

Federal Court



Cour fédérale

Date: 20111230

Docket: T-1944-11

Citation: 2011 FC 1528

Ottawa, Ontario, December 30, 2011

PRESENT: The Honourable Mr. Justice Barnes

ACTION *IN REM* AGAINST THE SHIPS “2008-1”, “CAPITAL “C””, “MITCO NO. 3”,
“SWEETIE PIE” AND “STRAITS WATER SKIDDER” AND *IN PERSONAM*

BETWEEN:

WESTERN FOREST PRODUCTS INC.

Plaintiff

and

**RANDOLF O'BRIEN aka RANDY O'BRIEN,
O'BRIEN & FUERST LOGGING LIMITED,
THE OWNERS AND ALL OTHERS
INTERESTED IN THE VESSELS "2008-1",
"CAPITAL "C"", "MITCO NO. 3", "SWEETIE
PIE" AND "STRAITS WATER SKIDDER"
AND THE VESSELS "2008-1", "CAPITAL
"C"", "MITCO NO. 3", "SWEETIE PIE" AND
"STRAITS WATER SKIDDER"**

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion by Western Forest Products Inc. (WFP) seeking an interlocutory injunction compelling Randy O'Brien and O'Brien & Fuerst Logging Limited (collectively referred to as

O'Brien) to remove a residential barge from WFP's foreshore leasehold at Dinan Bay, Haida Gwaii, British Columbia.

Background Evidence

[2] O'Brien is the holder of two Timber Sales Licences (TSLs) in the area of Dinan Bay, British Columbia. The initial TSLs permitted O'Brien to log the holdings for two years but he subsequently purchased a one-year extension for both.

[3] WFP holds Tree Farm Licence 60 and other related permits and licences all of which allow it to log in the vicinity of Dinan Bay. In 2009, WFP acquired a leasehold interest over a designated foreshore area of Dinan Bay for the purpose of making and sorting log booms. Under the terms of this lease with the province, WFP pays an annual rental fee and undertakes, among other things, not to moor or secure any boat or structure for use as a live-aboard facility, whether permanent or temporary. Other provisions in Article 4 of the lease limit WFP's use and occupation rights in various ways but, otherwise, the province contracts to provide quiet enjoyment over the foreshore leasehold.

[4] WFP has entered into a purchase and sale agreement for Tree Farm Licence 60 and related interests with Taan Forest Products Ltd. and, pending the closing, Taan has agreed to manage WFP's logging operations. Because of this management agreement, some of the evidence in the record comes from Taan employees. However, nothing turns on the relationship between WFP and Taan. I will refer to Taan and WFP under the collective acronym WFP.

[5] The record discloses, at least in a general way, a long-standing history of acrimony between O'Brien and WFP apparently arising out of O'Brien's desire to gain convenient and economical access to his TSLs. O'Brien deposes that as early as September 2009 he sought WFP's permission to moor a residential barge within the area of WFP's foreshore leasehold in Dinan Bay. It is not clear from O'Brien's affidavit what became of those early discussions, but in November 2011, he again sought permission to moor the barge in the bay. At that time, he understood that favourable consideration would be given to the request, subject to the Department of Fisheries' approval and the negotiation of a fee. On the strength of those positive indications, O'Brien unilaterally moved the barge from a dock in Port Clements to Dinan Bay where it was tied up to the existing WFP anchorage.

[6] O'Brien deposes that "the only practical access to our TSLs is by water". Road access, particularly in the winter, involves a minimum three-hour commute and is sometimes impossible. Nevertheless, he is able to use the existing roads to gain access to Dinan Bay and to his TSLs. O'Brien further deposes that daily access to his TSLs by boat – a distance of 22 miles – is "too dangerous to contemplate" using his 35-foot crew boat. The only solution to his problem is, therefore, to moor his residential barge at Dinan Bay which, he says, is the only safe and available moorage. Without this option, O'Brien asserts that he "would need to lay-off or not hire 20 workers" and that, because of the dispute with WFP, he has already laid off six fallers. According to O'Brien, there is also "no guarantee" that the province will renew his TSLs if they are not logged within the existing tenure. O'Brien's affidavit is, however, notably silent about the option of bringing in land-based accommodations for his crews or chartering a larger and safer boat to make the 22-mile daily commute as is done by other logging operators in the area. He also offers no

explanation for the earlier lay-off of six fallers in the face of his ongoing use of the barge since at least the early part of November. Inasmuch as O'Brien has imposed his own optimal solution to the dispute, it is not apparent why his operations would have suffered any setback up to this time.

