COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1004364 BC Ltd. v. Kelowna (City),* 2024 BCCA 418

Date: 20241218
Docket: CA49054

Between:

1004364 BC Ltd.

Appellant
(Defendant)

And

City of Kelowna

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated April 11, 2023 (*Kelowna (City) v. 1004364 BC Ltd.*, 2023 BCSC 554, Kelowna Docket S130623).

Counsel for the Appellant:	J.G. Frame
Counsel for the Respondent:	B. Williamson
Place and Date of Hearing:	Kamloops, British Columbia November 13, 2024
Place and Date of Judgment:	Vancouver, British Columbia December 18, 2024

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Abrioux

Summary:

The respondent municipality brought proceedings against the appellant corporation, which owns a hotel on Okanagan Lake, seeking injunctive relief. The prior owner of the hotel granted a statutory right of way to the respondent, the terms of which required the owner to maintain a boardwalk on the right of way, and to provide public and City access to it. The respondent brought the underlying proceedings against the appellant to enforce access to the right of way. The appellant counterclaimed, seeking to have the right of way declared invalid because it imposed positive obligations. The trial judge refused to issue the declaration, finding that although parts of the right of way imposed positive obligations that were unenforceable against the appellant, the remainder of the right of way remained valid. The appellant submits that the trial judge erred in his analysis of the right of way instrument. Held: Appeal dismissed. The trial judge did not err in his assessment of the right of way, and the invalidity of the positive covenants contained in the instrument does not preclude the continued enforceability of the remainder of the instrument.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] This appeal arises from a dispute between the City of Kelowna, as the holder of a statutory right of way (the “Right of Way”), the validity of which is at issue, and 1004364 BC LTD., the present owner of the servient tenement (the “Owner”). The Right of Way relates to a strip of land located along the lakefront of Okanagan Lake, in front of the Hotel Eldorado (the “Hotel”) in Kelowna.

[2] The City commenced these proceedings, seeking interlocutory and permanent injunctions against the Owner, in relation to the access of the City and the public to the Right of Way. The Owner counterclaimed against the City asserting the Right of Way, properly interpreted, was unenforceable as it purported to place a positive obligation on the Hotel to maintain and repair a boardwalk.

[3] It was common ground between the parties that certain provisions in the agreement contained positive covenants that did not run with the land and were therefore not binding on the Hotel. The judge nevertheless concluded the Right of Way remained valid. For the reasons that follow, I am satisfied the judge correctly interpreted the Right of Way and that the appeal should be dismissed.

Background

[4] In his reasons for judgment ("RFJ"), the trial judge observed that the background to the dispute between the parties was described in a detailed Agreed Statement of Facts that had been filed at trial. The judge synthesized the history that was before him. On appeal, though the appellant again describes much of the history and correspondence that led to the creation of the Right of Way in considerable detail, I too have distilled that history.

[5] The Owner owns lands with a civic address of 500 Cook Road, Kelowna (the "Lands"). The Owner operates the Hotel on the Lands.

[6] The judge described the history of the matter in four parts. First, he described the history that related to the "Filling of the Hotel Foreshore". Here he identified that the previous owner of the Lands, a corporation called "R93", created a marine proposal that included the reclamation and placement of fill on a section of land within Okanagan Lake and immediately adjacent to the Lands. R93, thereafter, having obtained approval to do so, proceeded with the placement of fill within a part of Okanagan Lake.

[7] The judge also identified various pieces of correspondence between the Ministry of Environment, Lands and Parks ("MELP"), a principal of R93, and the City. The salient aspects of this correspondence identified that R93 was interested in purchasing 515 square metres of filled area immediately in front of the Hotel, that the City and R93 were "agreeable to a right of way over the fill area for Public access" and that there was discussion of a boardwalk.

[8] The second part of the chronology fell under the heading "The Crown Grant". On February 17, 1999, MELP provided R93 with an Offer of Crown Grant for .0515 hectares (515 m^2) of filled area fronting the Hotel for a total purchase price of $30,688.67. A sketch plan, showing a proposed three-metre "easement for the City of Kelowna", was attached to the offer.

