

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2013 SKQB 129**

Date: **2013 04 09**
Docket: **QB No. 23 of 2013**
Judicial Centre: **Moose Jaw**

BETWEEN:

JERRY B. KAISER

PLAINTIFF

- and -

**R.M. BAILDON, CITY OF MOOSE JAW and
DEP'T MUNICIPAL AFFAIRS**

DEFENDANTS

Counsel:

Jerry B. Kaiser
Robert C. Fielding
Gail D. Wartman
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self-represented
for **R.M. Baidon**
for City of Moose Jaw
for Dep't Municipal Affairs

JUDGMENT
April 9, 2013

SCHERMAN J.

INTRODUCTION

[1] The plaintiff, a ratepayer in the Rural Municipality of Baidon ("the RM"), in connection with an application to approve a subdivision of lands, paid \$5000.00 to the RM, in lieu of dedication of lands as public reserve. The plaintiff alleges these monies were to be paid into a dedicated fund to be used for recreational, educational or cultural purposes within the RM.

[2] The RM later contributed some or all of these funds to the City of Moose Jaw's Multiplex Building Fund. The plaintiff took exception to this, taking the position that the funds he paid to the RM were to be used for recreational, educational or cultural purposes within the RM. The plaintiff commenced this action naming the RM, the City of Moose Jaw and "Dep't Municipal Affairs" as defendants.

[3] While the RM and the City of Moose Jaw (“the City”) are named as defendants, the only relief sought in the claim is against the Dep’t Municipal Affairs. The Government of the Province of Saskatchewan (the “Province”) acknowledges that it is the proper entity to be named as defendant in place of “Dep’t Municipal Affairs”.

[4] The relief sought by the plaintiff is:

- a. An order that the Province order the City to return to the RM the \$5000.00 said to have been misappropriated by the City; and
- b. An order that the Province in turn direct the RM to contribute the \$5000.00 to an appropriate organization in the RM.

[5] Both of the Province and the City have applied under [Rule 173\(a\)](#) of *The Queen's Bench Rules* to strike out the claim in its entirety as disclosing no reasonable cause of action against them. One of the basis for these applications is that the sole relief sought is orders directed to the Crown in the nature of mandamus or mandatory injunctive relief and injunctive relief does not lie against the Crown. The City also applies under [Rule 173\(c\)](#) to strike the claim on the basis that it is frivolous or vexatious.

APPLICABLE LEGISLATIVE PROVISIONS

[6] *The Planning and Development Act, 2007, S.S. 2007, c. P-13.2* provides *inter alia* as follows:

181 The owner of land that is the subject of a proposed subdivision shall provide, without compensation, to the municipality in which it is located all or any of the following that an approving authority may require in accordance with this Part:

- (a) land for environmental reserve or municipal reserve;
- (b) money in lieu of any of the land required to be dedicated as municipal reserve;
- (c) a combination of land and money.

187(1) If it appears to the approving authority that the dedication of land as municipal reserve would, for any reason, be unnecessary or undesirable at the time of subdivision, the approving authority may:

- (a) direct that the requirements of the dedication of land to municipal reserve be waived in whole or in part; and
- (b) require the applicant to pay to the municipality in lieu of that land a sum of money equal to:

[where after follows various criteria and formulas]

197 All moneys received by a municipality pursuant to this Part must be dealt with as provided in the regulations made pursuant to section 205.

[7] [Section 9](#) of *The Dedicated Lands Regulations, 2009, R.R.S. c. P-13.1, Reg. 3* passed pursuant to *The Planning and Development Act, 2007* provides *inter alia* as

follows:

9 Subject to section 10, all moneys received by a municipality pursuant to section 187 of the Act or from the sale, lease or sublease of public reserves, municipal reserves and environmental reserves is to be paid into a special municipal account, to be known as the dedicated lands account, and may only be used for the following purposes:

- (a) the purchase of land to be dedicated for public use;
- (b) the development of public parks and public recreation facilities on existing public reserves, municipal reserves or environmental reserves within the municipality or within any other municipality;
- (c) the upgrading or replacement of existing public parks or public recreation facilities on existing public reserves, municipal reserves or environmental reserves within the municipality or within any other municipality. [Emphasis added]

[8] Section 17(2) of *The Proceedings against the Crown Act*, R.S.S. 1978, c. P-27 states:

(2) Where, in proceedings against the Crown, any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties.

[9] The Province and the City bring their applications under Rule 173 provides as follows:

The Court may at any stage of an action order any pleading or any part thereof to be struck out, with or without leave to amend, on the ground that:

- (a) it discloses no reasonable cause of action or defence, as the case may be;
- (b) it is immaterial, redundant or unnecessarily prolix;
- (c) it is scandalous, frivolous or vexatious;
- (d) it may prejudice, embarrass or delay the fair trial of the action;
- (e) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly or may grant such order as may be just. Unless otherwise directed, the offending party shall pay double the costs to which the other party would otherwise be entitled.

ANALYSIS

[10] On Rule 173(a) applications to strike the court is to assume that the facts pled by the plaintiff are correct and on the facts as pled determine whether the plaintiff's claim discloses a

reasonable cause of action. *Swift Current (City) v. Saskatchewan Power Corp.*, 2007 SKCA 27, 293 Sask.R. 6.