[7] WFP contends that O'Brien was told that he could not moor his barge in its Dinan Bay leasehold unless and until the province agreed to an amendment to the foreshore lease. When O'Brien unilaterally moved the barge to Dinan Bay, WFP advised O'Brien that it would not further discuss the access issue until he relocated the barge. WFP further maintains that O'Brien's continued occupation of the Dinan Bay leasehold constitutes a breach of WFP's foreshore lease with the province and jeopardizes its ongoing tenure.

Issue

[8] Should an interlocutory injunction be issued in favour of WFP compelling O'Brien to remove the residential barge from WFP's foreshore leasehold at Dinan Bay?

Analysis

[9] The parties agree that the test for an interlocutory injunction is described by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311, [1994] SCJ no 17 (QL), and requires the proponent to establish that:

- a. there is a serious issue to be tried;
- b. the proponent will suffer irreparable harm; and
- c. the balance of convenience favours the grant of interlocutory relief.

[10] O'Brien concedes that there is a serious issue raised by this proceeding and that the Court ought not to consider the relative merits of the parties' positions. He disputes that WFP has or will suffer any irreparable harm by his continued occupation of WFP's foreshore leasehold. O'Brien also asserts that the balance of convenience favours his interests and those of his employees over the interests of WFP.

[11] On the record before me, I am satisfied that WFP has established a *prima facie* case of trespass that is unlikely to be excused by the defences raised by O'Brien. Although O'Brien may well have a right of riparian passage to gain access to his onshore timber leases, including the right of temporary moorage, the authorities do not support the kind of long-term fixed moorage that O'Brien has put in place: see *R v Lewis*, 2009 BCPC 386 at para 29, [2009] BCJ no 2596 (QL) and *North Vancouver (City) v Seven Seas S.R.*, [2000] FCJ no 1468 (QL) at para 35, 192 FTR 203 (TD). Indeed, O'Brien's several attempts to secure WFP's permission to moor the barge in Dinan Bay seemingly belie a good faith assertion that he had the right to tie up there on an ongoing basis. I also do not agree that the strength of WFP's allegation of trespass cannot be considered. The stronger the *prima facie* case for relief, the stronger the claim to an injunction: see *Tlowitsis-Mumtagila Band v MacMillan Bloedel Ltd*, [1990] BCJ no 2746 (QL), 53 BCLR (2d) 69 (CA).

[12] With respect to the issue of irreparable harm, O'Brien contends that WFP is not presently working in the foreshore lease area and, in the result, has suffered no harm whatsoever by his actions. He maintains that WFP is not at risk of being declared in default by the province under the foreshore lease because WFP has not consented or acquiesced to his incursion in Dinan Bay

and because the lease could presumably be amended by consent to permit his moorage. All that WFP needs to do to avoid the problem is to ask the province to agree to the necessary amendment.

[13] I agree with O'Brien that his unilateral actions could not legally be held by the province to constitute a breach of the foreshore lease by WFP. It is only by acquiescence to O'Brien's conduct that the province could make a case for default under the lease. WFP is making diligent efforts to have O'Brien removed and that is all that the province can expect of it in terms of its contractual performance. At the same time, WFP has no obligation to seek an amendment to the lease to permit O'Brien to moor his barge. WFP paid for quiet enjoyment of the foreshore lease area and it has no obligation to surrender that right to appease O'Brien.

[14] O'Brien also argues that WFP will not be harmed by the ongoing presence of the barge because WFP is not presently using the foreshore leasehold. It characterizes its use - even if it is a trespass - as trivial and not warranting the extreme remedy of an injunction. I do not agree.

[15] O'Brien relies on the authority of *Vaz v Jong*, [2000] OTC 323, [2000] OJ no 1632 (Ont Sup Ct), to support his argument that trivial interferences with property rights do not always attract injunctive remedies. However, what has been alleged by WFP is not a technical trespass. It is not the sort of conduct that can be fairly described as more in the nature of a nuisance or where the complaint is motivated by an unreasonable antisocial insistence.

[16] In cases of deliberate and ongoing trespass, the guiding principle is that damages are presumed inadequate and an injunction is the usual remedy: see *Frontenac Ventures Corp v Ardoch*

Algonquin First Nation, 165 ACWS (3d) 155 at paras 10-12, 2008 CarswellOnt 1168 (WL Can) (Ont Sup Ct) and *Hamilton (City) v Loucks*, 2003 CarswellOnt 3663 (WL Can) at paras 25-27, 232 DLR (4th) 363 (Ont Sup Ct). Injunctive relief is so strongly favoured in cases of *prima facie* trespass that it is generally unnecessary to consider whether the interference has caused any *de facto* harm: see The Honourable Mr. Justice Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (consulted on 30 November 2011), (Aurora, Ont: Canada Law Book, 2009), para 4.610 and *Terbasket v Harmony Coordination Services Ltd*, 2003 BCSC 17 at para 24, [2003] BCJ no 28 (QL).

