

CANADA / JUDGMENT

Arbutus Bay Estates Ltd. v. Canada (Attorney General)

2017 BCCA 374

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 374 Arbutus Bay Estates Ltd. v. Canada (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Arbutus Bay Estates Ltd. v. Canada (Attorney General),

2017 BCCA 374

Date: 20171027

Docket: CA44087

Between:

Arbutus Bay Estates Ltd.

Appellant/Respondent on Cross Appeal

(Plaintiff/Defendant by Counterclaim)

And

Attorney General of Canada and

Capital Regional District

Respondents/Appellants on Cross Appeal

(Defendants)

And

Her Majesty the Queen in right of

the Province of British Columbia

Respondent

(Defendant/Third Party/Defendant by Counterclaim)

Before:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia

dated November 14, 2016 (Arbutus Bay Estates Ltd. v. Canada

(Attorney General), 2016 BCSC 2083, Victoria Docket S130225)

Counsel for the Appellant:

S. Hern

Counsel for the Respondents,

Attorney General of Canada and

Capital Regional District:

M.K. Bulmer and

O.R. Pulleyblank

Counsel for the Respondent,

Her Majesty the Queen in right of the

Province of British Columbia:

D.R. Suntjens

and M. Butler

Place and Date of Hearing:

Victoria, British Columbia

September 22, 2017

Place and Date of Judgment:

Vancouver, British Columbia

October 27, 2017

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

Summary:

Appeal from an order concerning an easement over lands leading to a wharf held by the Government of Canada, and managed by the Capital Regional District. A predecessor in title to the appellant granted the easement to the Province of British Columbia. The appellant appeals the judge's rulings regarding the interpretation and rectification of the easement. Canada and the Regional District cross appeal the damage award in favour of the appellant. Held: Appeal dismissed except on the issue of parking; cross appeal allowed. While the judge erred in holding the easement gave the public a right of access to the wharf, she did not err in finding that the easement included an implicit waiver of the riparian rights of the upland owner. The judge did not err by rectifying the easement to give the public a right of access to the wharf and slightly adjusting the easement area to conform to the placement of the footpath to the wharf and the wharf structures on the upland property. However, the judge did err by implying that parking on the appellant's property outside the easement area was a right ancillary to the grant of the easement. With respect to the cross appeal, the rectification of the boundaries of the easement operated from the time the instrument was created, with the result that there was no infringement of the appellant's rights that could give rise to an award of damages.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

- [1] This appeal raises numerous issues in connection with an easement granted by a predecessor in title to the appellant, Arbutus Bay Estates Ltd. (the "plaintiff"), to the respondent, Her Majesty the Queen in right of the Province of British Columbia (the "Province"). The easement relates to a public wharf located in a water lot in Horton Bay off Mayne Island held by the Government of Canada ("Canada") and managed by the respondent, Capital Regional District (the "Regional District").
- [2] In her reasons for judgment dated November 14, 2016 and indexed as 2016 BCSC 2083, the trial judge held the easement gave the public the right of access from Horton Bay Road across the plaintiff's land to the wharf, as well as the ancillary right to park vehicles on the plaintiff's property on the side of the road. She also held that the easement implicitly gave consent to the interference with the plaintiff's riparian right to access the water from its property.

- [3] In the alternative, if the easement did not give these rights, the trial judge rectified the easement to provide for the rights. She also rectified the easement so that the easement area coincided with the actual location of the wharf and the footpath leading to it, and she awarded damages of \$7,500 for the infringement of the plaintiff's rights in this regard. Finally, the judge ruled that the easement did not expire when the Regional District took over management of the wharf.
- [4] The plaintiff appeals the judge's rulings regarding the interpretation, rectification and non-expiry of the easement. Canada and the Regional District cross appeal the \$7,500 damage award.

Background

- [5] In the late 1950s, Canada and the Province decided that it would be beneficial to have a public wharf in Horton Bay, Mayne Island. The land surrounding the end of the bay was owned by F.W. Pratt, who held a 158-acre parcel. Mr. Pratt was in favour of a public wharf being constructed. He was not willing to sell the portion of his land between Horton Bay Road and the foreshore where the wharf would be built, but he was willing to grant an easement. On September 22, 1959, he wrote to the Province's Department of Highways stating that he agreed "to grant a 20 foot wide easement for pathway to a public float to be installed in Horton Bay". He had written the word "you" after the word "grant", but he crossed it out.
- [6] Over the next year, there was further correspondence regarding the proposed easement between Mr. Pratt and the Province, as well as between the Province and Canada. One of the letters from Canada to the Province stated that it "would be satisfied with a public 20' easement as long as the public have access over the easement in the present and the future".
- [7] The construction of the wharf was finished in May 1960, and the wharf opened to the public in August 1960.
- [8] Mr. Pratt signed a form of easement in favour of the Province but the land title office rejected it because of a defect. A new form was signed on September 26, 1960 and registered in the land title office on September 30, 1960.
- [9] The operative portion of the easement reads as follows:

WITNESSETH that in consideration of the sum of \$50.00 now paid by the Grantee to the Grantor (the receipt whereof is hereby acknowledged) the Grantor doth hereby grant and convey unto the Grantee, the owner in fee of those lands and premises described as Lot 431, Cowichan District, her heirs and assigns and her and their agents, servants and workmen a free and uninterrupted right-of-way in perpetuity but subject to the proviso hereinafter contained, through, along and over that certain parcel of land described as:

"Commencing at a point South 63o 15' 30" East, a distance of 263.1 feet more or less from the most Southerly corner of Lot 2, Section 2, Mayne Island, Plan 6166, then North 22o 02' West 87 feet more or less to High Water Mark of Horton Bay and South 22o 02' East 7 feet more or less from the said commencement point and having a width of ten feet on either side of the above described centreline, containing 0.043 acre more or less for the purpose of constructing a footpath and other works incidental to the operation of wharfage facilities appurtenant to the lands owned by the Grantee hereinbefore described.