[9] The offer also included the following as a condition of the Crown grant: "This offer is subject to you surveying a right of way/easement through the fill for the purpose of establishing a public walkway in favour of the City of Kelowna."

[10] On January 12, 2000, R93 executed the appropriate Form C granting a statutory right of way, under s. 218 of the *Land Title Act,* R.S.B.C. 1996, c. c. 250 (the "*LTA*"), in favour of the City over a portion of the Lands immediately adjacent to Okanagan Lake for public access.

[11] The third portion of the judge's chronology was described as "The Instrument and the Right of Way". The judge said:

> [21] On July 31, 2000, the Form C was registered as a charge against the title of the Lands, under No. No. KP68923 (the "Instrument"). On the same day, the surveyed Plan of Statutory Right of Way KAP67233 (the "Right of Way"), which formed Schedule B to the Instrument, was filed in the Land Title Office, along with the Plan of Consolidation KAP67232, which consolidated the Crown Grant of filled foreshore with Lot 3 to create the Lands.
>
> [22] The key clauses (1.1, 2.1, 2.2 and 2.3) of the Instrument are as follows:
>
> > NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the sum of the One Dollar ($1.00) of lawful money of Canada, now paid by the Grantee to the Grantor (the receipt and sufficiency of which is hereby acknowledged by the Grantor), and in consideration, the Grantor doth hereby;
> >
> > 1.1.1 Grant, convey, confirm and transfer, in perpetuity, unto the Grantee, in common with the Grantor, the full, free and uninterrupted ingress or egress at all times hereinafter as the Grantee considers necessary to, though [*sic*], over and under that portion of the lands of the Grantor comprising 280 m^2 shown outlined in dark black on the Plan of statutory Right-of-Way deposited in the Kamloops Title Office under Plan KAP 67233, a reduced copy of which is attached as Scheduled "B" hereto (hereinafter called the Perpetual Right-of-Way) and, in common with the Grantor, for:
> >
> > (a) the Grantee:
> >
> > (b) its officers, invitees, licensees, employees, servants, agents; and
> >
> > (c) to the extent permitted by the Grantee, every member of the public during daylight hours only.
> >
> > (d) At their will and pleasure, to enter, go, pass and repass upon and along the Perpetual Right-of-Way.

> . . .
>
> 2.1 THE GRANTOR HEREBY COVENANTS TO AND AGRESS [*sic*] WITH THE GRANTEE that the Grantor will not, nor permit any other person to erect, place, install or maintain any building, structure, mobile home, concrete driveway or patio, pipe, wire or other condition, over and under any portion of the Perpetual Right-of-Way so that in any way [*sic*] interferes with or damages or prevents access to the Perpetual Right-of-Way.
>
> 2.2 The Grantor shall at all times maintain and keep the Perpetual Right-of-Way in a state of good repair and kept free of refuse, reasonable wear and tear excepted, and shall replace the Perpetual Right-of-Way or portions thereof from time to time when necessary at the cost of the Grantor.
>
> 2.3 The Grantor agrees to maintain, at the sole cost of grantor, a 3.0 m wide public boardwalk within the Perpetual Right-of-Way. The Grantee acknowledges that the Grantor has prior to execution of this agreement, constructed a boardwalk partially over the perpetual right-of-way (approximately 1.5 m wide) with the remainder of the boardwalk located partially over the adjacent foreshore of Okanagan Lake. In the event that the width of the boardwalk accessible to the public is reduced to less than 3.0 m wide, the Grantor agrees to expand the boardwalk surface within the Perpetual Right-of-Way, at the Grantor's cost, to a minimum of 3.0 m wide.

[23] The Instrument provides in cl. 3.1(a) that the grantor may temporarily interrupt the use and enjoyment of the Right of Way, so long as the temporary interruption does not materially or unreasonably impair the use of the Right of Way, except where the City has given its prior written consent to the grantor for constructing or renewing or enlarging sidewalks and walkways or for constructing, renewing or enlarging landscape areas through the Right of Way.

