COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1057600 B.C. Ltd. v. 1249645 B.C. Ltd.,* 2023 BCCA 365

Date: 20230915
Docket: CA48553

Between:

1057600 B.C. Ltd.

Appellant
(Respondent)

And

1249645 B.C. Ltd.

Respondent
(Petitioner)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated August 18, 2022 (*1249645 B.C. Ltd. v. 1057600 B.C. Ltd.*, 2022 BCSC 1425, Victoria Registry Docket 203882).

Oral Reasons for Judgment

Counsel for the Appellant:	G.N. Harney A.S. Aulakh
Counsel for the Respondent:	J.G. Dives, K.C. J.A. Hall
Place and Date of Hearing:	Victoria, British Columbia September 14, 2023
Place and Date of Judgment:	Victoria, British Columbia September 15, 2023

Summary:

This is an appeal of an order granting a petition that an easement registered against the respondent's property be cancelled. The appellant argues that the judge erred in (1) determining the easement was invalid and unenforceable; and (2) if the easement was invalid and unenforceable, concluding that the dominant property was not landlocked. Held: Appeal dismissed. The judge did not make any reviewable error in concluding that the easement was invalid and unenforceable or that the dominant property was not landlocked. The appellant did not satisfy its burden of establishing that an easement should be implied in the circumstances.

ABRIOUX J.A.:

Introduction

[1] This appeal arises from an order made in Supreme Court chambers granting the respondent's ("124") petition and ordering that an easement and easement modification ("easement") registered against a property owned by 124 be cancelled because it was invalid and unenforceable.

[2] As framed by the appellant ("105") the principal issues on appeal are whether the judge erred in finding the easement invalid and unenforceable. In the alternative it submits that, having done so, the judge erred in concluding that the property would not be effectively landlocked. In advancing this argument, 105 alleges that the judge erred in placing on 105 the burden of proving that, but for the easement, there was no reasonable access to the property.

Background

[3] The background is succinctly set out in the judge's reasons which are indexed as 2022 BCSC 1425. Reduced to their essentials the easement is registered against a property owned by 124 (the "servient property" also known as Lot 3) in favour of an adjacent property owned by 105 (the "dominant property" also known as Block 1242). The easement, as it was originally drafted and granted in 2015, allowed the dominant owner essentially unrestricted access to the servient property.

[4] The easement provided access from the dominant property to Goldstream Heights Road which was dedicated in 2005. The dominant property was created in 1969, some 35 years prior to the dedication of Goldstream Heights Road.

[5] The easement was originally granted in 2015 at a time when the properties were owned by different yet related companies. The judge found that "[a]s long as this remained the case, the terms of the easement did not really matter … [as] the properties were used in common by their owners for the commercial purpose of dumping fill and debris from construction sites" (at para. 2). On May 14, 2020, 124 purchased the servient property out of a foreclosure proceeding. The same day the dominant property was purchased out of foreclosure by one of 105's directors in his personal capacity who later transferred it to 105 (at para. 3). Shortly after acquiring the servient property, 124 barred 105 from accessing it.

[6] 124 then brought a petition seeking an order that the easement be cancelled or, alternatively, that the easement modification plan that was registered unilaterally by 105 on July 15, 2020 be cancelled.

[7] The relevant portions of the easement are:

> **1. Grant of Easement**
>
> Subject to the terms and conditions hereof, the Transferor hereby grants, conveys and transfers unto the Transferee, its successors and assigns in common with the Transferor, the right, license, liberty, privilege and easement for the Transferee, its servants, agents, contractors and invitees from time to time as set out hereunder to enter, use, go, return, pass and repass, on, over, under and through the Servient Land (the "Access Area") with or without vehicles, and to:
>
> > a) enter, work, pass and repass with and without vehicles upon, on and along the Access Area;
> >
> > b) clear the Access Area and to keep it cleared of all or any part of any obstruction, structure, building, improvement, or other matter which, in the opinion of the Transferee, acting reasonably, might:
> >
> > > i. interfere with the exercise of their respective rights, or
> > >
> > > ii. create or increase any danger or hazard to persons or to the Works.

