

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Strange v. Edy*,
2024 BCSC 870

Date: 20240522
Docket: S226803
Registry: Vancouver

Between:

Martin Strange and Philip Griffith

Plaintiffs

And

**Carolyn Louise Ellen Edy, Richard McLeod Anderson, Kevin McLeod
Anderson and William Hunter Anderson**

Defendants

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for the Plaintiffs:

M. Pokrajac

Counsel for the Defendants:

R.J. McDonell

Place and Date of Trial/Hearing:

Port Coquitlam, B.C.
April 15, 2024

Place and Date of Judgment:

Vancouver, B.C.
May 22, 2024

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Introduction

[1] The plaintiffs own properties on Bowen Island. While their properties do not have waterfront access, the plaintiffs can access the beach by the use of an easement that cuts through the defendants' property at 1693 Adams Road. The easement is approximately 20 feet wide on the eastern edge of the defendants' property, running from Adams Road to the Tunstall Bay foreshore. At various points along the easement, the defendants have installed stairs, fences, screens, trees, retaining walls, a patio area, and a wooden planter. The plaintiffs argue these installations have narrowed their footpath and substantially interfered with their use of the easement. They seek damages and an order that the defendants remove these installations.

[2] The parties agree this matter is suitable for summary trial. The defendants argue the plaintiffs have not proven substantial interference with their use of the easement, and that this action should be dismissed.

Factual Background

[3] The Adams family were the original owners of an acreage on the west side of Bowen Island, and over the years subdivided their property into numerous lots. Some of these lots did not have waterfront access. An easement was granted to the purchasers of these subdivided lots allowing access to the water ("Easement"). The Easement was located on the eastern boundary of what is now 1693 Adams Road ("Servient Lands"). There are currently 22 grants of Easement registered on title to the Servient Lands, which grant common rights of access to the water. These grants of Easement were registered from 1965 to 1989.

[4] The defendant, Carolyn Edy is the current registered owner of the property at 1693 Adams Road, Bowen Island, B.C. The legal description is Lot 6, Block A, District Lot 492, Plan 13181. This property is located on the west side of Bowen Island, and runs from Adams Road south to Tunstall Bay. Ms. Edy purchased the property in August 2008.

[5] The plaintiff, Martin Strange along with his wife are the registered owners of 534 Hilltop Place, Bowen Island, B.C. The legal description is Lot 8 of Lot 3, Block A, District Lot 492 Plan 13741. They purchased their property in October 2013. Their property is not waterfront. Their property has an Easement numbered 513629M registered in 1970 which states in part the following:

...the Grantors have agreed with the Grantee to grant an easement of right of way over the said Lot Six (6), Block "A", District Lot Four hundred ninety-two (492), Group One (1), New Westminster District, Plan Thirteen thousand one hundred eighty-one (13181), in common with the Grantors and all others having a similar right...

[Emphasis added.]

[6] The Easement is further described in Schedule A of the indenture:

For the purposes connected with the use and enjoyment of the said Lot Eight (8) of Lot Three (3), Block "A", District Lot Four hundred ninety-two (492), Group One (1), New Westminster District, Plan Thirteen thousand seven hundred forty-one (13741), and in common with the Grantors and all others who now have or may hereafter acquire a similar right, the full free right and liberty at all times of ingress, egress and regress upon, through and over that portion of the said Lot Six (6), Block "A", District Lot Four hundred ninety-two (492), Group One (1), New Westminster District, Plan Thirteen thousand one hundred eighty-one (13181), as shown on Reference Plan Eight thousand six hundred sixty-one (8661).

[Emphasis added.]

[7] The location of the Easement is marked on Reference Plan 8661, and is described as:

All that portion of Lot Three (3), Block "A", District Lot Four Hundred and Ninety-two (492), Group One (1), New Westminster District, Plan 12080 which lies between Easterly boundaries of said Lot Three (3), of Block "A" and a line perpendicularly distant 20.0 feet from and to the West of the said Easterly boundary containing 0.19 acres more or less. The said Easterly boundary may be more particularly described as commencing at the most Northerly corner of said Lot Three (3), of Lot "A", thence southerly 215.00 feet more or less to an angle in the said boundary; thence continuing southerly 210.98 feet more or less to the most southerly corner of said Lot Three (3).