Provided, and it is hereby expressly agreed, that if and whenever the operation of the said wharfage facilities is discontinued, the said right-of-way and all rights incidental thereto and hereby granted shall cease and determine.

The Grantee for herself, her heirs and assigns covenants with the Grantor his heirs and assigns that the Grantee will at her own expense keep the right-of-way in proper repair and condition.

The plan attached to the easement contained the description "Explanatory Plan of R/W required for access to Federal Government landing".

- [10] The wharf was constructed in a water lot granted by the Province to Canada. The order-in-council granting the water lot provided the water lot "be reserved and set apart for the use of the Department of Public Works, Canada, as the site for a wharf for so long as required for such purpose".
- [11] The wharf and the footpath have been used by the public since August 1960 without complaint until issues were raised by the plaintiff. Members of the public park their vehicles on the side of Horton Bay Road on the upland property outside of the easement area. If members of the public were not permitted to park vehicles there, they would have to walk 1.5 kilometres from the next closest parking location to the wharf.
- [12] Mr. Pratt sold his property, and it was resold several times during the following decade. The principal of the plaintiff, Ms. Buchholz, who was living in Germany at the time, became interested in the property in 1973, and she entered into an agreement to purchase it. She assigned the agreement to her company, Paula Buchholz Estates Ltd. which later changed its name to Arbutus Bay Estates Ltd., and it became the registered owner of the property on completion of the agreement.
- [13] Prior to the completion of the purchase, Ms. Buchholz was provided with photographs of the wharf, which showed the footpath from Horton Bay Road to the wharf. She was also provided with a copy of the registered easement which, she testified at her examination for discovery, she understood allowed for public access to the wharf. The trial judge rejected Ms. Buchholz's attempt at trial to resile from this admission.
- [14] Commencing in 1986, the plaintiff subdivided the property and sold a number of lots to third parties. The listing information for the marketing of the lots included a reference to the government wharf in Horton Bay.

- [15] The plaintiff first raised issues about the wharf and the easement in 1990 when Canada wrote to it requesting that it sign a separate consent, as the holder of riparian rights, to the Province's grant of the water lot to Canada. The plaintiff declined to sign the consent. Two years later, a lawyer acting for the plaintiff wrote to Canada stating the position that the water lot reserve had expired. Canada disagreed with this position.
- [16] In the mid-1990s, Canada decided that it wanted to divest itself of all recreational harbours it held. As a result of the conflict with the plaintiff, Canada continued operating the Horton Bay wharf until 2007. Commencing in 2007, Canada entered into a series of management agreements with the Regional District, which has operated the wharf until the present time. Canada remains responsible for the maintenance and repairs of the wharf.
- [17] The plaintiff commenced the underlying action in January 2013. A few months later, a surveyor performed a survey of the easement area and the wharf. The survey showed that a small portion of the wharf structure located above the high-water mark on the plaintiff's property, together with a small portion of the pathway leading to the wharf, were located outside of the easement area.

Decision of the Trial Judge

- [18] After dealing with an issue of whether the easement constituted a statutory easement (which is not raised on appeal), the trial judge considered the interpretation of the easement. She first considered the nature of riparian rights as discussed in *North Saanich (District) v. Murray* (1975), 54 D.L.R. (3d) 306 (B.C.C.A.), and the principles of interpreting easements as set out in *McCorquodale v. Baranti Developments Ltd.*, 2015 BCCA 133.
- [19] The judge held that the only reasonable interpretation of the easement is that it "authorizes the operation of a public harbour comprising a wharf and a footpath, including the impairment of the plaintiff's riparian rights where the wharf meets the upland property" (para. 86). She appears to have concluded that the public was entitled to cross over the easement area because the easement referred not only to the Province, its servants and workmen, but also to heirs, assigns and agents (para. 87). She also appears to have relied on the wording "that if and whenever the operation of the said wharfage is discontinued, the said right-of-way and all rights incidental thereto and hereby granted shall cease and determine" to conclude that the purpose of the easement was more than the construction of the footpath, the wharf and other works incidental to the operation of a wharf (para. 88).
- [20] The judge also discussed the topic of ancillary rights, as described by Charles James Gale, Jonathan Gaunt and Paul Morgan in *Gale on Easements*, 17th ed., (London: Sweet and Maxwell, 2002) and considered the decision of *Moncrieff v. Jamieson*, [2007] UKHL 42, which held that parking was an ancillary right in the circumstances of that case. The judge concluded that the present situation was an unusual one akin to that in *Moncrieff* and that the express grant of the easement included the ancillary right to park.

