

CANADA / JUDGMENT

Banville v. White

2002 BCCA 239

COURT

British Columbia Court of Appeal

DECIDED

16 April 2002

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2002 BCCA 239

Citation:

Banville v. White

Date: 20020416

2002 BCCA 239

Docket:

Registry:

CA28538

Victoria

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

MARC ANDRE BANVILLE and JOAN ANN FISHER-BANVILLE

APPELLANTS

(PLAINTIFFS)

AND:

FRANK ELLISON WHITE and HEATHER LOUISE WHITE

RESPONDENTS

(DEFENDANTS)

BETWEEN:

FRANK ELLISON WHITE and HEATHER LOUISE WHITE

RESPONDENTS

(PLAINTIFFS)

AND:

MARC ANDRE BANVILLE and JOAN ANN FISHER-BANVILLE

APPELLANTS

(DEFENDANTS)

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Low

S.E. Jenko

Counsel for the Appellants

D.L. Armstrong

Counsel for the Respondents

Place and Date of Hearing:

Victoria, British Columbia

January 7, 2002

Place and Date of Judgment:

Vancouver, British Columbia

April 16, 2002

Written Reasons Dissenting in Part by:

The Honourable Chief Justice Finch

Written Reasons by:

The Honourable Madam Justice Ryan (P.27, para.56)

Concurred in by:

The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Chief Justice Finch:

I.

[1] This an appeal from the judgment of the British Columbia Supreme Court pronounced 27 April 2001. The court heard cross-actions by adjacent property owners raising several issues. This appeal is brought by the Banvilles, the owners of one property, from that part of the order modifying rights-of-way:

4. Right of Ways No. G99863 and H1114 be modified to remove from Right of Way G99863 that portion of the right of way previously on Lot 1 and now on Lot 2 as a result of the southerly lot boundary modification and to add to Right of Way H1114 the paved area of the existing turnaround at the bottom of the driveway. Survey documentation and registration costs associates (sic) with these modifications will be borne by Frank Ellison White and Heather Louise White with no compensation to Marc Andrew Banville or Joan Ann Fisher-Banville; and

[2] The Banvilles say the learned trial judge erred in applying s.35 of the Property Law Act, R.S.B.C. 1996, c.377 to permit modification of an easement against the interests of a servient tenant, and in interpreting the easement to permit parking and the placement of portable curbs within its boundaries.

II.

[3] The Banvilles and Whites are owners of adjacent lots in Saanich. The Banvilles own Lot 1 (formerly Lot 3) and the Whites own Lot 2. Access to both properties is by a private driveway leading off Nimmo Road. The property slopes steeply to the west towards Saanich Inlet, onto which both properties face.

[4] Both lots were formerly included in one parcel owned by a Mr. and Mrs. Dilay. In 1978, the Dilays decided to subdivide their property into two lots. They had prepared and registered a subdivision plan. The subdivision plan included a surveyed right-of-way over both lots, laid out to provide driveway access to both properties.

[5] On 8 December 1978, the Dilays made two reciprocal easement agreements. The Dilays granted, as owners of what is now Lot 1, an easement numbered H01114 over Lot 1 in favour of Lot 2. The easement, by paragraph 2, says:

The parties hereto agree that the aforesaid easement shall forever be and remain an easement for the purposes of obtaining access over the said lands and the Grantor does hereby agree to grant to the Grantee, his heirs and assigns, the right and authority for him and his servants or agents and all persons as are duly authorized for the (sic) behalf from time to time and at all times hereafter at his and their will and pleasure to pass and repass over and across the said property either with or without motor-vehicles, implements and other things which the Grantee may reasonably require to move across the lands of the Grantor.

[6] On the same date, the Dilays, as owners of Lot 2, granted a reciprocal easement numbered G99863 in favour of Lot 1. Paragraph 2 of this easement is in identical terms to that of easement numbered H01114.