> **2. General Terms of Easement**
>
> The rights, privileges and easements are herein granted on the following terms, stipulations and conditions:
>
> > (a) The Transferor shall have the right fully to use and enjoy the Servient Land, subject always to and so as not to interfere with the easements, rights and privileges hereby granted and conferred on the Transferee.
> >
> > …
> >
> > (g) As soon as practicable following the execution and registration of this Easement, the Transferee shall have prepared by a licensed B.C. Land Surveyor a plan registrable at the Land Titles Office delineating the area of easement as mutually agreed between the Transferee and Transferor and immediately thereafter register the plan at the Land Titles Office and concurrently therewith execute, deliver and register a discharge of the easement, save and except over that portion of the Servient Land as shown on the survey plan of the easement area (which area shall thereafter be deemed to be the Access area).
> >
> > [Emphasis added.]

[8] The requirement within paragraph 2(g) to delineate the area of the easement "as soon as practicable" was not completed by the Transferee prior to the sale of the properties to the parties in this case.

[9] On July 15, 2020, 105 unilaterally registered an easement modification in the Victoria Land Title Office that limited the scope of the easement area to an access road drawn on the registered surveyor's plan. As delineated, the easement area bisects the servient property.

The Judge's Reasons

[10] Justice Baird ordered that both the easement and easement modification agreement be cancelled since they were invalid and unenforceable.

[11] He commenced by reviewing section 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377 (the "*Act*"), which 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 land, whether registered before or after this section comes into force:
>
> > (a) an easement;
> >
> > …

> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> …
>
> (e) the registered instrument is invalid, unenforceable or has expired and its registration should be cancelled.

Observing that s. 35(2) of the *Act* is a comprehensive code which displaces the common law and that the authority of the court to cancel an easement is constrained by the specific grounds set out in this subsection.

[12] He agreed with 124 that the application to cancel the easement was not premature and that the validity and enforcement of the easement as originally drafted or as unilaterally modified was "ripe for determination" (at para. 9).

[13] Referring to, *inter alia*, *Robinson v. Pipito*, 2014 BCCA 200 at paras. 22–23, the judge explained that a right over land cannot amount to an easement if its terms violate the principle that an easement cannot permit unrestricted use of a servient property by a dominant owner (at para. 10).

[14] He then stated:

> [11] When the easement was granted back in 2015, the Transferor and Transferee obviously foresaw the problem with the general language they used, which not only defined the so-called "Access Area" as the entirety of the servient property, but conceded to the Transferee the right to clear all or any part of any obstruction, structure, building, improvement, or "other matter" that might get in the way of its right to cross any part of the servient property. I find that this is why they bound themselves, within a reasonable time, to come to a mutual agreement properly limiting, delineating and registering the area intended to be covered by the easement.
>
> [12] They were motivated, I think it obvious, by their joint and entirely justified apprehension that without the immediate importation of mutually agreed limitations to the scope and use of the access area, the easement that they had registered would not be enforceable. They recognised, in other words, that the original grant conceded too much to the dominant property and reserved too little to the servient property. I agree. In my view, the original grant was never enforceable and created no valid interest in land, despite its registration.

[15] He thus concluded that because the obligations set out in paragraph 2(g) of the original grant were not performed, the owners of the dominant and servient

properties had never agreed to a valid and enforceable easement in 2015 and that it was not open to 105 to unilaterally register the easement modification (at para. 13).

[16] The judge considered 105's argument that without a valid easement, the dominant property would be landlocked and therefore the court should impose an easement based on the doctrine of necessity. He observed that the petition had originally come on for hearing in April 2021 and that Power J. had adjourned the proceedings generally:

> [14] … to permit the respondent to reconsider its approach to the case. She suggested that the respondent might consider filing a separate action to be heard along with the petition seeking remedies of its own, including, I infer, an order imposing an easement over the servient property. She noted the respondent's argument that in the absence of such an order, the dominant property would be landlocked.

[17] The judge went on to say that:

> [15] This suggestion was not followed. There are no proceedings before the court in which the respondent seeks orders or declarations affirming any proprietary right or interest in the petitioner's property. As I have just said, the easement registered in 2015 was invalid, and the unilateral modification filed in 2020 did nothing to change this fact. In my view, if the respondent wishes the court to imply or impose an easement based on the doctrine of necessity, or on any other basis, for that matter, it must do so in a separate proceeding, and present evidence to the court establishing that such a remedy would be just and appropriate in all of the circumstances.

[18] The judge then observed that it was only 124 who had presented evidence on this point which was in the form of a historical land title analysis, which 105 did not dispute. This indicated that access to the dominant property was likely available through adjacent Crown land.