[17] I am satisfied that the nature of O'Brien's admitted conduct is sufficiently injurious to WFP's proven leasehold interest that an injunction is the presumed remedy.

[18] O'Brien's assertions of harm must be considered as an element of the balance of convenience analysis and not as a potential offset to WFP's claim to irreparable harm: see *RJR-MacDonald*, above, at para 57. That is also the place to assess allegations of harm to the public interest.

[19] Although O'Brien's affidavit contains several allegations about lost employment and the potential loss of his TSLs, there is almost no factual support for his somewhat apocryphal predictions. It is difficult to believe that he alone has no available options to gain access to his TSLs except by the means he has chosen. He asserts that his own crew boat is too small to safely navigate the local waters, but he says nothing about the availability of a larger and safer vessel. He also says nothing about the possibility of bringing in, by road or by water, temporary land-based

accommodations for his workers. These are options that he understandably would like to avoid because of their cost and because there is a barge already at his disposal. Nevertheless, the burden of additional expense does not tip the balance of convenience in his favour absent some convincing evidence that the financial burden would be unmanageable. In summary, this evidence does not satisfy me that O'Brien's logging operations cannot be profitably executed by means other than the approach he has adopted.

[20] If the injunction is not granted, O'Brien will potentially finish up his operations in Dinan Bay before the case against him is resolved and WFP's ostensible rights to quiet enjoyment may not be fully vindicated. The public interest is not well served by ignoring such an interference in favour of protecting the economic benefits that will accrue to an alleged trespasser or by essentially licensing the conduct through the payment of damages. If, on the other hand, O'Brien successfully defends this action his losses can be fully compensated by an award of damages.

[21] WFP has agreed that it will provide an undertaking as to damages in favour of O'Brien in a form agreed to between the parties. O'Brien has provided no authority to support an expanded undertaking in favour of his employees and I decline to make that a condition of WFP's potential obligation to pay damages. In the result, this Court will issue an interlocutory injunction requiring O'Brien to remove the residential barge from the WFP's foreshore leasehold provided that WFP has executed an undertaking as to damages in the form hereto annexed. Having regard to potential weather and towing complications, I will allow the Defendants up to ten days to remove the barge.

[22] Inasmuch as the merits of the underlying dispute have not been determined by this Order, costs will be payable in the cause.

ORDER

THIS COURT ORDERS that the Defendants shall remove their residential barge identified by ship name 2008-1 from the area of WFP's foreshore leasehold at Dinan Bay, British Columbia within ten days of the date of this Order, subject only to the Plaintiff's execution and filing of the undertaking annexed hereto.

THIS COURT FURTHER ORDERS that the Defendants and each of them shall desist from occupying on a continuing basis any part of the WFP's foreshore leasehold at Dinan Bay, British Columbia. Nothing herein shall preclude the Defendants from exercising rights of temporary daily marine access within the confines of WFP's foreshore leasehold for the purpose of delivering personnel or equipment on shore.

THIS COURT FURTHER ORDERS that the costs of this motion be costs in the cause.

"R.L. Barnes"

Judge

ANNEX

No. T-1944-11

FEDERAL COURT

ACTION *IN REM* AGAINST THE SHIPS "2008-1", "CAPITAL "C"", "MITCO NO. 3", "SWEETIE PIE" AND "STRAITS WATER SKIDDER" AND *IN PERSONAM*

BETWEEN:

WESTERN FOREST PRODUCTS

THE PLAINTIFF

AND:

RANDOLF O'BRIEN aka RANDY O'BRIEN, O'BRIEN & FUERST LOGGING LIMITED, THE OWNERS AND ALL OTHER INTERESTED IN THE VESSELS "2008-1", "CAPITAL "C", "MITCO NO. 3", "SWEETIE PIE" AND "STRAITS WATER SKIDDER" and THE VESSELS "2008-1", "CAPITAL "C", "MITCO NO. 3", "SWEETIE PIE" and "STRAITS WATER SKIDDER"

THE DEFENDANTS

UNDERTAKING AS TO DAMAGES

The Plaintiff hereby undertakes to abide by any order this Court may make as to damages as a result of granting the interlocutory injunction dated December ____, 2011 in the event that this Court determines that for any reason this injunction should not have been granted.

Dated at Vancouver December ____, 2011

SIGNED, SEALED & DELIVERED)

By Western Forest Products)

in the presence of:)

)

)

_____))

Name)

)

_____))

Address)

)

_____))

Date)

_____))
Authorised signatory

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1944-11

STYLE OF CAUSE: WESTERN FOREST PRODUCTS v RANDOLF
O'BRIEN et al

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: December 16, 2011

**REASONS FOR ORDER
AND ORDER:** BARNES J.

DATED: December 30, 2011

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