- [7] In about 1979, the Dilays sold Lot 1 to Mr. and Mrs. M.E. Kittleson, who were the Banvilles' predecessors in title. Then, in June 1989, the Dilays traded Lot 2 to the Whites, its present owners, in exchange for another property owned by the Whites. The Dilays and Kittlesons were therefore neighbours for about 10 years, until the Whites became the Kittleson's neighbours in 1989.
- [8] During the time when the Dilays and Kittlesons were neighbours, the common boundary of Lots 1 and 2 was modified. By the first modification, part of Lot 2 was added to Lot 1 to permit the construction of the Kittlesons' residence. By the second modification, part of Lot 1 was added to Lot 2 to accommodate the septic field for Lot 2 where the Dilays' home was located. That second boundary modification had the effect of placing the original westerly end of the right-of-way and easement over Lot 1 within the boundaries of Lot 2.
- [9] Immediately to the south and west of that second boundary modification is an area referred to as the "turnaround". The turnaround is located on Lot 1, immediately adjacent to the modified boundary, and outside the area encompassed by easement H01114.
- [10] In November 1994, the Banvilles, the present appellants, purchased Lot 1 from the Kittlesons.
- [11] There are two main areas of dispute. The first is the turnaround located on the Banvilles' property. The Whites claimed to have easement H01114 modified pursuant to s.35(2) of the Property Law Act to include the turnaround. The judge accepted this submission and made the order appealed against.
- [12] In the alternative, the Whites now claim to have easement H01114 "rectified" to give effect to the unexpressed intent of the Dilays, and to accord with the subsequent use of the turnaround area by the Dilays, Whites and Kittlesons. The Banvilles say rectification was not pleaded and it is now too late to do so. They say they would be prejudiced because they could have called other evidence in answer to the claim of rectification had it been pleaded.
- [13] The second area of dispute is the use of the driveway itself. The Whites placed portable curbs along it at various locations for the assistance of their guests. The Banvilles say these curbs constitute a trespass, because they are objects placed on the Banvilles' property. The Banvilles also object to the use of the driveway by the Whites and their guests for parking. The Banvilles say the easement gives a right to pass and to repass, not a right to park or to place objects.
- [14] The learned trial judge described the dispute over the turnaround this way:
- [9] The Whites now seek a modification of the easement under s.35 of the Act to include the paved portion of the driveway referred to as "the turnaround" in the easement and to remove from the easement the portion now in lot 2 as a result of the boundary modification. The Banvilles want the paved portion of the turnaround removed from their property.
- [15] He made these important findings concerning the Banvilles' knowledge of the turnaround:

- [44] Mrs. Kittleson and the Banvilles signed a disclosure statement at the time they bought lot 1 from her. It indicated she was aware of "encroachments, unregistered easements or unregistered rights of way".
- [45] The retaining wall and the turnaround were there to be seen by the Banvilles when they inspected the property before purchase. There is no evidence they inquired of Mrs. Kittleson or the realtor, Mr. Fraser, about the retaining wall or the turnaround or made any inquiry about what constituted the disclosed encroachment or unregistered easement or right of way.
- [46] I find the Banvilles had constructive notice of both the retaining wall and the turnaround at the time they purchased lot 1. I infer from the fact they did not inquire about any encroachment, unregistered easement or right of way that they recognized at that time what is clear from photos of the areas in question, that neither the wall nor the turnaround detrimentally affects the use or enjoyment of lot 1. I find these circumstances, combined with the length of time before their action was commenced, militate against granting the Banvilles injunctive relief, which is equitable in nature and discretionary, in respect of the retaining wall and the turnaround.
- [16] The learned trial judge continued:
- [49] I permitted the Whites at the trial to amend their statement of claim to seek a modification of the registered easement to include the turnaround and to remove that portion of the easement which transferred from lot 1 to lot 2 when the lot boundary was modified as described in paragraph 8 above.
- ...
- [52] The Banvilles testified they intended to rip up the pavement which constitutes the turnaround and fence the area, making it impossible for it to be used as a turnaround. The evidence establishes it has been used as such since before the Banvilles and Whites acquired lots 1 and 2. Mrs. Kittleson testified it had always been regarded as part of the driveway and used as such while she lived there. The Whites continued to use it as such without objection from the Banvilles until the Banvilles belatedly discovered it was not on the easement. Evidence establishes it is the only practical place for large vehicles, including those delivering fuel to the Whites' house, to turn around.
- [17] The learned trial judge found jurisdiction to modify the easement, so as to include the turnaround, in s.35 of the Property Law Act. He held that the language of the easement authorized parking on the easement as long as it did not obstruct or damage the paved portion of the easement. He further held that the language of the easement permitted the placement of portable curbs by the Whites, so long as the curbs did not obstruct the Banvilles' right of passage.

