COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Worthington v. Webber,*
2024 BCCA 147

Date: 20240419
Docket: CA48576

Between:

Dallas John Worthington

Appellant
(Respondent)

And

Robert Bruce Webber and Sandra Jean Webber

Respondents
(Petitioners)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated August 31, 2022 (*Webber v. Worthington*, 2022 BCSC 1526, Penticton Docket S46945).

Counsel for the Appellant:	K.O. Hamilton
Counsel for the Respondent:	J.R. Kitsul
Place and Date of Hearing:	Vancouver, British Columbia April 9, 2024
Place and Date of Judgment:	Vancouver, British Columbia April 19, 2024

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Madam Justice Horsman

Summary:

The appellant began constructing a coach house on his property. The respondents, who are neighbouring property owners, filed a petition asserting that the coach house was contrary to a restrictive covenant. The appellant submitted that no charge restricted his use of his property. The chambers judge granted the petition in part, and continued an interim injunction, on the basis that the appellant was required to pursue the matter by bringing a petition to cancel or modify the charge under s. 35 of the Property Law Act. The appellant argues that the judge erred in determining that s. 35 governs a dispute about the meaning and interpretation of an alleged charge against a property. He submits that this Court should decide the issue of enforcement at first instance.

Held: Appeal allowed.

The chambers judge erred in her conclusion that s. 35 applied to this dispute. Section 35 is only a complete code for cancelling or modifying an easement or charge against land and it does not govern the interpretation and enforcement of such interests. That issue regarding the interpretation and enforceability of the indenture on title should be remitted back to the trial court. The interim injunction will expire 30 days after these Reasons, subject to further order.

Reasons for Judgment of the Honourable Justice Griffin:

[1] The underlying issue in dispute between the parties involves the interpretation of a document registered against title to real property. What brings the parties before this Court is a dispute regarding the proper procedure to determine this underlying issue.

[2] The chambers judge ruled that the correct procedure to determine the issue required the appellant to bring a petition pursuant to s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377 [*PLA*], on notice to all affected property owners. The judge also ordered a continuation of an interim injunction restraining the appellant from conducting any further work on his property.

[3] The appellant appeals from that decision. I would allow his appeal for the reasons that follow.

Background

[4] This is a dispute between neighbours. The appellant, Dallas Worthington, owns a residential property in Penticton, BC, which will be referred to as Lot 36.

[5] The respondents (who were petitioners in the court below), Sandra and Robert Webber ("the Webbers"), own a residential property on the same street, Lot 38.

[6] Mr. Worthington received a building permit to construct a coach house on Lot 36. When the Webbers learned of this, they wrote to him through counsel, objecting to the coach house and taking the position it was contrary to a restrictive covenant on Lot 36 that they were entitled to enforce.

[7] The starting point of examining the claim that there is a restrictive covenant, is a notation on the title of Mr. Worthington's property, under the heading "Legal Notations", stating: "For an appurtenant restrictive covenant see DD 39142E".

[8] This leads to a document registered in the Land Title Office by the same number, 39142E, described on its cover page as a "charge", and which has a hand notation "R/C 128033". The "R/C" is likely meant to indicate "restrictive covenant". Attached to the charge is a document described as an indenture, and stamped 128033 (the "Indenture").

[9] The Indenture was made March 15, 1947, between David Kyle, solicitor, the "Grantor", and Arlo Marchant, contractor, the "Grantee". It appears to be a grant of title to Lots 5 and 6 of property located in Penticton, from Mr. Kyle to Mr. Marchant, in consideration of $800.00.

[10] Included in the Indenture is the following typed paragraph:

> THE GRANTEE in pursuance of the scheme of arrangement of the said Fairview Homes, covenants with the Grantor and with other owners of similar parcels, not to erect on the said parcel any building or buildings other than a single private dwelling and a garage or similar outbuilding of like style and outside finish as the residence, which buildings shall be fully complete before being occupied and which shall be parallel to the street line and back not less that thirty feet therefrom, and shall be a total value or cost of construction of not less than $4500.00.
>
> The lands to be benefited by this restrictive covenant immediately above set out are Lots 1-4 and 7-8 inclusive, Map 3157, and Lots Nine to thirty-eight inclusive Map 3284, Penticton B.C.

[11] Mr. Worthington's property, Lot 36, is one of the properties referred to in the last paragraph above, as is the Webbers' property, Lot 38.