[24] The Instrument provides in cl. 3.1(d) that, despite cl. 2.1, the grantor has the right to erect, maintain, repair and replace signage and security gates as the grantor requires to ensure that no members of the general public have access to the Right of Way from sundown to sunrise each day.

[25] Clause 4.2 of the Instrument provides that the covenants contained therein are covenants running with the land.

[26] Clause 4.5 of the Instrument provides that it shall enure to the benefit of and be binding on the parties' respective heirs, administrators, executors, successors and assigns.

[12] In other paragraphs the judge described other relevant provisions of the Right of Way.

[13] The fourth and final portion of the judge's chronology was described as "Closure of the Right of Way" and he described some earlier court applications in this action. In this part of his chronology the judge described how, in the spring of 2020, the Owner had closed the Right of Way to public access from sunrise to sundown. The City commenced an action on March 29, 2021, to obtain an interlocutory injunction preventing the Owner from obstructing access to the Right of Way from sunrise to sundown, contrary to clause 3.1(d) of the Right of Way.

[14] Two separate applications were heard by Justice Riley during the COVID-19 pandemic. Aspects of those applications pertained to the substantive focus of the action before him and other aspects were concerned with the health-related details unique to that time. A further, and for present purposes more relevant, unopposed application was heard by Justice Wilson on June 21, 2022, at which time no COVID-19 public health restrictions applied to the Hotel's outdoor dining facilities. Since Justice Wilson's consent order of July 4, 2022, the Right of Way and lakeside walkway have not been further obstructed.

The Positions of the Parties on Appeal

[15] The appellant Owner has raised various issues on appeal. It primarily asserts that clauses 1.1, 2.2, 2.3 and other provisions of the Right of Way were all closely interrelated and that clause 1.1, in its own right, imposed an invalid positive covenant on the appellant. The appellant argues the judge erred in interpreting the Right of Way as though clauses 2.2 and 2.3—which the parties agreed imposed positive covenants that were not binding on the appellant—were not part of the instrument. The appellant says that though clauses 2.2 and 2.3 did not run with the land and did not therefore bind the appellant, they were nevertheless relevant and important to aspects of the interpretive exercise facing the court.

[16] The respondent, in turn, emphasizes that the judge was tasked with interpreting the Right of Way instrument. As such, absent an error in law or a palpable and overriding error, the judge's interpretation is entitled to deference. The respondent says the primary error the appellant relies on—that the judge failed to

consider the whole of the Right of Way document—is not accurate or faithful to the judge's reasons.

The Standard of Appellate Review in the Interpretation of Easements or Statutory Rights of Way

[17] The parties agree on the principles that govern the standard of review for interpreting an easement.

[18] Easements are to be interpreted as contractual documents: *Robb v. Walker*, 2015 BCCA 117 at paras. 30–31; *Grant v. Lowres*, 2018 BCCA 311 at para. 19.

[19] In *Sattva Capital Corp v. Creston Moly Corp.*, 2014 SCC 53, the Court determined that contractual interpretation involves questions of mixed fact and law: at para. 50. Accordingly, the standard of appellate review "is one of palpable and overriding error unless an extricable error of law can be identified": *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2017 BCCA 374 at para 28; *Sattva* at para. 53.

[20] Extricable errors of law include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Sattva* at para. 53, citing *King v. Operating Engineers Training*, 2011 MBCA 80 at para. 21. Courts should be cautious when identifying extricable questions of law in disputes involving contractual interpretation: *Sattva* at para. 54. Further, as the appellant accepts, it is not open to an appellate court to set aside a judgment because it might read an easement differently: *Robb* at paras. 40–41.

Analysis

The Applicable Legal Principles

[21] The parties also accept the accuracy of the legal principles the judge described. First, a statutory right of way is a modified easement created under, and in accordance with, s. 218 of the *LTA*.

