

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Valley's Edge Park Ltd. v. Holden*,
2025 BCSC 1177

Date: 20250624
Docket: S6907
Registry: Golden

Between:

Valley's Edge Park Ltd.

Petitioner

And

Moira Holden and Denis Holden

Respondents

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Petitioner:

D. Murphy

The Respondents, appearing on their own
behalf:

M. Holden
D. Holden

Place and Date of Hearing:

Cranbrook, B.C.
November 21, 2024

Petitioner's further Submissions:

March 27, 2025

Respondent's Further Submissions:

April 4, 2025

Place and Date of Judgment:

Golden, B.C.
June 24, 2025

Introduction

[1] In March 2024, I gave reasons dismissing the petitioner's application for a mandatory injunction to enforce a Statutory Building Scheme (the "SBS") governing a bare land strata in a recreational resort in Edgewater, BC (the "Resort"), indexed at *Valley's Edge Park Ltd. v. Holden*, 2024 BCSC 377 (the "Reasons"). There were 49 strata lots subject to this SBS and the petitioner was appointed administrator. The petitioner commenced this petition to seek an injunction to require the defendants to remove a portion of a deck constructed on the respondent's property without its approval.

[2] In the Reasons, I concluded that the respondent had breached the SBS to the extent they had constructed the deck improvement on their strata lot without the petitioner's approval. Although I accepted that the usual remedy for breach of a requirement in an SBS is injunctive relief, as discussed in *Foy v. 0933164 B.C. Ltd.*, 2022 BCSC 2046, I formed the view that a mandatory injunction should not issue in part on the basis that the SBS did not set out specific restrictions guiding property owners' proposed improvements, and that equitable damages could be awarded in lieu of an injunction in the circumstances.

[3] I allowed the petitioner to amend the petition to seek the alternative remedy of equitable damages. The petition has been amended and these reasons address the appropriate quantum of those damages.

The Parties' Positions

The Petitioner

[4] First, the petitioner invited the court to revisit the decision denying an injunction and to impose an order requiring the respondents to remove the deck improvement installed on their premises. The petitioner repeated its submissions that the court should adopt Justice Crerar's approach in *Foy* and grant the "usual remedy" of an injunction against the breach.

[5] In the alternative, the petitioner contends that the measure of equitable damages discussed in *Wrotham Park Estate Co. v. Parkside Homes Ltd.*, [1974] 2 All E.R. 321 (Ch D), [1974] 1 W.L.R. 798 at 815 should take into account the value of the deck, the respondent's flagrant disregard of the building scheme, the need to protect the community of interests that established the building scheme, and the need to deter others from taking similar action to the respondents. The petitioner produced an estimate for the cost of constructing and removing the offending deck at \$7,875.

[6] The petitioner suggests that damages in the sum of \$20,000 should be awarded as a meaningful deterrent against breaches of the SBS and to underscore the importance of the integrity of that scheme. Moreover, the petitioner submits that \$20,000 could be a measure that the administrator would have extracted from the respondent to build without its approval.

[7] The petitioner is concerned about others who have made, or might in the future make, improvements on strata lots within Valley's Edge Park Resort in contravention of the SBS. The petitioner contends it is important to create a disincentive to other owners in the Resort who simply wish to ignore and bypass the obligation to obtain approval from the administrator with relative impunity. The administrator contends that he is charged with the responsibility to protect the entire community from improvements erected on strata lots that might interfere with the use and enjoyment of other owners or constitute improvements offensive to other owners in design, location or cosmetic appearance.

The Respondents

[8] The respondents argued that the cost of constructing the deck in their backyard was \$1800. Those costs do not take into account the cost of labour necessary to build the improvement as they did the work themselves.

[9] The respondents contend the deck does not impact other property owners subject to the SBS and that \$20,000 is an exorbitant and arbitrary amount to be claimed. They submit that the deck is not visible to any other property owners

subject to the SBS and did not affect those properties. It was built to enhance the respondent's use of their property. As a result, they argue that this amount is intended to cause them economic pain for flouting the administrator's broad discretion to refuse to approve installation of any improvements regardless of the impact on neighbours.