[12] Mr. Worthington takes the position, among other things, that the "notation" on the title to his property is simply a notation that there is a legal charge granting a benefit in his favour. He submits that the Indenture is a restrictive covenant against the owner of Lots 5 and 6, restricting that owner from building more than a single private dwelling, and this is for the benefit of neighbouring lots including Mr. Worthington's Lot 36. However, he says there is no language in the Indenture that expressly imposes a restriction on Lot 36. He therefore continued to build the coach house.

[13] The Webbers assert that the burdens and benefits of the Indenture were part of a building scheme and are intended to be reciprocal. They point to the language in the first sentence that refers to "a scheme of arrangement of the said Fairview Homes", as indicating this was part of a building scheme applying to the whole development. Thus, they allege, Mr. Worthington is not permitted to build a coach house, because that would contravene the prohibition against more than a single private dwelling, which applies to all lots that are part of the building scheme.

[14] The Webbers therefore brought a petition against Mr. Worthington, seeking amongst other things, an injunction to prevent him from continuing to build the coach house.

[15] On December 9, 2021, Justice Brown granted the Webbers an interim injunction order, preventing further work on the coach house until "the trial or other disposition of this proceeding" or until further order of the court.

[16] The Webbers amended their petition on January 24, 2022. In their petition they seek the following orders:

(1) A declaration that Mr. Worthington has "willfully and intentionally" breached the restrictive covenant;

(2) An interim injunction restraining Mr. Worthington from conducting further work in relation to the coach house, until the conclusion of the hearing of the petition or further order;

(3) A permanent injunction restraining Mr. Worthington from conducting further work on the coach house;

(4) A mandatory injunction restraining Mr. Worthington from any further construction and an order to demolish the construction undertaken to date;

(5) In the alternative, an order that Mr. Worthington breached the procedural requirements of s. 35 of the *PLA*;

(6) Should order number 5 be successful, a permanent injunction preventing Mr. Worthington from continuing construction on the coach house;

(7) Should order number 6 be successful, an order quashing the development and building permits issued by the City of Penticton; and

(8) If orders 3 or 6 were successful, an order permitting the full demolition of the coach house.

[17] As I will explain, I am of the view that the Webbers were mistaken when they relied on s. 35 of the *PLA* as imposing a procedural requirement on Mr. Worthington.

Section 35 of the *PLA*

[18] Section 35 of the *PLA* provides:

> 35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
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> (a) an easement;
>
> (b) a land use contract;
>
> (c) a statutory right of way;
>
> (d) a statutory building or statutory letting scheme;

> (e) a restrictive or other covenant burdening the land or the owner;
>
> (f) a right to take the produce of or part of the soil;
>
> (g) an instrument by which minerals or timber or minerals and timber, being part of the land, are granted, transferred, reserved or excepted.
>
> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
>
> (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
>
> (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
>
> (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
>
> (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.
>
> (3) The court may make the order subject to payment by the applicant of compensation to a person suffering damage in consequence of it but compensation is not payable solely for an advantage accruing by the order to the owner of the land burdened by the registered instrument.
>
> (4) The court must, as it believes advisable and before making an order under subsection (2), direct
>
> (a) inquiries to a municipality or other public authority, and
>
> (b) notices, by way of advertisement or otherwise, to the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled.
>
> (5) An order binds all persons, whether or not parties to the proceedings or served with notice.
>
> (6) The registrar, on application and the production of an order made or a certified copy of it must amend the registrar's records accordingly.
>
> [Emphasis added.]

Chambers Judgment

[19] The petition came on for hearing over four days in June 2022, and the judge below issued her judgment on August 31, 2022, reasons indexed at 2022 BCSC 1526.

[20] The judge set out the parties' various arguments as to the interpretation, enforceability or unenforceability of the Indenture, however in the end did not decide those issues.

[21] The judge considered that the threshold issue was whether she should grant the orders sought by the parties, or whether a necessary precondition to the relief sought was the bringing of a petition under s. 35 of the *PLA*. She concluded that the latter applied.

[22] The judge was primarily concerned that determination of the merits of the question of whether or not the Indenture was a restrictive covenant, restricting the rights of Mr. Worthington, would affect the rights of other homeowners who were subject to the same Indenture but who had not received notice of the petition and had not been given an opportunity to be heard: paras. 13, 27.

[23] The judge held that the purpose of s. 35 of the *PLA* was to prevent such an outcome: paras. 26, 29. She found support in this interpretation in the decision of this Court in *Vandenberg v. Olson*, 2010 BCCA 204 [*Vandenberg*] and noted that decision's reference to s. 35 as providing a comprehensive code for modification or cancellation of any instrument.