[11] The plaintiff argues that under *The Planning and Development Act, 2007* and s. 9 of *The Dedicated Lands Regulations, 2009* the funds he paid to the RM in lieu of the dedication of a public reserve must preferentially be used within the RM and that it was improper for the RM to use these funds to pay towards a 2010 commitment the RM made to contribute \$55,000 over 11 years to the City of Moose Jaw's Multi-Plex Building Fund.

[12] Section 197 of *The Planning and Development Act, 2007* and s. 9 of *Dedicated Lands Regulations, 2009* expressly provide that the RM may use the funds in question for the development, upgrading or replacement of public recreational facilities within the municipality **or any other municipality**. Nothing in the legislation or regulation requires the RM to give a preference to developments within the RM itself nor in any other way limits the discretion of the RM as to where to spend the money among the permitted uses. Thus an underlying premise of the plaintiff's claim for relief is wrong. There is no obligation on the part of the RM to give preference to the expenditure of the monies on projects within the RM and there is nothing improper in the RM using the monies to develop, upgrade or replace public recreational facilities in other municipalities.

[13] The plaintiff concedes the Multi-Plex Building is a public recreational facility within the City of Moose Jaw; but argues that the funds in question were not actually paid to develop this public recreational facility. He pleads that in February of 2013 the City misappropriated the \$5,000.00 from the Multi-Plex Building Fund, to which the RM had paid the monies, and placed them into its' general operating account. He argues that the monies having been placed into the City's general operating account and from there were paid on a debt obligation incurred by the City to build the Multi-Plex. He says that payment of debt obligation is not an authorized use of the funds under s. 9 of *The Dedicated Lands Regulations, 2009*. He says that while this may be a novel viewpoint, it is reasonably arguable in law and thus his claim should be permitted to proceed to trial.

[14] In *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 45, the Supreme Court of Canada did say that on applications to strike pleadings as disclosing no reasonable cause of action, the courts should not strike out novel but arguable claims. However, the logic and conclusion of the plaintiff is not reasonably arguable and is in my opinion clearly wrong.

[15] Section 9 of *The Dedicated Lands Regulations, 2009* is concerned with the use the RM makes of the funds. If the funds were paid by the RM to the City for the purposes of developing a public recreational facility, then the use made by the RM of the funds was a proper use. This qualifying use is not made improper by the fact that monies from the Multi-Plex Building Fund went into the City's operating account and were from there paid on debt obligation incurred to build the Multi-Plex. The distinction drawn by the plaintiff that payment of debt is not a designated use under the legislation is an unreasonable interpretation of the legislation. The ultimate purpose to which the funds flowed was the development of a recreational facility. In any event, the path which the funds took after leaving the RM is irrelevant to the use made by the RM of the funds. By the plaintiff's own pleadings the monies were used for a donation to the Multi-Plex building fund, which was part of the process of

developing that public recreational facility. The use the funds were put to by the RM was a permitted use under s. 9 of *The Dedicated Lands Regulations, 2009*.

[16] In my opinion the claim discloses no reasonable cause of action against either the Province or the City and thus their applications under Rule 173(a) must succeed.

[17] The plaintiff pleads and reasons that the movement of the monies from the Fund to the City's general operating account was a misappropriation of the monies. If the RM is satisfied that the use of the funds by the City to repay monies borrowed to build the Multi-Plex Building is consistent with the intent of its donation, there has been no misappropriation. The only party to this action with status to allege there was a misappropriation of the funds is the RM. The plaintiff does not have the status to complain and has no basis in fact to make his allegation of misappropriation by the City.

[18] It is my finding that the allegations made by the plaintiff against the City is frivolous within the meaning of Rule 173(c). Thus the City's application to strike the pleadings against it also succeeds on that ground. As stated by Ryan-Froslic J. in *Chisum Log Homes & Lumber Ltd. v. Investment Saskatchewan Inc.*, 2007 SKQB 368, 303 Sask.R. 174 a pleading is frivolous if it is groundless and pursued for the purpose of delay or embarrassment. I find the claim that the City misappropriated funds to be groundless and to have been pursued for the purpose of embarrassment.

[19] There is an additional reason under Rule 173(a) why the claim should be struck in its entirety against the Province. The only relief sought in the claim is relief in the nature of an orders of mandamus or mandatory injunctions directed to the Province. Under s. 17(2) of *The Proceedings against the Crown Act* this court can not issue an injunction against the Crown. In *Douglas v. Saskatchewan*, 2005 SKQB 270, 267 Sask.R. 78, Foley J. said at para. 13, relying on s. 17(2) that "[the Crown has immunity from all forms of injunctive relief, be it permanent or interim...". In *City of Swift Current v. Saskatchewan Power Corporation, Crown Investments Corporation and The Government of Saskatchewan*, 2005 SKQB 505, 272 Sask.R. 160, Sandomirsky J. added at para. 130 that "Mandamus is simply not available against the Government."

[20] Rule 173 does contemplate that pleadings can be struck with leave to amend. I see no amendments that could properly be made that could salvage the claims as against the City or the Province. Accordingly I order the claim be struck as against both the City and the Province in its entirety without leave to amend.

CONCLUSION

[21] For the reasons set forth above I order the claim be struck as against both the City and the Province without leave to amend.

[22] Rule 173 provides that "Unless otherwise directed, the offending party shall pay double the costs to which the other party would otherwise be entitled." I can see no good reason to otherwise direct and according each of the City and the Province shall have the taxable costs of their applications against the plaintiff at double the amount they would otherwise be entitled to.

J.

B. SCHERMAN