[22] Second, positive covenants do not run with the land. A positive covenant requires the covenantor to undertake a positive act or to spend money. Accordingly, a positive covenant that is registered on title only binds the original parties to an agreement and not successors in title: *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.,* 2019 BCCA 144 at paras. 3, 81–83; *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29 at paras. 17–20.

[23] If an instrument contains invalid positive covenants, there are two possibilities.

a) Easements, statutory rights of way or restrictive covenants in the instrument can continue to be effective if they operate independently, notwithstanding the invalidity of the positive covenants: see e.g., *Jameson House* at paras. 96–97, *Nordin v. Faridi*, 1996 CanLII 3321 (C.A.) at para. 52; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19 at para. 48.

b) Conversely, if a court determines that an instrument only contains invalid positive covenants, or that there is an invalid positive covenant at the heart of the instrument, the court will declare the instrument ineffective or remove it from title; see for example *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5 at para. 20; *Atco Lumber Ltd. v. Kootenay Boundary (Regional District)*, 2014 BCSC 524 at para. 118.

[24] It is these alternative possibilities that underlie the Owner's counterclaim and the hearing before the judge. The judge concluded that clause 1.1 in the Right of Way instrument did not give rise to a positive covenant. As such, the Right of Way instrument continued to be effective.

Interpretation of the Right of Way

[25] The Owner asserts, and the City accepts, that the judge was required to interpret the Right of Way as a whole. It was not open to the judge, the Owner

argues and the City accepts, to interpret s. 1.1 of the Right of Way without concurrently considering other provisions of the Right of Way, including clauses 2.2 and 2.3, even though those clauses contained positive obligations that no longer bound the Owner.

[26] In *Robb,* the Court held that the first task in determining the scope of a right of way "is to give regard to the words used, and give them their ordinary meaning in the context of the instrument as a whole": at para. 33; see also *Jameson* at para. 91.

[27] For the Owner to succeed, it must establish that the judge failed to interpret the whole of the Right of Way instrument and, in particular, that he interpreted the Right of Way in a way that ignored the positive covenants in the instrument (for example, in clauses 2.2 and 2.3) that were now ineffective. In my view, respectfully, the appellant is unable to do so.

[28] I accept there are parts of the judge's reasons where he appeared to focus on the Right of Way instrument without any apparent regard to other provisions in the Right of Way and, in particular, the positive covenants in the document. The following are examples of this:

> [57] The central issue in this case is the interpretation of the Instrument and whether what remains without cls. 2.2 and 2.3 is a valid statutory right of way.
>
> …
>
> [103] It is my conclusion that the facts here do not support a finding that the Instrument, after the removal of cls. 2.2 and 2.3, imposes positive obligations on the Owner so as to render it invalid or unenforceable.

[29] However, it is well established that the different parts of a judge's reasons are not to be read in isolation or parsed in search of error: *R. v. G.F.*, 2021 SCC 20 at para. 69; *R. v. Kruk*, 2024 SCC 7 at para. 170. In my view, when the judge's reasons are read as a whole, it is apparent that he neither focused solely on limited parts of the Right of Way instrument, nor did he otherwise ignore clauses 2.2 or 2.3 and other parts of the document.

[30] The judge structured his reasons so that he addressed the principal authorities relied on by the Owner and he then compared the language of the easements or rights of way in those cases with the language and structure of the Right of Way. In doing so, he looked to the whole of the Right of Way instrument.

[31] Thus, for example, when the judge considered and compared the document in *Parkinson v. Reid,* [1996] S.C.R. 162, 1966 CanLII 4, with the Right of Way instrument, he said:

> [64] In the present case, cl. 1.1 of the Instrument, described above, is expressly over an area of land, not a structure. Clause 2.1 prohibits the hotel from placing any structures over the ROW Area that would interfere with the Right of Way, but cl. 2.3 "acknowledges that the Grantor has prior to execution of this agreement, constructed a boardwalk partially over the perpetual right-of-way". It goes on to state: "In the event that the width of the boardwalk accessible to the public is reduced to less than 3.0 m wide, the Grantor agrees to expand the boardwalk surface within the Right of Way, at the Grantor's cost, to a minimum of 3.0 m wide". This is despite the language of cl. 2.1 that limits construction on the area.