[8] The Easement is effectively 20 feet wide on the eastern boundary of the Servient Lands, and runs from Adams Road down to the water.

[9] The plaintiff, Philip Griffith along with his wife are the registered owners of 1652 Adams Road, Bowen Island, B.C. The legal description is Lot 2 of Lot 3, Block A, District Lot 492, Plan 12397. They purchased the property in March 2020. Their property is not waterfront, and has an Easement numbered 458831M registered in 1967 which contains identical wording.

[10] Both plaintiffs, along with a number of other families in the area, enjoy access rights to the Easement located on Ms. Edy's property.

[11] The Easement runs from Adams Road on the northern end to Tunstall Bay at the southern end. The Easement land has a driveway portion at the northern end where it meets Adams Road. This first portion of the Easement is approximately 215 feet in length. Where the driveway portion ends, the right of way angles to the west, continuing to follow the eastern boundary of the lot. This lower portion of the Easement is along a forested slope of a rock ridge extending to the top of a bluff that descends to the foreshore of Tunstall Bay. A substantial portion of the Easement south of the driveway is on bedrock.

[12] When Ms. Edy purchased the property in 2008, there was a rough narrow walking path from the end of the driveway to the ocean, with a set of wooden stairs down the bluff to the ocean at the southern end of the Easement. This set of stairs was installed in approximately 1975 ("Lower Easement Stairs"). Other than the Lower Easement Stairs, there were no man-made structures on the southern portion of the Easement when Ms. Edy purchased the property. There was a path roughly one to two feet wide worn through the vegetation by persons walking to the ocean. There were some rough stone and mortar steps on parts of the Easement to facilitate walking down some of the steeper sections.

[13] In 2008, the entrance to the walking path from the end of the driveway was in rough terrain, situated on a gully. At that time, Easement holders using the path would walk on the easier terrain to the west of the Easement, on Ms. Edy's property. Further down the Easement, the path jogged back to the rock ledge.

[14] Starting in approximately 2014, Ms. Edy began some work along the Easement. She relocated the stone and concrete steps on the gully section to the Easement, so that the path to the ocean is located wholly on the Easement and is easier to walk. She also rebuilt some of the stairs along the pathway, widened and leveled the path in some sections, installed a fence along the western edge of the Easement, and installed some steps and landscaping. She deposed that the work she has done on the Easement makes walking on the path to the ocean easier and safer. She deposed that some of the work done, such as the landscaping and retaining walls, has no effect on the path. She deposed that none of the work she has performed on the Easement impacts the access to the walking path to the ocean. The narrower parts of the walkway are at the fenced portions, and these portions vary in width from 53 to 60 inches. The narrowest part of the walkway is the stairs to the ocean, which are approximately 36 inches wide.

[15] In the summer of 2020, the Lower Easement Stairs were rebuilt by a group of the Easement holders. These set of stairs allow access to the beach at Tunstall Bay. Ms. Edy deposed that the stairs were rebuilt at a higher height than they were previously, which impacted views from her property. She has installed some screening and fencing to protect her privacy. At one point along the Easement, the defendants built a patio that is fenced off from the walking path. This patio is intended for use by the defendants and their guests, and not for use by all Easement holders.

[16] Since 2008, Ms. Edy deposed that she has never seen an Easement holder travel the pathway to the ocean other than by walking.

[17] The plaintiffs depose the installations made by Ms. Edy restrict their use of the Easement to a walking path to the beach that bottlenecks to a width of approximately three feet as they approach the Lower Easement Stairs. On the evidence, the plaintiffs can still access the beach by walking on the pathway located on the Easement. However, the plaintiffs depose the installations substantially interfere with their use of the Easement. They have repeatedly asked the defendants to remove the installations but the defendants will not agree.

[18] The plaintiffs depose there are many uses they could make of the Easement if the defendants' improvements were removed, such as "enjoying the nature and scenery of the Easement Area, enjoying unobstructed ocean views, gathering with friends, using motorized vehicles or bicycles, trail running, or even developing the Easement Area in such a way as to improve or facilitate more reliable access, without excluding any one else entitled to use the Easement".

[19] The Plan 8661 Easement Maintenance Society was incorporated in June 2021 ("Society"). This Society is for the purpose of physically and legally maintaining the access to and use of the Easement. Both plaintiffs are directors of the Society. The members are the other property owners with access to the Easement.