[24] The judge held that:

> [32] While the respondent argues that the [Indenture] does not extend to Lot 36, and therefore a s. 35 application is not necessary, such an approach would fail to do justice between the parties. Both parties require the Court to consider their respective interpretations. This is more appropriately done through a s. 35 petition.

[25] The judge therefore "granted" the petition and continued the interim injunction, adding that if Mr. Worthington wished to pursue the matter further, he was at liberty to file a petition under s. 35 of the *PLA* with notice to the affected parties. The judge noted that she was not seized of the matter.

[26] The parties came back before the judge to make submissions on costs, and to settle the terms of the order.

[27] The judge in supplementary reasons indexed at 2023 BCSC 223 explained that she had granted "a final order that the injunction should continue", but had declined to make a decision on the interpretation of the Indenture and had declined to grant the relief to the Webbers seeking demolition or modification of the coach house improvement. The judge further explained that if Mr. Worthington wished to pursue the matter further, he was at liberty to file a petition under s. 35 of the *PLA* with notice to the affected parties, but that the court could not impose a time limit in this regard.

[28] The judge rejected Mr. Worthington's argument that any award of costs was premature until the determination of the merits of the substantive issue, namely the interpretation and application of the Indenture. The judge held that issue would be determined in a subsequent petition pursuant to s. 35. She ordered that the Webbers would have their costs at scale C.

Ground of Appeal

[29] Although Mr. Worthington states it in more than one way, his ground of appeal is essentially that the judge made an error in determining that s. 35 of the *PLA* applies to govern a dispute about the meaning and interpretation of an alleged charge against a property, when no party is seeking a remedy to cancel or modify the charge.

[30] Mr. Worthington says that the judge should have determined the question of the interpretation and application of the Indenture in relation to his property, which was raised by the Webbers' petition and his response to the petition. He says that if she had done so, it would have resulted in dismissal of the Webbers' petition. He therefore seeks orders on appeal:

a) setting aside the order below; and

b) dismissing the petition.

Analysis

[31] The focus of the ground of appeal is on the judge's reasoning that the appropriate procedure to resolve the question of the application of the Indenture to Mr. Worthington's property required Mr. Worthington to bring a petition pursuant to s. 35 of the *PLA*, seeking to cancel the charge on his property.

[32] I agree with Mr. Worthington's argument that the judge's reasoning was in error.

[33] As Mr. Worthington points out, there is nothing in s. 35 of the *PLA* that requires him to seek to cancel a charge on his property, where he takes the position that the notation on title does not have the legal interpretation and implications asserted by the Webbers.

[34] It appears to me that the judge misapplied the decision of this Court in *Vandenberg*.

[35] In *Vandenberg*, one neighbour brought an action against another neighbour for a declaration that an easement between their properties was valid and subsisting, and for an injunction restraining the defendant neighbour from impeding their use of the easement. The defendant neighbour counterclaimed seeking a declaration that the easement was not valid, or alternatively, seeking cancellation of the easement under s. 35 of the *PLA*. The plaintiff brought a summary trial application for determination of the issues: see procedural history described in the underlying chambers decision in that case, 2009 BCSC 1302 at paras. 4–5. The chambers judge decided the matter in favour of the plaintiff and granted an injunction.

[36] On appeal in *Vandenberg*, the defendant, now appellant, argued that the easement had been abandoned through operation of the common law: para. 14. This Court rejected this argument: para. 17.

[37] This Court in *Vandenberg* noted, in response to the appellant's common law argument, that s. 35 of the *PLA* did not provide for abandonment as a ground for cancellation of an easement. It was in this context that this Court said that s. 35 is a "comprehensive code for the grounds in which an easement may be cancelled or modified" (emphasis added): para. 17. This Court concluded:

> [23] The respondents argue, correctly in my view, that the court's authority is no more and no less than that conferred by s. 35(2) of the *Property Law Act*. I also agree with the respondents that s. 35(2) is a comprehensive code (as that phrase is described by *Sullivan* [*On the Construction of Statutes*,5th ed.]) which displaces the common law. The authority of the court to cancel an easement is constrained by the specific grounds set out in s. 35(2). In my view, the language of the opening words of s. 35(2) must be interpreted to mean that the Legislature intended to comprehensively describe all the grounds on which an order under s. 35(1)(a) may be made. Consequently, I am of the view that the appellant must bring himself within the s. 35(2) grounds if he is to obtain any relief.

[38] Therefore, *Vandenberg* stands for the proposition that if a party seeks to rely on s. 35 to cancel or modify an easement (or other charge against an interest in land), that party must bring themselves into one of the grounds for relief set out in s. 35(2), and cannot rely on a former common law ground such as abandonment.