[10] The respondents contend that the administrator's assertions that other members of the SBS have or will proceed with improvements to their lots without the administrator's approval because this Court has denied to grant an injunction and should not result in an excess of damages. They contend the administrator has not suffered any damages and, if any amount is ordered to be paid, it should be paid for the benefit of owners of all strata lots subject to the SBS.

[11] The respondents contend that their breach of the SBS was not a flagrant disregard of the rules. They submit that deterrence should not be a factor in determining the quantum of equitable damages in this case.

[12] Lastly, the respondents contend that the administrator's treatment of them "before and after this matter arose" should be taken into account in determining the amount to be levied. They rely on two authorities: *Griffiths v. Sun Peaks Resort Corporation*, 2011 BCSC 62 and *Hemani v. British Pacific Properties Ltd.*, 70 B.C.L.R. (2d) 91, 1992 CanLII 575 (S.C.), aff'd 86 B.C.L.R. (2d) 378, 1993 CanLII 2300 (C.A.). As noted in the Reasons, these aspects concerning approval or rejection of proposed plans raised in *Griffiths* and *Peaks* were not explored at the hearing.

Discussion

Legal Principles

[13] In cases involving a breach of a restrictive covenant that does not give rise to any financial losses, equitable damages are generally calculated on the basis of what might reasonably have been demanded by the covenantee as *quid pro quo* for relaxing the covenant: *Foy* at para. 113; citing *Wrotham Park Estate*; *Arbutus Park*

Estates Ltd. v. Fuller, 1976 CanLII 1118, 74 D.L.R. (3d) 257 (B.C.S.C.); and *Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258 at para. 57.

[14] The rationale for assessing equitable damages on the basis of the approach set out in *Wrotham Park Estate* is that, since the withholding of a mandatory injunction has the same practical effect as requiring the petitioner to permit the infringement of its rights, its loss can be measured by reference to the economic value of such permission: *One Step (Support) Ltd. v. Morris-Garner*, [2018] UKSC 20, [2018] 3 All E.R. 659 at para. 95; cited in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19.

[15] In *Atlantic Lottery*, the Supreme Court of Canada discussed such damages, at times referred to as 'negotiating damages' on account of the notional negotiation in reference to which they are quantified, as follows:

[57] ... And courts have also granted what might be termed "negotiating damages" to prevent a defendant from obtaining for free an advantage for which it did not bargain (*Wrotham Park Estate Co. v. Parkside Homes Ltd.*, [1974] 2 All E.R. 321 (Ch. D.); *Smith v. Landstar Properties Inc.*, 2011 BCCA 44, 14 B.C.L.R. (5th) 48, at paras. 39-44; see also *Morris-Garner*, at paras. 91-100). As the Supreme Court of the United Kingdom recently explained in *Morris-Garner*, at para. 95:

Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. . . . The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment. [Emphasis added.]

[58] As these various examples demonstrate, an award that appears to be measured by a defendant's gain might arguably, in certain circumstances, serve a compensatory purpose that distinguishes it from disgorgement and which therefore tends to support recovery (McInnes (2001), at pp. 76-80; Weinrib (2003), at pp. 71-72; see also *Morris-Garner*, at paras. 39-40). Whether viewed as compensatory or not, these cases are indicative of the types of circumstances where a plaintiff is entitled to receive a monetary award that goes beyond the economic position that it would have occupied had its contract been performed (see Burrows, at pp. 672-77; McInnes (2014), at p. 285). While the circumstances in which a gain-based award will be appropriate cannot be clearly delineated in advance (*Blake*, at

p. 285; *Morris-Garner*, at para. 94), one would expect future legitimate interests protected by a gain-based award to resemble those interests that have been protected in the past.

[Emphasis added.]