On Appeal

[19] I would frame the issues as:

a) Did the judge err in concluding that the easement was invalid and unenforceable?

b) If the easement was invalid and unenforceable, did the judge err in concluding that it had not been established that the dominant property was landlocked?

Discussion

Standard of Review

[20] It is well known that findings of fact, or findings of mixed fact and law should not be interfered, with absent palpable and overriding error. Palpable refers to the obviousness of the error such that it must be plainly seen: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 6. Overriding refers to the impact of the error and if that error is determinative of the outcome of the case: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33.

[21] The standard of review involving the interpretation of easements is grounded in the same principled basis as those cases involving interpretation of contracts: *Robb v. Walker*, 2015 BCCA 117 at para. 40. Contractual interpretation "involves issues of mixed fact and law as it 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 para. 54. The standard of review is therefore deferential.

Positions of the Parties

[22] 105 submits that the judge erred in declaring the easement registered against the servient property to be invalid and unenforceable and in concluding that the dominant property would not be effectively landlocked. It also says he erred in not applying the doctrines of proprietary estoppel or implied easements.

[23] 124 argues that 105 has not identified any palpable and overriding error in the judge's conclusion that the terms of the easement were too wide and vague and the parties' failure in 2015 to "as soon as practical" comply with paragraph 2(g) of the easement rendered it invalid and unenforceable. Nor had any error been

demonstrated in relation to the judge's conclusion that it had not been established that the dominant property was essentially landlocked.

Analysis

Issue #1: Did the judge err in concluding that the easement and easement modification were invalid and unenforceable?

[24] I would first observe that 105's factum on appeal does not address the standard of review or provide submissions as to whether the judge made any palpable and overriding errors. It simply repeats the position taken in its response to the petition.

[25] In concluding that the easement was invalid and unenforceable, the judge applied the criteria set out in section 35(2) of the *Act* which this Court has confirmed is a comprehensive code displacing the common law: *Vandenberg v. Olson*, 2010 BCCA 204 at para. 23.

[26] He then reviewed the general language in the easement and the fact that paragraph 2(g) was not complied with, specifically that the parties to the 2015 easement did not come to a mutual agreement delineating the access road as soon as practicable. That being the case, neither the easement nor the unilateral modification which was registered in 2020 were valid or enforceable.

[27] There can be no doubt that paragraph 2(g) was not complied with. I am also of the view that 105 has not demonstrated any reviewable error by the judge in relation to the interpretation of the agreement, that its terms were too wide and vague to be enforceable, or in his conclusion that both the easement and the modification were void *ab initio*.

Issue #2: If the easement was invalid and unenforceable, did the judge err in concluding that it had not been established that the dominant property was landlocked?

[28] This issue essentially involves a consideration of whether an easement could be implied in the circumstances of this case based, in part, on the doctrine of necessity.

[29] A related issue concerns which party bears the burden of proof on this issue.

[30] Respectfully, 105's argument was difficult to follow. On the one hand, 105 appeared to acknowledge that if it were asserting the existence of an implied easement based on the doctrine of necessity then it had the burden of proof relating to that issue. And yet it also argued that due to the equitable considerations at stake in this case, that 124 had a *prima facie* burden.

[31] As I understand 105's argument, it comes down to this. There was a registered easement on title at the time 124 purchased the servient property. The parties were well aware that the easement had been in existence for many years and had been used by 105 on a regular basis. If the servient property owner's application for an order cancelling the easement were granted on technical grounds, then that owner, in resisting a claim that an implied easement was in place, had an initial *prima facie* burden of establishing that a reasonable access to the property was available. Once that occurred, then the ultimate or persuasive burden that no reasonable access was available fell on the dominant owner who was seeking the implied easement.

[32] Central to 105's submission is *Bland v. Bland*, 2017 BCSC 1712.

[33] *Bland* involved two estranged brothers who had lived for many years on adjacent farm properties, acquired many years earlier from their parents. The petitioners brought proceedings based on section 36 of the *Act* in which they sought a vesting order or an easement over an access road. They had used the road, which was located within a BC Hydro Statutory Right of Way, granted in 1967, for many years and which the parties had assumed for decades was a public road. In 2012, it was discovered that the access road was not a public road and the respondent attempted to prevent the petitioners from using the road to access their property.

[34] On the issue of proprietary estoppel, the court referred to the years that the respondent had stood by and permitted the petitioner to utilize the access road as forming an equitable basis for estoppel (at paras. 43–48).