III.

[18] The relevant parts of s.35 of the Property Law Act are:

35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:

(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

...

(b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,

(c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,

(d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or

...

(3) The court may make the order subject to payment by the applicant of compensation to a person suffering damage in consequence of it but compensation is not payable solely for an advantage accruing by the order to the owner of the land burdened by the registered instrument.

[19] The learned trial judge appears to have held the view that the easement across the Banvilles' Lot 1 could be modified to include the turnaround, which lies outside of the right-of-way as registered, under the provisions of s.35(2)(b). At para.53 of his reasons he said:

I am satisfied that the Whites' right to "pass and repass" through lot 1 as provided by the easement would be impeded and the reasonable use of their land therefore likewise impeded if the easement is not modified to extend it to the turnaround area so as to preclude the Banvilles from altering the area as they propose "without practical benefit" to themselves.

[20] The difficulty I have with this interpretation is that the Whites, as applicants, do not have an interest in "the land" against which the easement number HO1114 is a charge. That easement is a charge on Lot 2, the Banvilles' property. Applying s.35(2)(b), it is not "the reasonable use of the land" charged with that easement that "will be impeded" "if the charge is not modified" (namely the Banvilles' land), but rather the reasonable use of the Whites' land, in whose favour the easement operates, that will be impeded.

[21] Counsel for the Whites sought to sustain the trial judge's interpretation of s.35. He argued that the easement itself was an interest in land, the use of which would be impeded if the turnaround was not included within it. In other words, he argued that the opening words of s.35(1), "a person interested in land", included a person interested by way of an easement. The effect of this argument is to permit the dominant tenant to apply for modification of an easement in his favour, at the expense of the servient tenant, or at the expense of the owner of the land against which the easement is a charge.

[22] None of the cases to which we were referred support this interpretation, and I have been unable to find other authorities which do.

[23] There are two cases which appear to be against the trial judge's interpretation. In *Firman v. Michaleski* (December 15, 1995) Victoria Registry, 3742/94 B.C.S.C., Drake J. said at p.7:

The statute invests the Court with a discretion to modify an easement only on very limited grounds; of which the reflection of current use is not one: "current use" being a changeable thing in the course of time. Nor does the discretion, in my opinion, extend to changing the terms of a grant at the request of a party who wishes to regain full proprietary rights over all or part of the land impressed with the easement.

[24] In *Sidhu v. Chandra*, [1997] B.C.J. No. 88 (B.C.S.C.), Mr. Justice Boyle said:

[26] I agree with the Respondent's argument s.31 applies to the servient party bearing the burden of a charge against the land and does not provide a remedy to the dominant party who enjoys the benefit.

[27] I agree with the Respondent's statement that s.31 "is not intended to provide a chargeholder with the means to expand the scope of his/her interest in the land." If expansion were contemplated by s.31, it would give a power similar to expropriation of a right in the land.

[28] S.31(4)(b) requires notice to "the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled." From that requirement it appears the holder of the servient tenement, not the charge holder, must be the applicant. The "land" referred to in the section is the title holder's land, not the charge holder's.

[25] I respectfully agree with these conclusions. I am therefore of the view that the learned trial judge erred in purporting to "modify" the easement across the Banvilles' property in the Whites' favour, in order to include the turnaround by applying s.35 of the Property Law Act.

[26] In the alternative, counsel for the Whites says the easement should "rectified" to accord with the original intention of the Dilays, who were the owners of both lots at the time the easements were created. Counsel argues that the failure to include the turnaround in the area encompassed by the easement was a "mutual mistake" by the Dilays as owners of both lots. He also argues that the Banvilles purchased with constructive notice of the existence of the turnaround, as found by the learned trial judge at para.46 of his reasons, quoted above.