- [221] The judge went on to consider the doctrine of rectification in two respects. The first was an alternative analysis in the event the easement did not authorize the public to access the wharf for the duration of its operation. The second related to the area of the wharf and footpath that fell outside the area described in the easement.
- [222] The judge concluded that rectification was available in situations, such as the present one, where it was established there was "a common intention between the original parties that was not reflected in the registered instrument, and the subsequent purchaser had notice at the time they purchased that 'part of the easement' included the area sought to be included by the rectification" (para. 120). She relied on *Banville v. White*, 2002 BCCA 239, and *White v. Banville*, 2003 BCSC 606, to hold that neither s. 29 of the Land Title Act, R.S.B.C. 1996, c. 250, nor the principles of the Torrens system was a bar to the rectification of a registered instrument (para. 119). She was of the view that "Canada, the Province and Mr. Pratt clearly intended that the easement was to provide public access to the wharf located in water lot 431" (para. 124).
- [223] The judge rejected the plaintiff's argument that the easement ceased to exist when the Regional District took over the operation of the wharf in 2007. She observed that the wharf has operated since 1960 as a public wharf facility of the same nature and kind as was agreed to by Mr. Pratt (para. 154).
- [224] Finally, the judge dealt with the plaintiff's claim for damages. She held the plaintiff was not entitled to damages for infringement of rights based on the presence of the wharf as a result of her interpretation of the easement (para. 163). She did, however, find that the plaintiff was entitled to damages of \$7,500 for the infringement of the plaintiff's rights in relation to the small portion of the footpath and wharf structures located outside the area described in the easement (para. 167).

Issues on Appeal

- [225] The issues raised by the plaintiff on the appeal are as follows:
- (a) Did the judge apply the correct principles of interpretation to the easement?
 - (b) Did the judge correctly apply the law of rectification?
 - (c) Did the judge apply the appropriate test to the issue of ancillary rights?
 - (d) Did the judge err in concluding the easement had not expired?
- [226] The issue raised by the cross appeal is whether the judge was correct in awarding damages for infringement of the plaintiff's rights in relation to the small portion of the footpath and wharf structures that were outside the easement area prior to the rectification of the easement by the judge.

Discussion

a) Interpretation of the Easement

- [27] The first sub-issue to be addressed on this point is the appropriate standard of review to be applied by an appellate court to an interpretation of an easement by a trial judge. This sub-issue has already been considered by this Court in *Robb v. Walker*, 2015 BCCA 117, where the majority held, at para. 40, that there is no principled basis to distinguish between cases involving the interpretation of easements and the interpretation of contracts, with the result that *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, is the governing authority with respect to the standard of review. In *Robb*, the Court upheld the trial judge's interpretation of an easement even though it was acknowledged there was a potentially broader interpretation (to which the minority would have given effect).
- [28] In *Sattva*, the Supreme Court of Canada mandated a deferential approach to appellate review of the interpretation of contracts. It held that contractual interpretation involves issues of mixed fact and law because the words of the written contract must be considered in light of the factual matrix (para. 50), which is of heightened importance in the case of easements. As a result, the standard of review is one of palpable and overriding error unless an extricable error of law can be identified. 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" (para. 53).
- [29] This deferential approach is grounded in the trial judge's enhanced position to assess the factual matrix. However, the Supreme Court of Canada warned that the factual matrix should not govern over the wording of the document:
- [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), 101 B.C.A.C. 62).
- [30] *Robb* also dealt with the general principles of interpreting an easement:

- [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), 16 B.C.L.R. (3d) 382 (C.A.).

Also see the *McCorquodale* decision, which was relied upon by the trial judge, at paras. 23 to 29.

- [31] In my respectful opinion, the trial judge committed the error described in para. 57 of *Sattva* in interpreting the easement to provide for public access from Horton Bay Road to the wharf. She allowed the surrounding circumstances to overwhelm the words in the easement, and she gave the words a meaning they cannot reasonably bear.
- [32] In giving the easement the interpretation she did, the judge did not give effect to two limitations in the wording; namely, the limitation on the persons entitled to use the easement area and the limitation on the purpose for which the easement could be used.
- [33] The easement gave the right of use of the easement area to the "Grantee, her heirs and assigns and her and their agents, servants and workmen". In my view, none of these words is reasonably capable of including members of the public. The judge appeared to rely on the words "heirs", "assigns" and "agents". Members of the public are certainly not heirs or agents of the Province, and there is no evidence that the Province assigned its rights under the easement to the public.
- [34] The purpose of the easement was described in the phrase "for the purpose of constructing a footpath and other works incidental to the operation of wharfage facilities". On its face, this wording does not allow use of the easement for the purpose of the operation of the wharf. Rather, the purpose is limited to construction (which could reasonably be interpreted to include maintenance of the wharf during the period of its operation). The proviso that followed, which the judge appears to have relied upon, does not add anything more to the purpose for which the easement can be used. It simply provides for the termination of the easement when the operation of the wharf is discontinued.
- [35] On the other hand, it is my view that the judge did not err in interpreting the easement to include an implicit waiver of the upland owner's riparian right to have access to the ocean at the point where the wharf was constructed. The easement clearly contemplates the construction of the wharf, and a portion of the wharf structure was constructed on the property above the high-water mark prior to the execution and registration of the final version of the easement. It is inconceivable in these circumstances that it would have been

the intention of the grantor of the easement to retain the right to claim for compensation for the interference of his riparian right as a result of the existence of the wharf.

