018 to 2020, without consideration of any expenses and assuming the Property had not been vandalized.

[15] The respondent claimed rental income in the amount of $90,254.32 for the 34-month period between the completion date and resale of the Property. The trial judge assessed damages at $50,000, based on rent for 28 months at $2,150 per month less an allowance for insurance, paint and cleaning, and repairs.

Issues

[16] The appellants have raised five issues in relation to the judgment under appeal, but I consider it necessary to address only two of them:

> (a) whether the trial judge erred in finding that the respondent was entitled to recover for lost third-party rental income in the absence of any pleading alleging that the respondent had intended to rent the Property to a third party, or any pleading claiming damages for lost rental income; and
>
> (b) whether the trial judge erred in finding that the respondent intended to rent the Property to a third party in the face of the sworn evidence of the

respondent's principal that he intended to move into the House with his family immediately after completion.

Analysis

[17] This appeal concerns trial fairness. Rule 3-1(2) of the *Supreme Court Civil Rules* requires that the Notice of Civil Claim set out the material facts giving rise to the claim and the relief sought by the plaintiff:

> A notice of civil claim must do the following:
>
> (a) set out a concise statement of the material facts giving rise to the claim;
>
> (b) set out the relief sought by the plaintiff against each named defendant; …

[18] The purpose of pleadings is to define the issues and give the opposing party fair notice of the case to be met. These requirements serve two foundational purposes, efficiency and fairness. Defendants should not be required to divine the claim being made against them: *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 16–19.

[19] The risk to a plaintiff of failing to meet these requirements was explained by this Court in *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201:

> [157] … Pleadings define the issues of fact and law for determination in an action and give opposing parties fair notice of the case to be met: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 43; *Homalco Indian Band v. British Columbia*, 1998 CanLII 6658 (BC SC), [1998] B.C.J. No. 2703 at para. 5 (S.C.). If a party is unfairly disadvantaged by a failure to raise or properly particularise an issue in pleadings the court should not determine that issue. If it does, on appeal the result will be set aside: *Wu v. Sun*, 2010 BCCA 455 at paras. 19–20.
>
> [Emphasis added.]

[20] The respondent's Notice of Civil Claim adequately pleaded a breach of contract, and alleged loss arising from that breach. This claim does not, however, contain any allegation that the respondent intended to rent the Property to a third party, or make any claim for lost rental income. The question is whether these pleadings gave the appellants, as defendants, fair notice that they would be facing a

claim for lost rent, or whether the pleadings unfairly disadvantaged the appellants by failing to give them fair notice of the case to be made against them.

[21] In considering this question, the trial judge referred to para. 16 of the appellants' Response to Civil Claim, which reads as follows:

> 16. In further response to paragraph 15 of the Notice of Civil Claim, at no time were the Defendants aware that the Plaintiff and/or Sidhu had the intention of occupying the house on the Property. The intention of the sale of the Property was for development purposes only.

[22] The trial judge commented as follows:

> [70] Paragraph 15 of the notice of civil claim is not as precise as it could have been. The plaintiff is the company, not its owner Mr. Sidhu, and para. 15 appears to conflate the two. However, given the response to civil claim, in my view, the defendants were aware of the nature of the rental claim being advanced by the plaintiff. I therefore do not accede to the defendants' argument and find the pleadings are sufficiently wide to encompass a claim for lost rental income, be it by renting to Mr. Sidhu and his family or anyone else, and find that the defendants had notice of this claim.

[23] With respect, it is difficult to see how the appellants' denial of knowledge that the respondent or Mr. Sidhu intended to occupy the House supports the conclusion that the appellants must have been aware that the plaintiff intended to rent the House to third parties, such that the loss claimed was for rental income from third parties.

[24] The thinness of the pleading might have been cured had the plaintiff advanced the claim for rental income sufficiently in advance of the trial that the appellants could be expected to realize that this was the claim they were facing, but that was not the position of the plaintiff throughout the proceedings. Mr. Sidhu was examined for discovery on April 23, 2019, two years before the commencement of the trial. His consistent position was that he intended to move into the House with his family after closing. He was examined extensively on this evidence, repeating this position several times. No reference was made to any intention to rent the House to a third party, which might have elicited questions as to the condition of the House for renting, the expenses necessary to bring the house up to a state where it could be

rented to a third party, or the timeframe by which a rental commitment could be made in light of the pending application for redevelopment of the Property.

[25] Some excerpts from the discovery illustrate the unequivocal nature of Mr. Sidhu's evidence:

> Q Okay. When you became – when you first became aware of the vandalism – was it a cause for concern to you?
>
> A Yes
>
> Q It was.
>
> A Yes.
>
> Q Okay. Why?
>
> A Because we want to move in that house and live in that house.
>
> Q You wanted to live in the house?
>
> A Yes.
>
> Q Who was going to live in the house?
>
> A Me and my family. My wife and my kids.
>
> …
>
> Q So you were planning on moving in, I take it, November 1st, the next day?
>
> A Yes.
>
> …
>
> Q And you were planning to move in right after completion?
>
> A Yes, yes.
>
> …
>
> Q So the plan basically was you were going to move in in November and then I guess move out at some point after you got your development permit?
>
> A Yes.