[16] Ultimately, as the Supreme Court of the United Kingdom explained at para. 95 in *Morris-Garner*, it is for the court to judge what method of quantification will give a fair equivalent for what is lost by the refusal of the injunction in the circumstances of the case before it.

Analysis and Conclusion

[17] At the outset, I note that I have declined the petitioner's invitation to revisit my decision, reflected in the Reasons, denying a mandatory injunction requiring the respondents to remove the deck improvement installed on their premises. An appeal of that decision has been filed with the Court of Appeal and the petitioner's challenge to the decision will be properly dealt with in that court. These reasons assess the appropriate quantum of the equitable damages to be awarded in lieu of an injunction, being a fair equivalent for what was lost by the refusal of that injunction.

[18] It is important to recognize that an SBS impacts broader community interests in the regulation of improvements in the Resort properties, and that the value to other owners may be substantial but difficult to quantify. Although there was no evidence of complaints by other SBS lot owners about the improvement built by the respondents, the scheme is nevertheless designed to protect all owners against improvements that might impact owners subject to the SBS. For example, unsightly structures can impact neighbours and affect the general ambience. Although not strictly measurable in economic terms, protections afforded by an SBS can protect the value of other properties governed by the scheme.

[19] In this case, Article 5.11 of the SBS prohibits owners from constructing or placing improvements in such a way as to detract from the overall design and reputation of the Valleys Edge Park and the Strata Lots benefiting from the Building Scheme.

[20] The respondents began constructing the offending deck before requesting permission to build it and made their application to the administrator only after the work was completed. The administrator rejected this application because the deck had been constructed without the required application and because it was “at ground-level and adjacent to a pre-existing 4-foot-high deck”. Mr. Ortt, an agent of the administrator, said that these types of decks were not generally approved. In his affidavit, he said that the new deck looked like an “afterthought” and a “tagged on appendage”. He did not, however, suggest that ground-level decks detracted from the overall design and reputation of Valley's Edge Park.

[21] In that respect, I note that this case stands in contrast to the circumstances considered in *Foy and Lynch et al v. In-Situ et al*, 2000 BCSC 1045, which involved improvements that clearly and significantly interfered with the interests of other property owners. While I recognize that *Foy and Lynch* were concerned with determining whether to grant an injunction or award equitable damages in lieu, as opposed to assessing the appropriate quantum of equitable damages, I note the distinction to highlight that this is not a case where the respondent's contraventions of the SBS markedly changed the reasonable expectations of the parties nor the equities shaping the relief to be granted: see *Foy* at para. 126.

[22] That being said, the respondents' actions are not condoned simply because the injunction was not ordered. Justice will manifestly not have been done if the petitioner is merely given a nominal sum, or no sum, in substitution for the mandatory injunction: see *Wrotham Park Estate* at 815.

[23] Importantly in this case, the sum is not intended to compensate other owners for interference with their use and enjoyment of their properties, but to be calculated as a fair equivalent for what was lost as a result of the refusal of the injunction, namely, the petitioner's ability to control the construction or placement of improvements on the strata lots within the SBS. I say *ability*, as opposed to *right*, intentionally here, as the refusal to grant an injunction did not undermine the petitioner's right to approve and control improvements before they are constructed

(which it retains under the terms of the SBS), but its practical ability to do so in the limited circumstances of this case. Put differently, the petitioner has been deprived of its ability to insist, in a notional negotiation over the relaxation of the restrictive covenant, that the covenant not be relaxed in a way that suggests to other owners subject to the SBS that the restrictions could be easily disregarded. As I explain more fully below, I am satisfied that the administrator could reasonably have demanded payment for relaxation of the restrictive covenant so as to avoid suggesting to other owners within the SBS that the restrictive covenant could be avoided without a cost.

