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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *District of West Vancouver (Corporation of) v. Liu*,
2016 BCCA 96

Date: 20160229
Docket Nos.: CA42039; CA42040

Docket: CA42039

Between:

The Corporation of the District of West Vancouver

Appellant
(Petitioner)

And

Jie Liu

Respondent
(Respondent)

- and -

Docket: CA42040

Between:

Jie Liu

Respondent
(Petitioner)

And

The Corporation of the District of West Vancouver

Appellant
(Respondent)

Before: The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Fitch

On appeal from: Orders of the Supreme Court of British Columbia, dated July 3, 2014 (*District of West Vancouver (Corporation of) v. Liu*, 2014 BCSC 1230, Vancouver Dockets S121927; S127407).

Counsel for the Appellant:

P. Hildebrand
S. Dubinsky

Counsel for the Respondent:

D.J. Taylor

Place and Date of Hearing:

Vancouver, British Columbia
October 28, 2015

Place and Date of Judgment:

Vancouver, British Columbia
February 29, 2016

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Chiasson

Dissenting Reasons in part by:

The Honourable Mr. Justice Frankel (p. 28, para. 88)

Summary:

This is an appeal from two consolidated petitions that were heard together. The appellant's petition was for a declaration that features associated with the respondent's property encroach on the appellant's road allowance and for a statutory injunction requiring the removal of these encroachments. The respondent's petition was for an easement over the encroached on land or an order vesting title in her pursuant to the Property Law Act. The chambers judge found that the appellant failed to establish that the encroachments were unauthorized and granted the respondent an easement over the encroached on part of the road allowance. Held: appeals allowed in part. Per Fitch J.A. (Chiasson J.A. concurring). The chambers judge erred in finding that the encroachments on the road allowance had been authorized. There was no evidence upon which that conclusion could reasonably be reached. The structures and improvements constitute unauthorized encroachments. The appellant's statutory injunction is, however, denied. In the unusual circumstances of this case, it is premature to grant the District an order that would entail destruction of a large portion of the respondent's home. Upon the District filing proof that a bylaw has been passed closing that portion of the highway consisting of the road allowance and removing its dedication, an order will issue under s. 36(2)(b) of the Property Law Act vesting title to the encroached land in the respondent upon payment by her of fair market value for the land. The valuation of the land will be remitted to the Supreme Court of British Columbia. If the respondent does not purchase the land at fair market value, the District has leave to renew its application for an injunction. Per Frankel J.A. (dissenting in part). The reasons of Fitch J.A. are agreed with except that the respondent is not entitled to a vesting order. The appellant is entitled to an injunction that will not come into force until the respondent has had an opportunity to purchase the property at fair market value.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

A. Introduction

- [1] In June 2011, the respondent, Jie Liu, purchased residential property that encroaches on an undeveloped road allowance located within the boundaries of the appellant, the Corporation of the District of West Vancouver ("District"). The road allowance was dedicated as a highway by the deposit of Plan 4613 in the Land Title Office ("LTO") on February 14, 1914. Title to the road allowance vested in the District on January 1, 2004, following enactment of the *Community Charter*, S.B.C. 2003, c. 26.
- [2] On August 30, 2011, the District informed Ms. Liu they were prepared to sell her a marketable portion of the road allowance on which the encroachments are located. Ms. Liu expressed her willingness to purchase this land from the District.
- [3] When negotiations for the sale of the land foundered, the District brought a petition seeking: (1) a declaration that various structures and improvements associated with the property encroach on the District's road allowance; and (2) a statutory injunction requiring Ms. Liu to remove the encroaching structures and improvements within 90 days. Ms. Liu argued before the chambers judge that the District had not shown that the encroachments were unauthorized. In the alternative, Ms. Liu argued that the District's application for a statutory injunction should be dismissed because the private hardship she would suffer would outweigh the limited public benefit to be gained from such an order.
- [4] Ms. Liu counter-petitioned seeking relief under ss. 36(2)(a) or (b) of the *Property Law Act*, R.S.B.C. 1996, c. 377 ("PLA"). She sought an order granting her an easement on the encroached land on her making compensation to the District or, alternatively, an order vesting title in her to the encroached land on her making compensation to the District. Relying on *Osoyoos (Town) v. Nelmes*, 2009 BCSC 704 at para. 22, the District argued that s. 36 of the PLA was not engaged because it was entitled to the statutory injunction. The District also argued that relief is unavailable under the PLA to remedy the encroachment of a dedicated highway. In support of its position, the District noted, *inter alia*, that the council of a municipality is given specific legislative powers authorizing the closure of highways and the removal of highway dedication. These powers oblige a municipal council to enact closure and removal of highway dedication bylaws following a public consultation process. The District argued that s. 36 of the PLA should not be interpreted as conveying judicial authority to close a portion of a highway or remove highway dedication without public consultation. In the alternative, the District argued that if Ms. Liu is entitled to an interest in part of the road allowance pursuant to the PLA, she should be obliged to pay a minimum of fair market value for that interest.
- [5] The petitions were heard together. By Reasons for Judgment indexed at 2014 BCSC 1230, the chambers judge dismissed the District's petition. He found that the District failed on the threshold issue of establishing that the encroachments were unauthorized. The chambers judge allowed Ms. Liu's petition and granted her an easement over that part of the road allowance upon which the encroachments are located for the life of the buildings. Ms. Liu was not ordered to pay compensation to the District in return for the easement.
- [6] The District appeals from the dismissal of its petition (CA42039) and the order allowing Ms. Liu's petition and granting her an easement, without compensation, over the portion of the road allowance on which the encroachments sit (CA42040).
- [7] The first issue on this appeal is whether the chambers judge erred in finding that the encroachments were authorized. The District seeks leave to adduce fresh evidence on this point. The application is opposed by Ms. Liu. If this Court decides that the chambers judge erred on the first issue, a question arises as to whether the District should be granted the statutory injunction it seeks. If this Court determines that the chambers judge erred and the encroachments are unauthorized, but the District is not entitled to a statutory injunction, a further issue arises about whether Ms. Liu is entitled to equitable relief under s. 36 of the PLA.