IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Keehn v. 1029804 BC Ltd.,* 2023 BCSC 2067

Date: 20231107
Docket: S62627
Registry: Kamloops

2023 BCSC 2067 (CanLII)

Between:

Ryan Gary Keehn and Serica Dawn Keehn

Plaintiffs

And:

1029804 BC Ltd. and Gregory Ross Darroch

Defendants

Before: The Honourable Justice Hori
in Chambers

Correct Judgment: The Reasons for Judgment were corrected
on the front page on November 20, 2023

Oral Reasons for Judgment

Counsel for the Plaintiffs (by video):	C. Gray
Counsel for the Defendants (by video):	R.P. Barton B. Matheson
Place and Date of Hearing:	Kamloops, B.C. November 6, 2023
Place and Date of Judgment:	Kamloops, B.C. November 7, 2023

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Introduction

[1] The parties own adjacent properties near Mara Lake, British Columbia. The subject properties are:

a) Lot 1, Section 24, Township 21, Range 8, West of the Sixth Meridian, Kamloops Division Yale District, Plan KAP 67235 ("Lot 1"); and

b) Lot A, Section 23, Township 21, Range 8, West of the Sixth Meridian, Kamloops Division Yale District, Plan KAP 73456 ("Lot A").

[2] In the year 2000, Harriet Hyde owned Lot 1 and 57241 BC Ltd. owned Lot A. On August 3, 2000, Ms. Hyde granted an easement over Lot 1 for the benefit of Lot A (the "Easement"). The purpose of the Easement was to install, construct, and operate a waterworks system to provide potable water and irrigation water to Lot A.

[3] The Easement granted by Ms. Hyde is registered as a charge against the title to lot 1. It is shown as a legal notation on the title to Lot A.

[4] Construction of the waterworks contemplated by the Easement was completed by the spring of 2001. Since the date of completion, Lot 1 has used water from the waterworks. On some unspecified date, the then owners of Lot 1 installed a connection to the waterworks through which they obtain water from the system. There is no evidence as to whether the then owners of Lot A agreed to a diversion of water from the waterworks system to Lot 1.

[5] The defendant, 1029804 BC Ltd., became the registered owner of Lot A on September 9, 2009. The plaintiffs became the registered owners of Lot 1 on June 30, 2022.

[6] The water from the waterworks system is used by the defendants to supply a golf course operation on Lot A. The water from the system is used by the plaintiffs to supply a personal residence, a short-term rental business and a hobby farm.

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[7] In the fall or winter of 2022, without notice to the plaintiffs, the defendants ceased operation of the water treatment facility within the waterworks system. When the plaintiffs noticed a reduction of the quality of water they were receiving, they voiced concerns to the defendants. In March 2023, the defendants made an inquiry with the Interior Health Authority about the operation of the waterworks, which resulted with the health authority conducting an investigation.

[8] In May 2023, the defendants notified the plaintiffs that they would terminate Lot 1's connection to the system. Ultimately, the defendants advised the plaintiffs that they would shut off the water on November 15, 2023.

[9] As a result of this advice, the plaintiffs bring this application for an interlocutory injunction restraining the defendants from terminating or impeding the plaintiffs' use of the waterworks located on Lot 1 and Lot A.

Legal Basis for the Application

[10] The legal basis for the plaintiffs' application is *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The Supreme Court of Canada in *RJR-MacDonald* established the test for granting an interlocutory injunction. The applicant must establish that:

a) there is a serious question to be tried;

b) the applicant will suffer irreparable harm if the injunction is not granted; and

c) the balance of convenience favours the granting of the injunction.

Factual Basis for the Application

[11] The plaintiffs rely on the Easement as a basis for their injunction application. During his submissions, counsel for the plaintiffs suggested that the plaintiffs also rely upon an agreement between the parties that the flow of water would continue. However, there is no evidence of any such agreement, and the evidence that the defendants or their predecessors in title may have acquiesced in Lot 1's use of water from the system, cannot form the basis for this injunction application.

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[12] The material terms of the Easement are as follows:

a) Lot 1 is a servient tenement and the grantor of the easement;

b) Lot A is the dominant tenement and the grantee of the Easement;

c) The grantor grants the Easement for the benefit of the grantee;

d) The purpose of the Easement is to provide potable and irrigation water to the dominant tenement;

e) The grantor reserves the right to use the Easement area for the benefit of the servient tenement;

f) The grantee will not impede the flow of water or wastewater into, through, and from the servient tenement, except only to such degree as may be unavoidable during the construction or maintenance of the waterworks; and

g) The cost of installing, repairing, and maintaining the waterworks will be entirely borne by the "transferee."