[32] When the judge considered *Aquadel*, an authority the Owner relied on heavily before the judge and again on appeal, he did not accept that the instrument in that case was "strikingly similar" to the instrument before him, as is argued by the appellant: RFJ at para. 77. More importantly, the judge expressly understood that the Owner's submissions extended to each of clauses 1.1, 2.1, 2.2 and 2.3 of the Right of Way: RFJ at para. 72.

[33] I agree that the facts and instrument at issue in *Aquadel* are distinguishable from those of this matter. The relevant terms of the *Aquadel* instrument are as follows (*Aquadel* at para. 7):

a) the covenantor could not use the land "for any purpose other than as a golf course including any facilities necessary or incidental thereto";

b) the covenantor was obliged to maintain the golf course "in a proper manner in keeping with its use as a golf course"; and

c) the covenantor would provide specific persons a preferential rate for use of the golf course.

[34] In *Aquadel*, the Court found that the instrument as a whole, properly construed, imposed positive obligations on the covenantor: at para. 4. The instrument did not limit the covenantor to maintaining a golf course on the property, but rather required the covenantor to use the property a golf course—a positive covenant: *Aquadel* at paras. 16–17. Put simply, the covenantor could not do nothing with the land without violating the terms of the covenant. The second and third covenants imposed additional positive obligations that were intrinsically tied to the first covenant (i.e., the existence of the golf course).

[35] Although clauses 2.2 and 2.3 of the Right of Way are positive covenants, the similarities to the *Aquadel* instrument end there. Unlike the first covenant in *Aquadel*, clause 1.1 of the Right of Way is an easement that does not impose positive obligations on the Owner. As the trial judge held, clause 1.1 operates differently from the covenant in *Aquadel* both "by its plain wording and by its nature as a legal interest": RFJ at para. 77.

[36] In a different submission, that again relied on *Aquadel*, the Owner had argued that clauses 1.1 and 2.1 pertained to the construction and maintenance of a boardwalk. The judge did not accept that submission. In doing so he looked to other provisions in the Right of Way and said:

> [84] It is my conclusion that the Right of Way is over the land, not the boardwalk and as a result I do not find that cls. 1.1 and 2.1 and cls. 2.2 and 2.3 contradict one another. The Owner stressed in argument that the boardwalk featured prominently in the negotiation of the Instrument and that the ROW Area was selected to match the location of the boardwalk. The Owner said that these factors mean that the Court should interpret the Right of Way as lying over the boardwalk rather than the ROW Area. In my opinion, cls. 1.1 and 2.1 of the Instrument are clear that the Right of Way is over the ROW Area, not the boardwalk structure.

[37] Elsewhere in his discussion of *Aquadel*, it is apparent the judge understood his obligation to interpret the whole of the Right of Way document when he

expressed the view that the appellant's submissions "…[did] not account for the construction of the Instrument as a whole…": RFJ at para. 78.

[38] Still further, in his "Summary", the judge again referred to both clauses 2.2 and 2.3 when he interpreted the Right of Way and said:

> [106] …It was natural for the City to wish for the ROW Area to align with the area of the boardwalk given its presence so that the public could use it. However, the Instrument expressly defines the Right of Way to correspond with the ROW Area rather than the boardwalk. It accounts for the existence of the boardwalk outside of cl. 1.1, which grants the Right of Way. While cl. 2.2 implicitly and cl. 2.3 expressly refer to the existence of the boardwalk, they do not invalidate or otherwise impact the right of way granted in cl.1.1. With the City's concession that these clauses do not bind the Owner as a subsequent owner, there is no obligation on the Owner to maintain the boardwalk.