- [27] It is common ground that the Whites cannot claim a right to continued use of the turnaround on the basis of historical usage, since the acquisition of property rights by prescription was abolished by s.24 of the Land Title Act, R.S.B.C. 1996, c.250 originally enacted by the Land Titles Act, S.B.C. 1978, c.25, s.24.
- [28] Counsel for the Banvilles says that the Whites cannot claim rectification of the easement, since this claim was not pleaded, was objected to at trial, and was not addressed by the learned trial judge in his reasons. Counsel says the Banvilles might have been able to lead other evidence touching on the intention of the Dilays if rectification had been pleaded.
- [29] In order to make a successful claim for rectification, it is necessary to show there was a common intention not reflected in the conveyance or contract as actually produced. However, the intention does not have to be shown in express words. The standard of proof required is "very clear and convincing proof" (Re Butlin's S.T., [1976] Ch.251). In *Boundaries and Easements* (2nd ed.) Sweet & Maxwell 1996, the learned author, Colin Sara, states:

This is not some special principle of evidence somewhere between "beyond a reasonable doubt" and "on the balance of probabilities", but just an expression of the caution required when witnesses seek to suggest that the words of a written document, which is presumed to represent their intentions at the time, ought to be altered because of their oral evidence which may well be coloured by subsequent events.

- [30] A claim for rectification of an easement succeeded in *McQuiggan v. Sharp*, [1984] B.C.J. No. 1054 (S.C.). As the claim for rectification succeeded, the trial judge found it unnecessary to consider the alternative claim for modification of the agreement pursuant to the Property Law Act.
- [31] In *Bank of Montreal v. Vancouver Professional Soccer Ltd.*, [1987] B.C.J. No. 1326 (C.A.), McLachlin J.A. (as she then was) for the court set out the standard of proof required for a grant of equitable rectification. Although the case related to a contract, the principles governing equitable rectification relate to the land title context as well (see *Hawkes Estates*, *infra*). She said:

The remedy is concerned only with defects in the recording, not the making of the contract, a principle expressed succinctly in the maxim: "Courts of equity do not rectify contracts; they may and do rectify instruments"; *Mackenzie v. Coulson* (1869) L.R. 8 Eq.368 at 375.

Before rectification can be obtained, the applicant must establish:

1. that the written instrument does not reflect the true agreement of the parties;
2. that the parties shared a common continuing intention up to the time of signature that the provision in question stand as agreed rather than as reflected in the instrument

The standard of proof of these elements is a stringent one because of the danger of imposing on a party a contract which he did not make. While it may not be so high as the criminal onus of proof beyond a reasonable doubt, terms such as "certainty" and "convincing proof" are appropriate (at 2).

[32] McLachlin J. (as she then was) also discussed the standard for rectification of a contract in the case of *Shaughnessy Estates v. City of Vancouver* (1983), 40 B.C.L.R. 389 (S.C.) at p.395, which was considered and applied in the context of rectification of title by the British Columbia Court of Appeal in *Hawkes Estate v. Silver Campsites Ltd.* (1991), 79 D.L.R. (4th) 677. In introducing McLachlin J.'s test, which required "convincing proof", Gibbs J.A. stated:

There can be little doubt that the vested interest of society in preserving the certainty and reliability associated with a Torrens system indefeasible title casts a heavy burden on a party seeking to impeach by extrinsic evidence. The burden may not be difficult to discharge when error can be shown by objective evidence such as in a survey, or in a failure accurately to record a land description in a deed or a title. But where, as here, the allegation is that at an earlier stage in the chain of title a vendor intended to sell and a purchaser intended to purchase a lesser area of land than was contained in the vendor's title and subsequently appeared in the purchaser's title, "convincing proof" will be required. In effect, the court is being asked to rectify a conveyance and the resulting title and all subsequent titles in the chain.

[33] In *McQuiggan*, supra, Ruttan J. stated:

I agree with counsel that in a rectification action, the court must be satisfied that there is convincing proof the written agreement does not embody the true agreement of the parties. However, as set out above, I am satisfied that there is sufficient evidence both from the nature of the document itself and from Mr. Beech, that the parties were referring to the existing road when they were referring to the right-of-way in the easement agreement (para.22).