[36] The plaintiff relies on the request by Canada in 1990 for a separate consent in respect of riparian rights and other internal government documents indicating that there should be a separate consent. In my opinion, these documents are not determinative of the issue. In other circumstances, a separate waiver or consent in relation to riparian rights may be necessary, and Canada was acting prudently in requesting the consent to ensure that there was no issue about the point. A separate waiver or consent was not essential in this case because it was implicit in the grant of the easement in the prevailing circumstances.

b) Rectification

[37] There are two aspects to this issue. The first is whether the evidentiary record was sufficient to allow for rectification of the easement to provide for public use of the easement area to access the wharf during its operation and to expand the easement area. The second is whether it is permissible or appropriate to rectify an easement as against a person who purchased the property burdened by the easement (the servient tenement) after the easement was granted.

[38] The Supreme Court of Canada issued a decision regarding rectification subsequent to the trial decision in the present case. In *Canada (Attorney General) v. Fairmont Hotels Ltd.*, 2016 SCC 56, the Court held that rectification was not available to rectify agreements that created unintended tax consequences. Mr. Justice Brown, for the majority, set out the following principles of the equitable doctrine of rectification:

[12] If by mistake a legal instrument does not accord with the true agreement it was intended to record -- because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement -- a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement.

Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions

[13] It must, as this Court has repeatedly stated be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts" It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement It is not concerned with mistakes merely in the making of that antecedent agreement In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement, but the agreement itself

[Emphasis of Brown J.; citations omitted.]

- [39] In the present case, the trial judge stated the law to be that rectification is an equitable doctrine that allows the court to correct a written instrument where it is established that the instrument fails to set out accurately the agreement made by the parties (para. 120, as well as para. 113). She made the finding that the clear intention of the parties was for Mr. Pratt to have granted an easement providing for public access to the wharf (para. 124).
- [40] In my view, the judge did not make any error of law in her statement of the doctrine of rectification. Nor did she make a palpable and overriding error in her finding that there was an agreement for the granting of a public easement. The plaintiff asserts that there is not a sufficient evidentiary record to support rectification because the evidence is gap-ridden and inferential from historical correspondence. However, the September 22, 1959 letter from Mr. Pratt clearly establishes that he unequivocally agreed to grant an easement for a pathway to a public float. It is significant that he crossed out the word "you" after the word "grant" because the easement was not to be granted to the Department of Highways only - it was to be granted to the public. In my view, there was convincing evidence of the intention to grant a public easement.
- [41] There was also convincing evidence that the easement area was intended to cover all of the area upon which the footpath and wharf structures were constructed. As a result of the delays in finalizing the easement, the construction of the footpath and the wharf had been completed by the time the easement was executed and registered. If the small discrepancy between the easement area and the location of the footpath and wharf structures had been noticed at the time the easement was executed, there can be no doubt that Mr. Pratt would have agreed to the appropriate revision in the description of the easement area.
- [42] The plaintiff also submitted in its factum, without citing any authority, that rectification was not appropriate unless there was an ambiguity in the instrument. Counsel for the plaintiff somewhat retreated from that position at the hearing of the appeal, presumably out of recognition that there have been numerous cases where rectification has been granted in the absence of an ambiguity. There is no mention of ambiguities in Fairmont Hotels.
- [43] The plaintiff relies heavily on the decision of *Roop v. Hofmeyr*, 2016 BCCA 310, for the proposition that historical easements cannot be implied or rectified as against a subsequent purchaser of the servient tenement. Before discussing *Roop*, I will paraphrase the relevant provisions of the Land Title Act and discuss the cases relied upon by the parties in their chronological order.
- [44] The Land Title Act creates a Torrens system, in which heavy reliance is placed on a registration system. Section 23(2) provides that an indefeasible title is conclusive evidence that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple of the described lands subject only to an enumerated list of exceptions. The exception relevant to this appeal is a charge endorsed on the title.