[39] Further, the grounds in s. 35(2) are disjunctive, and so the court may exercise its discretion to modify or cancel a charge against an interest in land if satisfied that conditions in at least one of the subparagraphs (2)(a) to (e) have been met: *Vandenberg* at para. 25.

[40] Importantly, *Vandenberg* does not stand for the proposition that if party A seeks to enforce an alleged easement or charge against land owned by party B, and party B disagrees as to party A's interpretation and the enforceability of the easement or charge, party A can oblige party B to commence a s. 35 petition. It is only where a party (plaintiff/petitioner or defendant/respondent) seeks, as relief, the modification or cancellation of a charge, that the party must come within s. 35.

[41] The situation where one party seeks to enforce an easement, of which the other party disputes the meaning and enforceability, was considered more directly in *NBC Holdings Ltd. v. Aarts Nursery Ltd.,* 2021 BCCA 7 [*NBC Holdings*].

[42] In *NBC Holdings*, a party applied pursuant to s. 35 to cancel an easement. The chambers judge did not grant the order cancelling the easement, but instead "fashioned something of a judicial compromise", as this Court put it, by ordering that the easement be relocated. This Court held that the substance of the order was to enforce a clause in the easement agreement, which was essentially an order for specific performance.

[43] This Court held in *NBC Holdings* that enforcement of an easement is outside the scope of s. 35:

> [38] Specific performance, or enforcement generally, of the clauses in an easement agreement cannot be pursued by a petition under s. 35 of the *PLA*.

[44] This Court explained in *NBC Holdings* that while s. 35(1) provides a comprehensive code for the modification or cancellation of certain interests in land, the grounds to do so are limited by s. 35(2):

> [40] Section 35 of the *PLA* provides a comprehensive code for the modification or cancellation of the interests in land identified in subsection (1). A comprehensive code displaces the common law, such that "the authority of the court to cancel [or modify] an easement is constrained by the specific grounds set out in s. 35(2)": *Lafontaine v. UBC*, 2018 BCCA 307 at para. 51; *Vandenberg v. Olson*, 2010 BCCA 204 at para. 23.
>
> [41] What is critical, is the fact that the jurisdiction to cancel or modify the easement is constrained by subsection (2). This point was succinctly summarized by Justice Punnett in *Langlois v. Tessaro*, 2018 BCSC 1463 [*Langlois*] (aff'd with minor variance in 2019 BCCA 95) at para. 27:
>
> > For the petitioners to succeed on their application under s. 35 of the *Property Law Act*, (whether for cancellation or modification of the easement), they must:
> >
> > a) Demonstrate that the application is not premature;
> >
> > b) Demonstrate that the application fulfills one of the five criteria in subsection 35(2); and
> >
> > c) Persuade the court that, in all the circumstances, the court should exercise its discretion in favour of granting the application.
>
> [42] The five criteria in s. 35(2) provide the necessary context for the cancellation/modification jurisdiction set out in s. 35(1). <u>That jurisdiction is not at large and, in particular, it is not triggered by allegations of non-performance of obligations under the instrument</u>.
>
> [Emphasis added.]

[45] *NBC Holdings* confirms that s. 35 is only a complete code for cancelling or modifying an easement or charge against land and it does not govern the interpretation and enforcement of such interests. Accordingly, a party seeking to enforce a possible charge against land cannot rely on s. 35.

[46] The judge was in error in concluding that s. 35 of the *PLA* applied to the dispute.

[47] Mr. Worthington was not seeking an order pursuant to s. 35 cancelling the Indenture. As such, he was not required to bring a petition pursuant to s. 35 of the *PLA*.

[48] I also note the concern of the chambers judge, that not all interested parties had notice of the petition, could have been addressed by the Webbers. As petitioners, they are required to serve "all persons whose interests may be affected by the order sought": R. 16-1(3). However, I do not suggest that all neighbours would necessarily fall into this category, as the dispute is regarding the title to Mr. Worthington's property.

Remedy

[49] As set out above, it is my view that the judge erred in her analysis of the proper procedural framework for the hearing of the issues before her.

[50] The merits of the underlying dispute have not yet been determined.

[51] In such a situation, this Court's usual practice is to remit the matter to the trial court, so that a court of first instance has the first opportunity to consider and opine on the issues.

[52] Mr. Worthington urges this Court not to remit the matter, asserting that the issue is purely one of interpretation of the Indenture and title to his property, which is in evidence. He says no additional evidence is required, there are no credibility issues that can arise, and this Court is in as good a position as the trial court to

decide the issues. Further, it will save the parties time and expense if this Court simply decides the issue.