[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.

[35] As to the matter of whether counsel can rely on the doctrine of rectification at all, the authorities discussed above indicate that it is permitted. However, rectification was disallowed, apparently on the basis of the pleadings, in *Gasparin v. Arduini*, [1995] B.C.J. No. 234 (C.A.). That case was an appeal from two orders by a trial judge, one of which was that the words of the easement be changed from "free and interrupted right of way" to "free and uninterrupted right of way". Southin J.A. stated as follows:

While I have little doubt that the word "interrupted" is a typographical error, and the learned judge had no doubt either, these proceedings as brought were not apt to correct that error. There is no power under s.31 of the Property Law Act to order rectification of an instrument registered in the Land Title Office. That paragraph of the judgment must therefore be struck out (para.11).

- [36] I respectfully agree with Madam Justice Southin that s.31 (and its current equivalent, s.35) does not give the power of rectification; rectification is an equitable remedy. On the basis of the other cases discussed above, however, my view is that rectification may be granted where the burden described above is met, even though the pleadings did not include a claim for rectification.
- [37] On the evidence, and on the facts as found by the learned trial judge, it appears to me indisputable that the failure to include the turnaround area within the boundaries of the easement number HO1114 was a "mutual mistake" by the owner of both properties, and that the easement as recorded and registered failed to conform with their intention. The Dilays were owners of both properties when the two lots were subdivided and the easements created. They lived in a house on Lot 2. Their only access was by the driveway encompassed by the easement, and their only means of turning around at the bottom of the driveway was by using the turnaround. It is an irresistible inference that when the easements were created, the Dilays intended that both lots should have the use and benefit of the turnaround. To infer that they intended to deprive themselves of the only means by which they could reasonably have access to and egress from their home when they sold Lot 1 to the Kittlesons would be completely unreasonable.
- [38] The Dilays' intention concerning the use of the turnaround is reflected in Mrs. Kittleson's evidence:

Q Now, the little -- what's called the turnaround -- tell us what you know about that?

A Well, until we built our house and, ah -- the road, paved the road across from the house and the track up to our septic field, it was the only place that you could turn around when you came down that hill. You had to turn around there and go back up.

Q And was it used by the Delahays?

A Well, it was down, ah -- at their home --

Q Right.

A -- practically and, ah -- was sort of surprised to find out that it was now on what had been our property. It was just there and everybody used it.

...

Q I, I didn't hear what you said, I'm sorry. What did you think that it was?

A Well, the turnaround. It had always been there.

Q Yeah.

A And, as I say, before our place -- it was the only place you could turn around and go back up the hill.

Q Okay.

A And, strangely enough, it didn't happen a lot -- but at least a dozen times, somebody would come down that road and realize they were lost and it was the only place they could turn around and go back up until we had built that.

Q And did you just consider it was part of the common driveway?

A It had been there for ever. It was no problem.

[39] This evidence provides ample support for the trial judge's conclusion at para.52 quoted above.

[40] With respect, I think it is fanciful to suggest that evidence could have been obtained from the Dilays, or from anyone else, to support the proposition that the turnaround was excluded from the easement by design, and that in doing so the Dilays intended to deprive themselves of its use for the 10 years or so that they continued to reside on Lot 2, after they sold Lot 1 to the Kittlesons in 1979.

[41] As mentioned earlier, the Banvilles purchased Lot 1 with constructive notice of the existence of the turnaround as an unregistered charge on their land, as found by the learned trial judge at para.46 of his reasons, quoted above.

[42] For these reasons I am satisfied that this is a proper case in which to order rectification of the easement numbered HO1114 to include the area of the turnaround so as to reflect the intention of the Dilays who were the owners of both Lots 1 and 2 when the easement was created.

IV.

[43] The remaining issues are whether the learned trial judge erred in holding that parking was permitted within the area covered by the easement, and whether he erred in his directions concerning the portable curbs. He dealt with these matters as follows:

[58] Motor vehicle access by authorized persons includes parking of those vehicles on the easement in such a way that they do not obstruct use of the paved portion of the easement or damage the paved or other areas of the easement.