- [45] Section 27(1) provides that registration of a charge gives notice to every person dealing with the title to the land of the interest in respect of which the charge has been registered and the contents of the instrument creating the charge, but not otherwise.
- [46] Section 29(2) provides that, except in the case of fraud in which he or she has participated, a person taking title to land is not affected by notice (express, implied or constructive) of an unregistered interest affecting the land other than enumerated exceptions, none of which is relevant to this appeal.
- [47] The first authority in chronological order relied upon by the parties is *McQuiggan v. Sharp*, [1984] B.C.J. No. 1054 (S.C.). In that case, the plaintiff sought rectification of an easement in two respects; namely, to include covenants in the easement that the owners of the servient tenement and the dominant tenement were both responsible for the maintenance of the road which was the subject matter of the easement and to correct the sketch plan attached to the easement to reflect the actual location of the road. Mr. Justice Ruttan granted rectification in both respects. There was no discussion of the Land Title Act.
- [48] The next case is *Weisner v. Blades*, [1985] B.C.J. No. 182 (S.C.), a decision of Madam Justice McLachlin (as she then was). The easement gave a right of access to a land lot, and the issue was whether the owner of the dominant tenement was also entitled to access to an adjoining foreshore lot. Madam Justice McLachlin rejected the defendant's argument that she was entitled to an equitable easement for access to the foreshore lot because equitable easements do not fall within any of the specified exceptions of s. 29.
- [49] One of the issues in *Kemp v. Holler* (1989), 8 R.P.R. (2d) 216 (B.C.S.C.), was whether a reservation in a conveyance for the purpose of a flower garden should be rectified to allow sports activities and social events on the reserved area. The reservation was declared by the court in other proceedings to constitute an easement. Following the decision in *Smith v. Jones*, [1984] 1 W.L.R. 1089 (Ch. D.), Mr. Justice Cowan held that the equity of rectification was not available against a purchaser for value without notice. He referred to s. 27 of the Land Title Act and held the rights of the owners of the dominant tenement to be limited to those expressed in the deed containing the reservation.
- [50] In *Hawkes Estate v. Silver Campsites Ltd.* (1991), 79 D.L.R. (4th) 677, 55 B.C.L.R. (2d) 145 (C.A.), the dispute concerned the boundary between two properties. One of the grounds of appeal was that a conveyance in 1948 did not reflect the intention of the parties. Mr. Justice Gibbs referred to the indefeasibility of title accorded by s. 23 of the Land Title Act, and held that "convincing proof" was required to impeach an indefeasible title by extrinsic evidence where it was alleged that at an earlier stage in the chain of title the parties intended to convey a lesser area of land. He held that the evidence in that case fell far short of meeting the rectification requirements. Gibbs J.A. also went on to say that a stranger to the chain of title should not be able to challenge an antecedent transaction on the ground of an imputed intention not reflected in the conveyance because it would destroy the certainty of title which is the core of the Torrens system.

- [51] The next case, *Babine v. Prince George Shopping Centre*, 2002 BCCA 289, was not directly relied upon by the parties but I will mention it because it became the foundation of the decision in *Roop*. It involved a claim of an implied easement for access to the rear doors of the claimant's premises and a vacant lot used for parking by way of a closed lane owned by another party. The claim for the implied easement was based on the doctrine of non-derogation as explained in *Wheeldon v. Burrows* (1879), 12 Ch. D. 31 (Eng. C.A.); namely, a vendor of a part of a parcel cannot derogate from his grant in the sense that the purchaser is entitled to all easements over the remainder of the parcel which were necessary and were used by the vendor to access the part of the parcel being sold.
- [52] Madam Justice Huddart, for the majority, held that there was an implied easement over part of the claimed area. In so holding, Huddart J.A. was of the view that, while the Land Title Act made the doctrine of non-derogation inapplicable to a bona fide purchaser, the doctrine does apply as between the grantor and the grantee (i.e., the original vendor and the purchaser of the part of the parcel).
- [53] The next two decisions for consideration are the ones relied upon by the trial judge, *Banville v. White* and *White v. Banville* (the former was decided shortly before *Babine*, but it is convenient to deal with the two of them together). A former owner subdivided a lot to create the two properties in question and granted reciprocal easements of access. Included as part of the driveway constructed on the easement area was a "turnaround" used by the Whites and their guests, but the turnaround was located outside the easement area described in the Whites' easement. The trial judge had modified the easement area in the Whites' easement to include the turnaround pursuant to s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377. On appeal by the Banvilles, the Whites argued in the alternative that their easement should be rectified to include the turnaround.
- [54] The Court was unanimous that s. 35 of the Property Law Act could not be utilized to modify the easement. The majority held rectification could not be granted because it had not been pleaded, but gave leave to the Whites to amend their pleadings to seek rectification in a subsequent trial. In dissent, Chief Justice Finch would have allowed the rectification of the easement. After referring to *Hawkes Estate* and *McQuiggan*, Finch C.J.B.C. said the following:
- [34] Therefore, in order to rectify the title in the case at bar, it would be necessary to conclude that the easement as it appears on title is not the true "agreement", and that there was a common intention between the original parties that the turnaround in fact be part of the easement. This would have to have been demonstrated very convincingly. In addition, it would have to be demonstrated that the Whites and Banvilles had notice, when they purchased, that the turnaround was "part" of the easement.

Chief Justice Finch held that there was ample evidence to support rectification, and he made reference to the finding by the trial judge that the Banvilles purchased Lot 1 with constructive notice of the existence of the turnaround as an unregistered charge on their land.