Appropriateness for Summary Trial

[20] Rule 9-7(15) of the *Supreme Court Civil Rules* provides that:

- (15) On the hearing of a summary trial application, the court may
 - (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
 - (c) award costs.

[21] As can be seen, there are two questions to be considered in determining whether a matter is suitable for summary determination:

- a) Is there an adequate evidentiary base for the court to make the necessary findings of fact?
- b) Would it be unjust to decide the case on a summary trial application?

[22] In *Gichuru v. Pallai*, 2013 BCCA 60, the Court identified a number of factors at paras. 30–31 that may be considered in determining whether it would be unjust to give judgment on a summary trial:

- a) The amount involved;
- b) The complexity of the matter;
- c) Its urgency;
- d) Any prejudice likely to arise by reason of delay;
- e) The cost of taking the case forward to a conventional trial in relation to the amount involved;
- f) The course of the proceedings;
- g) The cost of the litigation and the time of the summary trial;
- h) Whether credibility is a critical factor in the determination of the dispute;
- i) Whether the summary trial may create an unnecessary complexity in the resolution of the dispute;
- j) Whether the application would result in litigating in slices; and
- k) Any other matters which arise for consideration on this important question.

[23] I find this matter is suitable for summary trial. The Court can find the necessary facts to determine the issue. For the most part, the evidence is not in conflict. The issue is how to interpret the rights granted to the plaintiffs by the Easement. I find it would not be unjust to decide the issue on a summary trial. The plaintiffs claim the Easement grants them a broad right of access, and they are not limited to a walking pathway. The defendants' position is the Easement is a right of way to access the foreshore, and the plaintiffs have not shown their walking access to the waterfront has been impeded.

Legal Framework

[24] The principles of how to interpret an easement were set out in *Grant v. Lowres*, 2018 BCCA 311:

[19] Easements are to be interpreted as contractual documents, which raises questions of mixed fact and law: *Robb v. Walker*, 2015 BCCA 117 at paras. 30–31.

[20] Contractual interpretation generally involves discerning “the intent of the parties and the scope of their understanding” by “read[ing] the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47. In *Sattva*, the Supreme Court of Canada explained the manner and extent to which surrounding circumstances may inform contractual interpretation:

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services [Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31], at para. 14; and Hall [Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed. (Markham, Ont.: LexisNexis, 2012)], at p. 30). The goal of examining such evidence is to deepen a decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).

[21] This court adapted those insights to the particular context of easements in *Robb v. Walker*.

[31] When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the time the agreement was entered into. Surrounding circumstances, that is, objective evidence of the background facts at the time of the execution of the contract, are to be considered in interpreting the terms of a contract: *Sattva* at para. 58.

[32] The wording of the instrument creating the right of way should govern interpretation unless (1) there is an ambiguity in the wording, or (2) the surrounding circumstances demonstrate that both

parties could not have intended a particular use of the easement that is authorized by the wording of the document: *Granfield v. Cowichan Valley (Regional District)* (1996), 1996 CanLII 356 (BC CA), 16 B.C.L.R. (3d) 382 (C.A.).

[Emphasis in original.]

[25] The Easement is a contractual document, to be interpreted in accordance with the plain and ordinary meaning of the words to determine what the intention of the parties was at the time the grant was made: *Robb v. Walker*, 2015 BCCA 117 at para. 31. Ordinary principles of contractual interpretation apply, including the appropriate consideration of surrounding circumstances: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

Analysis

[26] The Court has to interpret the Easement to decide what rights have been granted to the Easement holders. The Court then has to consider if the installations erected by the defendants have substantially interfered with the plaintiffs' exercise of their rights pursuant to the Easement.

[27] The plaintiffs argue the wording of the Easement is broad, and does not restrict the use of the Easement to a walking path. The width of the Easement is 20 feet, and the plaintiffs argue there is no evidence that other uses in addition to a walking path were not intended. The plaintiffs argue if the Easement was intended to be limited to a footpath to access the foreshore, the parties could have said so: *Grant* at para. 12.