[13] The plaintiffs submit that the provisions in the Easement that:

a) reserves the grantor's right to use the Easement area for its benefit; and

b) requires the grantee to not impede the flow of water or wastewater into, through and from the servient tenement;

create a right to an unimpeded supply of water to Lot 1 that runs with the land.

[14] In my view, the Easement is not capable of the interpretation urged upon me by the plaintiffs.

[15] It is clear from the Supreme Court of Canada decision in *Heritage Capital Corp. v. Equitable Trust Co.*, [2016] 1 S.C.R. 306 and the BC Court of Appeal decision in *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA

268, that a positive covenant cannot run with the land. In *Westbank Holdings*, the Court of Appeal held:

> [16] The necessary conditions of covenants which run with land are set out by DeCastri in his text, *Registration of Title to Land* (Carswell 1987). They were stated by Clearwater, J. in *Canada Safeway Ltd. v. Thompson (City)*, [1996] M.J. No. 393, August 15, 1996, at page 8, as follows:
>
>> (a) The covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement. No personal or affirmative covenant requiring the expenditure of money or the doing of some act can, apart from statute, be made to run with the land.

[16] In my view, the interpretation of the provision that requires the grantee not to impede the flow of water to Lot 1 urged upon me by the plaintiffs is, in substance, an interpretation of the provision that creates a positive covenant. The plaintiffs' interpretation makes the provision an affirmative covenant requiring the owners of Lot A to continue operating the waterworks system for the benefit of Lot 1. It requires that the owners of Lot A expend money to operate the system for the benefit of Lot 1.

[17] The interpretation of this provision in the Easement that is consistent with it being a negative covenant is that it prohibits the grantee from interfering with other sources of water flowing into the servient tenement other than a temporary interference during construction or maintenance of the waterworks. In my view, it does not, nor can it, create a positive obligation on the owners of Lot A to continue supplying water to Lot 1.

[18] The registration of the Easement against title to the properties is consistent with my interpretation. The Easement is registered as a charge against title to Lot 1. However, it is not a charge against title to Lot A. The Easement appears on title to Lot A as a legal notation that indicates that the easement is "ANNEXED" to Lot A. Had the Easement been intended to burden the title of Lot A, it would or should have been registered as a charge against the title to Lot A.

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[19] Accordingly, based on the forgoing analysis, I find that the plaintiffs have failed to establish the first step in the *RJR-MacDonald* test. I find that there is no serious question to be tried. Therefore, the application for an interlocutory injunction is dismissed.

[20] Mr. Gray, anything arising out of my decision?

[21] CNSL C. GRAY: Just questions about the conditional water licence and the process with the water authority, but if you have nothing to say on that, then ...

[22] THE COURT: I do not have the jurisdiction nor the knowledge to give you any direction on the water licence or the condition or the process of the water sustainability.

[23] CNSL C. GRAY: Yes, Your Honour. I guess my question is just we have this parallel process going with the proper authority, who has requested the beneficial use or invited for the beneficial use declaration form to be filled out. So is there any guidance on the continued use of the waterworks until the -- that process has been resolved?

[24] THE COURT: I have not based my decision on the status of the waterworks, or the conditional water licence. That is still an open question whether or not there is an entitlement to use water under the licence. I have not decided that issue, and nor could I really. That is still an open issue.

[25] The problem that you have, that your client has, is that he is seeking to impose a requirement on Lot A to continue supplying water to Lot 1, and I have found that that is not appropriate under the Easement. It seems to me if there is to be an entitlement to get water through either the existing system or over Lot A, then there has to be some further discussion and negotiation with the owners of Lot A.

[26] CNSL C. GRAY: Thank you.

[27] THE COURT: Mr. Barton, anything arising?

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[28] CNSL R. BARTON: Only the matter of costs, justice.

[SUBMISSIONS ON COSTS]

Costs

[29] The defendants have been successful in defending this application. There will be costs for the preparation and attendance at the application that will be awarded to the defendants in any event of the cause at Scale B. There will be no order with respect to costs related to the short leave application.

[30] One question that I will raise here with counsel is, I am aware that Lot 1 relies upon the water from the system, and I am not in a position I do not think to make an order to this effect, but I would urge the defendants to provide some period of time for the plaintiffs to arrange alternate source of water, or some other arrangement that can facilitate the supply of water to Lot 1. That is certainly not an order that I can make, but it seems to me that it would be reasonable in the circumstance to arrange some kind of accommodation where the plaintiffs are not all of a sudden shut off supply of water with no other access.

"D.K. Hori J."

HORI J.

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