- [55] Despite the hope expressed by the majority that the parties would find a practical solution to the problem, the matter proceeded to a second trial which resulted in the decision in *White v. Banville*. In granting the order of rectification, Mr. Justice E.R.A. Edwards made the following finding:
- [36] I find that the Banvilles were bona fide purchasers for value who were unaware that the turnaround was not included in the right of way. It follows that rectification of the instrument is not precluded in this case because the Banvilles, notwithstanding the state of registered title, did not have actual notice that their property included the turnaround unencumbered by the right of way but were, at the time they purchased Lot 1, under the mistaken belief the right of way included the turnaround.
- [56] Mr. Justice Edwards then addressed the argument of the Banvilles that the principles of the Torrens system precluded rectification. After referring to *McQuiggan* as an example of rectification of a registered easement, Edwards J. concluded as follows:
- [43] I have found that the Banvilles were under the mistaken impression at the time they acquired Lot 1 that the turnaround was part of the driveway within the right of way boundary. That means the proposed rectification will simply reflect the state of title they believed they were acquiring when they bought Lot 1. That is no injustice.
- [57] In *Avanti Mining Inc. v. Kitsault Resort Ltd.*, 2010 BCSC 1181, a claim for rectification of a right-of-way was rejected because the evidence was insufficient to prove that there was an error in writing down the terms of the agreement between the parties and that the plaintiff was a bona fide purchaser for value without notice. In his discussion of the issue of rectification, Mr. Justice Joyce cited *Hawkes Estate* for the proposition that there is a high burden on the party seeking rectification, particularly where the instrument is registered under the Land Title Act. He cited *Banville v. White* for the proposition that rectification will not be granted against a bona fide purchaser for value without notice.
- [58] One of the issues in *Golden Valley Enterprises Ltd. v. B.P.Y.A. 1290 Holdings Ltd.*, 2013 BCSC 1213, was whether a registered easement should be rectified by substituting the word "Dominant" in place of the word "Servient" in the body of the easement. In ordering the rectification, Madam Justice Dardi cited *Avanti Mining* for the proposition that there was a heavy burden on the party seeking rectification of an instrument registered under the Land Title Act.
- [59] Like *Babine*, the decision in *Roop* involved a claim of an implied easement. The easement was claimed on a driveway over the respondents' property that provided vehicular access to the appellants' property as well as the respondents' property. The property that came to be owned by the appellants was part of a larger parcel which included both properties. The larger parcel was subdivided, and the appellants' property was sold in 1934 to their predecessor in title. When the respondents purchased their property in 2009, they were told by the former owner that the use of the driveway by the appellants was a temporary favour.

- [60] In upholding the trial judge's dismissal of the appellants' claim, this Court held the evidence did not meet the requirements of the rule in *Wheeldon v. Burrows* for establishing an implied easement but, in any event, an implied easement would not have survived the subsequent sale of the servient tenement to the respondents as bona fide purchasers. The Court considered *Babine* to be determinative of the second issue because it held that the Land Title Act abrogates any rights to an implied easement except as between the original grantor and grantee.
- [61] The Court went on to discuss the "fraud exception" contained in s. 29 of the Land Title Act. It noted that there are two lines of authority on s. 29, as described in *Vancouver City Savings Credit Union v. Serving for Success Consulting Ltd.*, 2011 BCSC 124:
- [62] The first line of authority, reflected in *Woodwest* [*Woodwest Developments Ltd. v. Met-Tec Installations Ltd.*, [1982] 6 W.W.R. 624 (B.C.S.C.)], states that a purchaser of real property who takes title to a property with knowledge of a prior unregistered adverse interest, and who then attempts to rely on s. 29 of the Land Title Act, may be found to have committed equitable fraud.
- [63] The second line of authority, as evidenced in *Szabo*, [*Szabo v. Janeil Enterprises Ltd.*, 2006 BCSC 502] requires something more than knowledge; usually conduct that constitutes some form of dishonesty.

As the Court did not consider it necessary to decide between the two lines of authority, it left the issue for another day.

- [62] The plaintiff submits the trial judge erred in relying on *Banville v. White and White v. Banville*. It says *Finch C.J.B.C.*'s reliance on *Hawkes Estate* and *McQuiggan* was not well founded because *Hawkes Estate* did recognize the effect of the Torrens system, and *McQuiggan* did not consider the Land Title Act. The plaintiff maintains *Roop* is the governing authority and also relies on *Weisner and Kemp*. It says that, as in *Roop*, it is not necessary for the Court to consider the fraud exception in s. 29 of the Land Title Act, because fraud was not pled or argued before the trial judge.
- [63] I do not accept *Roop* to be the governing authority. *Roop* and *Babine* dealt with implied easements that were not registered, in whole or in part, under the Land Title Act. In *Babine*, the parties to the litigation were the same parties whose conduct gave rise to the implied easement, and the Court held that s. 29 of the Act was not a bar to the claim. In *Roop*, there was a subsequent purchaser and s. 29 clearly applied to protect the purchaser against an unregistered interest. Similarly, *Weisner* dealt with an equitable easement that was not registered.
- [64] Like *Banville and White*, the present case involves the remedy of rectification of a registered easement to reflect the parties' actual agreement. As will be discussed under the cross appeal, the remedy of rectification is retrospective in nature, and the point to be determined is whether the existence of a subsequent purchaser should stand in the way of rectification.