[39] Unlike *Aquadel*, the interpretation of the Right of Way expressed by the trial judge does not render any clauses of the Right of Way "meaningless and unenforceable", when reading the instrument as a whole: *Aquadel* at para. 18. For example, clause 2.3—which explicitly refers to the existence of the boardwalk—is not rendered meaningless by the trial judge's interpretation of clause 1.1. As the trial judge aptly concluded, the presence of the boardwalk enhances access to the Right of Way, but the instrument does not require that presence: RFJ at para. 107.

[40] In my view, a review of the judge's reasons as a whole establishes that he recognized two separate things. First, he recognized and accepted, as the parties did, that clauses 2.2 and 2.3 of the Right of Way were positive covenants that did not run with the land. Second, and for present purposes more importantly, he appreciated that when he interpreted clause 1.1 and other parts of the Right of Way, it was necessary to do so with regard to the whole of the Right of Way instrument—including those provisions that created a positive covenant. This does not give rise to any reviewable error, and I do not accede to this ground of appeal.

The Appellant's Further Submissions

[41] The appellant's factum, though not its oral submissions, raised two further submissions.

[42] First, the Owner argued that the judge failed to adequately consider the surrounding circumstances to conclude that clause 1.1 of the Right of Way did not itself impose positive obligations on the owner of the servient tenement. In particular, the Owner argued that earlier correspondence and draft documents between MELP, the City and R93 supported its position. Respectfully, I do not believe there is merit to this submission for several reasons.

[43] Before the judge, the City had actually argued that the surrounding circumstances should not be considered because the plain language of the Right of Way instrument was unambiguous. The judge did not, however, accept this submission, and relied on each of *Sattva* at para, 47; *British Columbia (Minister of Technology Innovation and Citizens' Services) v. Columbus Real Estate Inc.*, 2016 BCCA 283 at paras. 38, 39 and 41–47; and *Huber Estate v. Murphy*, 2022 BCCA 353 at para. 15, in aid of his conclusion that the surrounding circumstances were relevant to his analysis: RFJ at paras. 54–56.

[44] Next, the judge referred to the Agreed Statement of Facts before him. That document referred to aspects of the relevant surrounding circumstances before him. Further, the judge had expressly referred to parts of the history and surrounding circumstances that had existed between MELP, the City and R93.

[45] There is, however, no need for a judge to detail their conclusions on each piece of evidence before them: see e.g., *R. v. R.E.M.,* 2008 SCC 51 at para. 20; *Rawlins v. Rawlins Estate*, 2024 BCCA 376 at para. 36. There was, therefore, no need for the judge to refer to specific parts of this evidence in his analysis.

[46] Finally, the judge confirmed he had considered the evidence of surrounding circumstances before him under the heading "Summary" when he said:

> [106] The Right of Way lies over the ROW Area, not over the structure of the boardwalk. I make this finding as a matter of interpretation in light of the surrounding circumstances know to the parties at the time of the negotiation of the Instrument…

[47] The second issue raised by the appellant asserts the judge erred in failing “to apply, or even consider, the law relating to severance”. The appellant argues “the trial judge severed clauses 2.2 and 2.3 from the Instrument in the face of uncontroverted evidence that at the time of the grant of the Instrument, the City would not have agreed to modified terms of the Instrument.”

[48] The appellant in its oral submissions accepted that if it did not succeed in its primary submission on appeal it was not likely to succeed on this issue. This is for good reason. I have already concluded that the judge did not omit clauses 2.2 and 2.3 from the Right of Way instrument when he interpreted the document as a whole. Instead he looked to the entirety of the document when he undertook his analysis. Accordingly, the concept of severance was appropriately not engaged at this stage of the judge’s analysis.

[49] The fact the parties agreed that clauses 2.2 and 2.3 were positive covenants that did not run with the land, and that did not therefore bind the appellant, is a different and narrower proposition that had little to do with the interpretive issues before the judge.

Disposition

[50] In my view, the appeal should be dismissed.

“The Honourable Mr. Justice Voith”

I AGREE:

“The Honourable Chief Justice Marchand”

I AGREE:

“The Honourable Mr. Justice Abrioux”