[28] The Easement granted to the plaintiffs is described in Schedule A of the indenture. Schedule A states that for the purposes connected with the "use and enjoyment" of the plaintiffs' lots, and in common with the rights of the defendants and all others who are easement holders, the plaintiffs have the "full free right and liberty at all times of ingress, egress and regress upon, through and over" the Easement lands. In my view, the Easement is a right of travel through the Easement lands. While the opening words are for the plaintiffs' "use and enjoyment", this is limited to travel through the Easement to access the foreshore and back to their upland lots. There is no broad right of use and enjoyment of the Easement lands for the plaintiffs, such as

a right to occupy it, use it to enjoy viewpoints, or to develop the area. The ordinary meaning of the words in the grant of Easement do not permit the interpretation urged by the plaintiffs. The plaintiffs' interpretation ignores the words "ingress, egress and regress" and seeks to only give effect to the opening words of the grant. The right of the plaintiffs is for "ingress, egress and regress" through the Easement lands, which are words for entering, leaving and returning. Further, in my view, the phrase "for the purposes connected with the use and enjoyment" is referencing the use and enjoyment of the plaintiffs' lots, not the Easement lands. That is, the Easement is granted so the plaintiffs' use and enjoyment of their own lots can be enhanced.

[29] The words of the grant are clear and not ambiguous. The grant of Easement is to be read as a whole. I find the grant of Easement is for travelling through it to access Tunstall Bay and back to the upland lots. This interpretation is consistent with the words of the Easement which state it is "an easement of right of way in the terms expressed in Schedule A". I agree with the defendants that the Easement is a right of way.

[30] Even if the Easement is a right of way only, the plaintiffs argue there is nothing in the Easement which restricts the mode of travel to a walking path. The plaintiffs depose they would like to use vehicles or bicycles on the Easement lands. They argue the installations made by the defendants have made other modes of travel not possible.

[31] There is no evidence that any other mode of travel besides walking has ever been used on the Easement. Considering the topography, in my view, it is not possible to access the foreshore by any means other than walking. The location and physical characteristics of the Easement make any other mode of travel not practical. There are multiple sets of stairs at various points along the Easement. The Lower Easement Stairs contain 49 steps with four landings. The photos show a steep slope, with the stairs ending on jagged rocks protruding from the water. There are other sets of stairs along the Easement. The video of the Easement shows it is a path that is sloped along a rock ledge. The topography of the Easement makes any other mode of travel

besides walking not possible or practical. Where the proposed use of an easement is contrary to the topography, that use is likely not intended by the easement: *Birch v. Brenner*, 2015 BCSC 466 at para. 55, rev'd on other grounds 2017 BCCA 22.

[32] There is no evidence that the installations erected by the defendants have substantially interfered with the plaintiffs' ability to walk to Tunstall Bay. The plaintiffs agreed they could still walk the entirety of the path. The evidence shows the installations by the defendants, including stairs and handrails, have in some sections of the path made walking easier and safer.

[33] The plaintiffs argue the defendants' installations have prevented them from accessing desirable parts of the Easement, including viewpoints at the cliff bluffs near where the defendants have erected a private patio, and prevented machinery and equipment from developing the southern half of the Easement. The plaintiffs complain sections of the path have been narrowed, and they take issue with the defendants building a patio on Easement land that is for their private use. The plaintiffs wish to be able to develop the full width of the Easement so they can also have view points out to the water.

[34] However understandable the wish is for prime locales to stop, dine, or take in views, that is not what the Easement grants. The plaintiffs do not have proprietary rights over the entire width of the Easement. They do not have exclusive or unrestricted use of the Easement lands for all purposes: *Robinson v. Pipito*, 2014 BCCA 200 at para. 40. The defendants are not precluded from using the Easement area as long as they do not interfere with the rights of the plaintiffs to access the water. Further, due to the physical location and topography, there is no evidence that any type of roadway can be built along the path to Tunstall Bay. When the Lower Easement Stairs needed to be rebuilt, the Easement holders replaced it with another set of stairs, and not any type of roadway. I find the plaintiffs' arguments about theoretical uses of the Easement not persuasive.

[35] What the plaintiffs have is the right to walk on the Easement lands to get to Tunstall Bay and back. On the evidence, the plaintiffs have not shown a substantial interference with their right to walk to and from the ocean.

Conclusion

[36] The plaintiffs' application is dismissed.

[37] Unless there are matters the Court is not aware of, the defendants have been successful and are entitled to their costs at scale B. If either party wishes to make different submissions on costs, they are to contact the registry within 30 days.

“Chan J.”