- [65] In my opinion, the issue is not, as it was in *Weisner, Babine and Roop*, whether s. 29 protects a purchaser from being affected by an unregistered interest. Rather, as was recognized in *Kemp*, the issue is whether s. 27 protects a purchaser from being affected by the changes brought about to a registered charge by an order for rectification made after the purchaser acquired title to the property.
- [66] In my opinion, the proper approach to be taken to this issue was discussed by Madam Justice Abella in *Fairmont Hotels*. Although she was in dissent in the result, she was discussing general principles when she made the following comments about third parties:
- [67] Whether the errors are in transcription or in implementation, courts may refuse to exercise their discretion where allowing rectification would prejudice the rights of third parties (*Wise v. Axford*, [1954] O.W.N. 822 (C.A.)). But the mere existence of a third party will not bar rectification. In *Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354, this Court concluded that the presence of a third party is only a bar to rectification where the third party has actually relied on the flawed agreement. This principle was subsequently explained by Gray J. in *Consortium Capital Projects Inc. v. Blind River Veneer Ltd.* (1988), 63 O.R. (2d) 761 (H.C.J.), at p. 766, *aff'd* (1990), 72 O.R. (2d) 703 (C.A.): "... the proper test is whether the third party relied on the document as executed and took action based on that document". (See also *McCamus* [John D. McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at p. 595; *Spry* [I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 9th ed. (Pymont, N.S.W.: Lawbook Co., 2014)], at pp. 630-31; *Kolias v. Owners: Condominium Plan 309 CDC* (2008), 440 A.R. 389 (C.A.); *Carlson, Carlson and Hettrick v. Big Bud Tractor of Canada Ltd.* (1981), 7 Sask. R. 337 (C.A.), at paras. 24-26.)
- [68] This is consistent with one of the underlying purposes of rectification, namely to prevent unjust enrichment: *Waddams* [S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010)], at p. 240; *El-Bris* [*Royal Bank of Canada v. El-Bris Ltd.*, 2008 ONCA 601], at paras. 13 and 36; *McLean* [*McLean v. McLean*, 2013 ONCA 788], at para. 73. Just as rectification can prevent one party from enforcing an error and being unjustly enriched by the other's mistake, rectification can also prevent a third party who has not relied on the agreement from enforcing a mistake and receiving a windfall
- [67] In my opinion, there is nothing in s. 27 that prevents this approach from being taken in the rectification of a registered charge after a purchaser acquires title to the property. Section 27 provides that a subsequent purchaser is given notice of the contents of the registered charges but not otherwise. It does not provide, however, that a subsequent purchaser cannot become bound by a rectification of the contents of the charge.
- [68] As in *Banville and White*, the order of rectification in this case has done no more than regularize the easement to have the meaning and the boundaries that the purchaser of the servient tenement believed it to have at the time of the purchase. The plaintiff did not rely on the flawed easement to its detriment - indeed, it relied on the existence of the public

wharf when marketing the subdivided lots. It would receive a windfall if the easement were not rectified. The orders of rectification do not offend against the principles underlying the Torrens system because the plaintiff is simply being bound to the terms and boundaries of the easement as it believed they were at the time it purchased the property.

[69] In these circumstances, the existence of a subsequent purchaser was not a bar to the orders of rectification. I would not accede to this ground of appeal.

c) Ancillary Right of Parking

[70] As stated in the excerpt from *Gale on Easements* quoted by the trial judge at para. 84, an ancillary right is an implied right reasonably necessary for the exercise of the express rights given in the grant of easement.

[71] Coincidentally, one of the other issues in *Banville v. White* was whether the easement included an ancillary right to park on the easement area. Chief Justice Finch spoke for the Court on this issue. Relying on *Brundrett v. Muckle*, [1997] B.C.J. No. 1585 (C.A.), and *C. Sara, Boundaries and Easements*, 2nd ed. (Sweet & Maxwell, 1996), Finch C.J.B.C. held that a grant of passage does not include the right to park.

[72] In finding there was an ancillary right to park vehicles on the plaintiff's property abutting Horton Bay Road, the judge relied on *Moncrieff v. Jamieson*, a case involving Scots law. The facts of the case were quite unusual. The dominant tenement, known as "Da Store", was located on the island of Shetland. It was bordered on the west by the sea and on the east by a cliff. There was no access from the north, and the only land access was on the east by means of a gate and a stairway. The easement granted in favour of the dominant tenement was a distance of 150 yards of rugged terrain from a public road to the top of the stairway. A sheriff conducted an evidentiary process, and he reported his conclusion that the right to park on the servient tenement adjacent to the dominant tenement was reasonably necessary for the use of the dominant tenement and was therefore a necessary incident of the right of access. The sheriff pronounced an interlocutor in which he declared the owners of the dominant tenement to be entitled to park vehicles in the exercise of rights accessory to the servitude right of access. This was upheld by the Court of Session and ultimately by the House of Lords.

[73] The trial judge in this case acknowledged that parking is not an ancillary right in the majority of cases, but held that, as there was no parking available within 1.5 kilometres of the wharf, the case was an unusual one akin to *Moncrieff*. In the unique circumstances of the case, she found that parking along Horton Bay Road was a necessary ancillary right.

[74] Even if this case could be regarded to be unusual, like *Moncrieff*, so as to justify making parking on the easement area a necessary ancillary right, it is nevertheless my view that the judge erred by failing to consider whether it could be implied that parking was to be permitted on lands owned by the plaintiff which were not part of the area covered by the easement.