[24] In this case, the calculation of a fair equivalent for the petitioner's ability to control improvements to Strata Lots within the SBS must take into account that enforcement of the SBS, and in particular the restrictive covenant, may have economic impacts on the value of neighbouring properties insofar as the restricted improvements can have deleterious effects on some or all of the owners within the resort. The risk that the petitioner has lost its ability to approve and control improvements could render an SBS of reduced value because other owners may feel they will be exempted from the strict requirement to obtain approvals of improvements in similar circumstances. Each violation can result in considerable disturbance and expense to the administrator including bringing enforcement proceedings. Moreover, there is the risk that more unapproved and intrusive improvements can affect the value and reputation of the development. As Bauman J. (as he then was) explained in *417489 B.C. Ltd. v. Scana Holdings Ltd.*, 1998 CanLII 6770 (B.C.S.C.) at para. 7:

I have found that the building scheme provides practical benefits to the plaintiffs. These include the protection and enhancement of property values and the preservation of the more ethereal, but no less important, neighborhood aesthetics.

[25] In sum, I am satisfied that the assessment of the equitable damages payable in this case ought to recognize that there is inherent value to all owners under the SBS that the administrator be able to control building activity within the resort. In order to recognize the value of the SBS to the overall strata development and to

ensure future compliance with the SBS, the petitioner would objectively have demanded a significant monetary price for the relaxation of the restrictive covenant.

[26] The value of the deck to the respondents, including the costs to construct and remove the improvement, would also likely influence the economic negotiation that might notionally precede a relaxation of the restrictive covenant in the SBS. The respondents personally built the deck on their property with the help of friends, with the only cost being \$1800 for materials. The petitioner obtained an estimate that the cost of building the deck would be \$6700 and removal \$800. He contends this value includes material and labour that is higher than expended by the respondents. Although these estimates were not tendered usual form of an opinion, I accept they are within the likely range of costs for the construction.

[27] In my view, the petitioner's submission of \$20,000 exceeds what might reasonably have been agreed to in this case. The evidence tendered by the respondent that their material costs to build the deck totalled only \$1800 is also of limited use because the economic value of the respondents' (and their friends') labour might have been significant. I find the petitioner's evidence concerning the costs that might have been incurred in building the new deck (valued at \$6700) is more helpful because it represents the respondents' financial interest in the improvement, and sheds some light on the cost of the work that the petitioner could reasonably have demanded be done to bring the deck improvement in conformity with the requirements of the SBS.

[28] Administrators have an obligation to enforce the requirements set out in an SBS. The Resort owners generally expect administrators to enforce a SBS with some emphasis on improvements made without permission and that are objectionable to the other owners. As a result, a notional negotiation to relax the SBS also involves consideration of the grounds cited by the administrator for refusing to grant permission for construction of the deck. In this case, the respondents argue that the absence of guidelines that could inform the administrator or the respondents on the issue of their deck construction is a factor that should be

taken into account. They concede that the petitioner's actions did not disentitle it to equitable damages, but argue the absence of reasonable grounds for denying permission should be taken into account in determining the *quid pro quo* in the assessment of the equitable damages. I note, however, that in the hearing of the petition the respondents did not challenge or seek to review the administrator's decision or reasons for refusing their application to build the deck as manifestly unreasonable.

[29] As above, it is ultimately for this Court to judge what method of quantification of equitable damages should be paid to achieve a fair equivalency for what is lost by the refusal of the injunction in the circumstances of this case: *One Step* at para. 95. I am satisfied that my assessment should take into account that breaches of an SBS may cause discord, significant disruption and cost to the administrator.

[30] In view of the costs incurred by the respondents, and the estimated costs of removing the improvement if an injunction had been granted, I assess the plaintiff's equitable damages at \$5,000. This amount is an objective assessment of the amount I find the petitioner would likely have accepted to grant relief from the SBS and what the respondents could have reasonably been required to incur to construct an improvement which complied with the restrictions in the SBS.

[31] If either party wishes to make submissions concerning costs, those submissions must be made also within 30 days. If no submissions are received by that time, the petitioner will have its costs.

“Armstrong J.”