[53] In my view this is not an appropriate case to make a decision on a point of first instance, namely the scope and meaning of the Indenture and the notation on the title to Mr. Worthington's property.

[54] In *McLeay v. Kelowna (City),* 2003 BCCA 523, Justice Hall affirmed that this Court has to be cautious and to generally eschew the role of acting as a court of first instance. Quite often this Court is the final word in this province, because leave to appeal to the Supreme Court of Canada is rarely granted: para. 20. In that case the appellants alleged that a walkway constructed by the Crown along a dike constituted a continuing trespass over their property. The issue of whether s. 55 of the *Land Act*, R.S.B.C. 1996, c. 245 applied to the creek bed and adjacent dikes and provided a defence to the respondents was raised at trial but not addressed by the trial judge. In remitting this issue back to the trial court to be decided, Hall J.A. stated:

> [21] The trial judge made no findings on this issue and, while it may be a difficult argument for the Crown to succeed upon, I consider that it is appropriate that a full opportunity be given to the court of first instance to decide both the facts and the law relating to this issue; only in that way can an appropriate record be framed for decision by this Court. I appreciate that this will occasion some further delay, but having regard to the fact that this is an important issue and that it could have repercussions well beyond the confines of this litigation, I consider it desirable for the issue to be fully and fairly addressed at first instance before this Court deals with the matter. Therefore, I would remit this issue for decision to the Supreme Court of British Columbia.

[55] I do appreciate that the parties in this matter have already expended resources on this litigation, with considerable time passing since the dispute began, yet no court has determined the interpretation issues at the heart of the dispute. I am concerned about this.

[56] Nevertheless, because the result of this case might have a precedential effect on other homeowners in the same subdivision, I am reluctant to decide the issues as a court of first instance when this would deprive the losing party of ordinary rights of appeal. This is especially so because the record put before us on appeal is very

slim. It is comprised of a single affidavit that formed part of the record in the underlying proceedings, attaching title searches of Lots 5, 6, 36, 38 and the Indenture.

[57] We do not have any evidence regarding the history of the subdivision, or what was the context of the development at the time of the Indenture. The parties in their pleadings below referred to several affidavits, at least ten on my count, and we are advised some are by neighbouring property owners who append documents relating to their titles. We can see that the title to the Webbers' property refers to a building scheme 107596F, but that document is not in the record before us. We do not know if the title documents to other properties are consistent with the Webbers' argument that the Indenture evidenced a building scheme affecting all properties, or would support arguments to the contrary. The documents that were before the judge are not all before us.

[58] The interpretation of a contract involves issues of mixed fact and law and is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at paras. 53 to 55. On appeal, deference is typically given to the judge's construction of the contract: *Corner Brook (City) v. Bailey,* 2021 SCC 29 at para. 44.

[59] The principles of contractual interpretation apply to the Indenture: see *Gubbels v. Anderson* (1995), 8 B.C.L.R. (3d) 193 at paras. 15–16, 1995 CanLII 1377 (C.A); see also *Anderson v. Michaels*, 2018 BCCA 237 at para. 23.

[60] I am not confident that we have been provided with all relevant evidence.

[61] For these reasons, I am of the view that the first opportunity to consider these issues should be the trial court.

[62] I would therefore set aside the judge's order granting the petition, and remit the petition for hearing in the trial court.

[63] This leaves the question of what to do about the injunction order granted by the judge. The judge did not directly address the test for an injunction in her reasons, but simply extended an earlier interim injunction. The parties before us did not direct their argument to the merits of the injunction order.

[64] It does seem to me that the injunction order has been in place for quite a long time now and I wonder whether that was anticipated at the time it was granted and whether the passage of time has shifted the balance of convenience. In my view, a pragmatic course would be to order that the judge's extension of the injunction order be varied, such that it will terminate 30 days after the date of the issuance of these reasons, subject to any further court order. That will give time for the Webbers to reapply for an injunction if they consider it necessary. Should it come back before the trial court, I do not intend by my comments to weigh the scale one way or the other towards a continuation or termination of the injunction.

Disposition

[65] I would grant the appeal and would set aside the judge's order granting the petition. I would vary the judge's order extending the interim injunction, such that the injunction order will terminate 30 days after pronouncement of this judgment, subject to court order.

[66] I would remit the matter to the trial court for determination of the enforceability of the Indenture or such other relief as arises from the petition and response to the petition, or such amended pleadings as may be filed.

"The Honourable Justice Griffin"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Horsman"