- [75] When asked at the hearing of the appeal if there was any authority for the proposition that an ancillary right of parking could be exercised outside the easement area, counsel for Canada and the Regional District responded that Moncrieff was such an authority. It is clear on a reading of Moncrieff, however, that it does not stand for that proposition. The easement in Moncrieff gave a general right of access over the servient tenement (para. 2), which meant that the owner of the dominant tenement could chose the route of access as long as it was "not invidiously to the other's detriment" (para. 12). Hence, the right of access granted by the easement covered the whole of the servient tenement, and the ancillary right of parking upheld by the House of Lords was exercisable within the easement area, and not elsewhere.
- [76] At the trial, Canada and the Regional District also relied upon the decision in *MacKenzie v. Matthews* (1999), 46 O.R. (3d) 21 (C.A.), in which the Ontario Court of Appeal upheld a ruling of an ancillary right to install and maintain a dock because it was reasonably necessary to use an easement, the purpose of which was to allow access to islands on a lake. However, it is apparent from paras. 1 and 8 of the decision that the dock was located within the right-of-way.
- [77] There is authority for the proposition that certain ancillary rights can be exercised on the servient tenement outside of the easement area. The issue was discussed by the Ontario Court of Appeal in *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417, 235 D.L.R. (4th) 263, (C.A.), a decision in which the majority of the court overturned a ruling of an application judge that the owners of the dominant tenement had the ancillary right of access onto the servient tenement in order to access the easement area. Madam Justice Feldman, for the majority, noted that the classic example was the ancillary right to enter the servient tenement in order to conduct repairs on the easement area.
- [78] After pointing out that ancillary rights are a matter of necessity, not convenience, Feldman J.A. commented that "the courts have been particularly loath to imply an ancillary right that would have the effect of enlarging the dimensions of a granted easement onto land not included within its described boundaries" (para. 24). I agree that the courts should be reluctant to do so because if it had been intended that the owner of the dominant tenement could use part of the servient tenement outside the easement area, one would normally expect the area described in the easement to have included the expanded area. This is especially the case when the ancillary right in question, such as parking, involves more than a fleeting or occasional use of the servient tenement outside the easement area.
- [79] While this may have been an unusual situation warranting a finding that the rectified easement included an ancillary right to park on the easement area, it is my conclusion that this is not such an extraordinary case in which it can be implied that such a right extended to lands beyond the easement area.

d) Expiry of the Easement

- [80] The plaintiff says the trial judge erred in rejecting its argument that the easement expired when the wharf was no longer required by Canada. It says the order-in-council granting the water lot to Canada as the site for a wharf continued only for "so long as required for such purpose". It maintains that the water lot no longer exists and that the wharf is no longer authorized. The easement has therefore expired because it provided that it would cease and determine if "the operation of the said wharfage facilities is discontinued", and it should be cancelled pursuant to s. 35(2)(e) of the Property Law Act.
- [81] In my view, this ground of appeal has no merit for the simple reason that the operation of the wharf has not been discontinued. The easement does not stipulate that Canada must continue to hold the water lot or be the operator of the wharf.
- [82] In addition, the order-in-council has not expired or ceased to be operative. Although Canada expressed a desire to divest itself of all recreational harbours, it has continued to operate the Horton Bay wharf by way of a management agreement with the Regional District. The Province - the grantor of the water lot - accepts that Canada's tenure continues.
- e) Cross Appeal - Right to Damages
- [83] The trial judge rejected most of the plaintiff's claims for damages, but held the plaintiff was entitled to damages in the amount of \$7,500 for the infringement to its rights as a result of small portions of the footpath and upland wharf structures being located outside the easement area (which the judge rectified). Canada and the Regional District cross appeal from this aspect of the judge's order on the basis that rectification operates from the time the instrument was created and that, as a result, there was no infringement of the plaintiff's rights.
- [84] Canada and the Regional District rely in this regard on the decision of this Court in *Kawana v. Sung*, 2010 BCCA 578, as well as *McPeake v. Canada (Attorney General)*, 2012 BCSC 132 at para. 16, and *Swiss Reinsurance Company v. Camarin Limited*, 2007 BCSC 1202 at para 82, for the proposition that the remedy of rectification is retrospective and the rectified instrument speaks from the time of its formation. In *Kawana*, the plaintiff sought rectification of a real estate contract and judgment for the amount owed under the rectified contract. The defendant made a third party claim against his realtor. In upholding the decision of the summary trial judge granting the rectification and the judgment, and dismissing the third party claim, this Court held the appellant had suffered no damages because the contract was rectified to reflect the actual bargain of the parties.
- [85] The plaintiff agrees with the principle that damages do not result from the period between the formation of an instrument containing a mistake and its rectification. It responds to the cross appeal by arguing that Canada and the Regional District did not amend their counterclaim to seek rectification of the easement area after they received the 2013 survey.

[86] I do not accept this argument. Prior to the trial, the counterclaim sought a declaration that the easement allowed for the maintenance and operation of the wharf in its present location. On the first day of trial, the judge gave Canada and the Regional District leave to amend the counterclaim by, among other things, including an alternate claim of relief in the form of an order rectifying the easement so as to contain the agreement made between the parties. In my view, this was a sufficient pleading to permit the rectification order made by the judge.

[87] I would allow the cross appeal.

Conclusion

[88] I would dismiss the appeal except on the issue of parking, and I would allow the cross appeal.

[89] In order to have the order dated November 11, 2016 conform to these reasons, I would vary it as follows:

- (a) by making para. 1 an order instead of a declaration and revising it by deleting the word "allows" and substituting the words "is rectified to allow"; and
- (b) by deleting para. 6 awarding damages to the plaintiff and adding a new para. 6 declaring that the Registered Easement does not permit those entitled to use the footpath to trespass on any part of Lot A that is not included in the parcel of land described in the Registered Easement, as rectified, including parking on any such portion of Lot A.

[90] Although the plaintiff was successful on the first and third issues discussed above, the respondents have been substantially successful in the outcome of the appeal. I would award costs of the appeal to the respondents, and I would award costs of the cross appeal to Canada and the Regional District.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Mr. Justice Hunter"

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