[35] With respect to the issue of non-derogation of grant, the court found for the petitioners on the basis that they were entitled to an implied easement because of their reasonable expectation that they would have the same rights as had the vendor-parents. The easement was implied by the circumstances of the transfer of the property.

[36] Regarding the issue of necessity, the court found that "[t]he petitioners have proven that the Access Road is the only access to Property #2. There is no other realistic option available" (at para. 40). Accordingly, "the use of the Access Road to access Property #2 is a matter of necessity, not convenience" (at para. 42).

[37] In my view, *Bland* does not assist 105, to the contrary.

[38] First of all, there is nothing in *Bland* which can be said to ground an argument that there is a shifting burden of proof on the party that is seeking an implied easement.

[39] The fact that the proceedings in *Bland* were brought pursuant to s. 36 of the *Act* for a vesting order or an easement, and that those in this case were pursuant to s. 35 for an order cancelling the easement is, in my view, of no moment.

[40] That is because the burden of proof pertaining to the existence of an implied easement must rest with the party advancing that proposition. In *Bland* it is clear that the petitioners who were seeking the vesting order or easement, had the burden of proof of establishing that the easement was required out of necessity. This included the burden of establishing that there was no other reasonable access to the property and that the use of the Access Road in question was a matter of necessity, not convenience.

[41] So why, logically, would a party whose alleged easement had been declared invalid or void *ab initio* not have the same burden of establishing that it was equitable, based on the doctrine of necessity that an easement be implied?

[42] I would add that 105 appears to concede that if the judge's order that the easement is cancelled as being void *ab initio* is upheld in this Court, then separate proceedings should be commenced in order to seek relief based on the existence of an implied easement. But rather than doing so, 105 has sought in this proceeding, as part of its strategy in resisting 124's application for an order cancelling the easement, a declaration of the existence of an implied easement.

[43] And it is noteworthy, in my view, that the hearing of the Petition was adjourned generally in April 2021 to permit 105 to reconsider its approach to the case (at para. 14 of the reasons quoted at para. 16 above). And nothing was done by 105 in this regard for the approximately 14 months that intervened until the hearing of the petition proceeded before the judge in June 2022. Rather, 105 chose to continue resisting 124's application for an order cancelling the easement, in part, on the basis of the equitable doctrine of necessity and the existence of an implied easement.

[44] The judge nonetheless provided 105 with the opportunity to make submissions on the issue. He then observed that the only evidence tendered came from 124 in the form of a historical land title analysis, which indicated the likelihood that the dominant property had access to it through adjacent Crown land.

[45] There was evidence in the record which formed a basis for this finding, being the affidavit of Debra Bartel, Land Title Agent who, having outlined the history of the properties as outlined above stated:

> 12. …The Registrar of the LTO accepted the deposit and registration of the 1968 survey plan and issued a safe holding and marketable title in accordance with the provisions of the Land Registry Act. The necessary and reasonable access to the Property was likely available through adjacent Crown Land via the Malahat Forest Service Road and/or via the BCH right of way plans located on Crown Land and E&N Lands. The Property was created as a parcel 35 years before Goldstream Heights Road was created in 2005.
>
> [Emphasis added.]

[46] Accordingly, no reviewable error was committed by the judge when he found that 105 had failed to prove that the dominant property would be landlocked. In my

view, the most that can be concluded from the record is that 105 had established that the access it sought was a matter of convenience, not necessity.

[47] I would add that even if 105 is correct in its argument that a *prima facie* burden rested on 124, which I specifically do not accept for the reasons I have outlined, Ms. Bartel's evidence satisfied this onus and 105 then failed to satisfy its persuasive or ultimate burden of proof on this issue.

[48] I will briefly deal with two other issues.

[49] The judge also specifically addressed 105's argument that it was entitled to an easement based on the principles of proprietary estoppel or the doctrine of implied estoppel and I can find no reviewable error in his analysis on these points. Unlike the circumstances in *Bland*, the parties in this case, as recent purchasers of their properties, had no history which would form the basis for the creation of a proprietary estoppel. In addition, unlike *Bland* there was also no basis for the finding of an implied easement based on a non-derogation of grant in that there was no existing relationship from which such an implication could arise.

Disposition

[50] I would dismiss this appeal.

[51] **HARRIS J.A.**: I agree.

[52] **FENLON J.A.**: I agree.

[53] **HARRIS J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Abrioux"