[26] This evidence was repeated in the affidavit filed by Mr. Sidhu on the summary trial application:

> 17. I had planned to have the Company rent the Property to me and my family. Instead of paying rent to an unrelated landlord, I could pay rent to the Company, which would help with [sic] the Company with the mortgage payments.

[27] During cross-examination at the trial, Mr. Sidhu continued to insist that the plan was for him and his family to occupy the House after closing:

> Q Well, I'm going to suggest to you, sir, that your plans at the time you entered the contract and at the time you completed the sale did not include retaining that house. You wanted simply to demolish it, subdivide, redevelop and sell the units?
>
> A Yeah, that's what I said, because I – the house was in livable condition, so we were intending to move into that house to live for that period because we were renting the house at that time.
>
> Q So yeah, you were renting a house before then, right?
>
> A Yes.

[28] This evidence was consistent with the claim in the pleadings for the costs for renting additional accommodation. If Mr. Sidhu was planning to move into the House with his family but could not do so because of the vandalism, it would follow that he would require additional accommodation, and a claim for the cost of renting the additional accommodation would be a reasonable head of loss, at least for Mr. Sidhu. In fact, as the trial judge found, Mr. Sidhu had already moved with his family into his new Delta house prior to the closing on the Parks' Property, and did not incur any costs for renting additional accommodation.

[29] A claim for lost rental income is a claim for special damages. It has long been held that special damages, unlike general damages, must be specifically pleaded: *William P. Crooks Consultants Ltd v. Cantree Plywood Corp.* (1985), 62 B.C.L.R. 281 (S.C.). In this judgment, Justice Wallace confirmed that special damage means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, "for which he ought to give warning in his pleadings in order that there may be no surprise at the trial": at 283–284, citing *Ratcliffe v. Evans,* [1892] 2 Q.B. 524 at 528 (C.A.).

[30] In *Green v. Stanton* (1969), 6 D.L.R. (3d) 680 (B.C.C.A.), a leading judgment on nominal damages, this Court disallowed a claim for damages that had not been pleaded, and restricted the plaintiff to pecuniary loss actually suffered (at 691):

> Also, the learned trial Judge seems to have awarded damages, to some extent at least, because of some alleged improper solicitation of patients by the appellant. The only claim for damages is for breach of contract and that breach was of a covenant not to practise in a certain area. There is no additional covenant in the Agreement forbidding the solicitation of patients as is so often found in commercial contracts with similar types of restrictive covenants. No claim for damages for solicitation of patients was pleaded. In my view, the learned Judge erred in not restricting his assessment of damages to the pecuniary loss actually suffered by the respondents because, and only because, the appellant broke his covenant not to practise in the area specified for the period specified.

[31] In my view, the failure of the plaintiff to claim for lost rental income in his pleadings disentitled the plaintiff to recovery on that basis. The plaintiff could have recovered damages for pecuniary loss actually suffered, but led no evidence of loss in respect of the four pleaded heads of loss: loss of value of the Property, cost for renting alternative accommodation, costs for mortgage financing for uninhabitable Property, or costs for fencing and securing the Property.

[32] This conclusion is sufficient to set aside the damage award, but it is reinforced by the speculative nature of the award. Having rejected Mr. Sidhu's testimony that the plan was for him to move into the House with his family from the time of closing until he received the redevelopment permit, the trial judge found that if the Contract had been completed, the plaintiff would have rented the Property to a third party. The judge explained the evidentiary basis for this finding in this way:

> [80] … Mr. Sidhu testified that he would not have let the House sit vacant and he gave reasons why; he had financing costs to purchase the Property, and a vacant house cannot be insured. I accept this evidence because it makes sense in the circumstances. It is improbable that the plaintiff would not earn income from the House which could be used to offset costs, knowing that the rezoning and redevelopment process will take two to four years. Mr. Sidhu inspected the House, and clauses 7 and 8 would have no purpose if the House was not going to be used pending redevelopment. Further, as Mr. Sidhu testified, leaving a house vacant creates a vandalism hazard as occurred in this situation, and from his experience, property cannot be insured if it is vacant. …

[33] The appellants submit that this conclusion is largely speculative, as Mr. Sidhu did not testify that the respondent would have rented the House to a third party; his testimony was that he would have lived in the house. I agree that the finding that the

plaintiff would have rented the Property to a third party is not reasonably supported by the evidence in light of Mr. Sidhu's testimony, and accordingly is a palpable error warranting reversal: *H.L. v. Canada (Attorney General),* 2005 SCC 25 at para. 74.

[34] In light of the failure to prove a pleaded loss, the plaintiff is entitled to nominal damages only: *Green* at 691-692. I would fix those damages at $1,000.

Disposition

[35] For these reasons, I would set aside the damage award of $50,000 and replace it with a nominal award of $1,000. The appellants are entitled to their costs of the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Voith"