...

[60] The Banvilles also allege the Whites installed portable curbs on lot 1 and seek a direction for their removal. Mr. White testified they were installed on the easement to prevent his guests from parking off the easement on lot 1. The evidence did not clearly establish whether they were on or off the easement. If they are on lot 1 but not on the easement, I order them removed. If they are on the easement they are unobjectionable so long as they do not obstruct the Banvilles' right to pass and repass by motor vehicle or otherwise.

[44] Neither of these rulings is reflected in the order appealed from. Both turn upon the correct interpretation of easement number HO1114. The language of the easement is quoted above at para.5 of these reasons.

[45] On the question of whether the easement permits parking, there appears to be only one B.C. case. In *Brundrett v. Muckle*, [1997] B.C.J. No. 1585 (C.A.), the easement granted a right of passage in the following language:

[11] "right to cross over the Easement area to and from the dominant lands and Brookridge Drive"

[46] The plaintiffs sought a mandatory injunction requiring the defendants to restore a portion of their land to its original state and to remove a driveway allegedly constructed on the easement. Southin J.A. for the court held that the driveway was permissible, but that the defendants were not allowed to use it for parking:

I have no difficulty in saying that the grant, in these words, does not carry with it a right of parking. A right to cross over may carry with it the right to tarry for a brief moment or two, but no more.

[47] She concluded that "parking areas may be reasonably incidental, but they are by no means necessarily ancillary to a grant of a kind made here".

[48] In *Sara, Boundaries and Easements* (supra), the learned author says at 313:

A private right of way is an easement permitting people to pass to and fro over another person's land from one point to another for the benefit of land belonging to the person entitled to the right of way.

And at 315:

As [a private right of way] is a right of passage, it does not include a right to park. Frequently, where there is a vehicular access the dominant owner does not have anywhere on his own land where vehicles can stop to unload. It has been accepted, therefore, that a right of way includes a right to stop for sufficient time to load or unload

And at 330:

stopping on a right of way for the purposes of unloading could be a legitimate incident of a right of way. However, whether the dominant owner is entitled to stop and unload on the way depends on the circumstances. The right to park one or more vehicles either on a roadway, or in a car park or in a designated parking space is a separate easement.

- [49] These statements are in accord with the decision in *Brundrett*. In my view, fuel trucks or other service vehicles which stop temporarily on the driveway, turnaround, or elsewhere within the easement, do not amount to parking, and are within the right of passage contemplated by the easement. With respect, however, the authorities do not support the trial judge's conclusion in para.58 that parking is permitted on the easement so long as it does not obstruct passage on the driveway, or cause damage to the easement area.
- [50] Finally, there is the question of the portable curbs. The learned trial judge found that the evidence did not clearly establish whether they were on or off the easement. Clearly, the Whites have no right to place curbs or other objects on the Banvilles' property outside the boundaries of the easement. The question is whether the judge was right to hold that the Whites could place curbs within the easement's boundaries so long as they did not obstruct the Banvilles' right to pass or repass by motor vehicle or otherwise.
- [51] Two B.C. cases deal with the temporary obstruction by the servient tenant of access by easement to the dominant tenant's lands: see *Bossler v. Burton*, [1993] B.C.J. No. 1614 (S.C.) and *Hankey v. Hankey*, [1994] B.C.J. No. 71 (S.C.). These cases hold that the servient tenant may be permitted transitory or minimal interference with the right-of-way, but that substantial interference with the right to pass and repass will not be permitted. These cases are not of assistance to the case at bar, however, because while the easement constitutes a charge on the servient tenant's lands, the servient tenant retains all residual property rights to the area affected by the easement, and is entitled to the use and enjoyment of that land so long as such use and enjoyment do not impair the right of passage in a substantial way or impair any other right granted by the easement.
- [52] Here, however, it is the dominant tenants, the Whites, who claim the right to place portable curbs on the easement area for the guidance and assistance of their guests. There do not appear to be any B.C. cases dealing with the right of a dominant tenant to place objects on an easement across the servient tenant's lands.
- [53] In the absence of clear language in the grant, I do not think the Whites' claim in this regard is supportable. Placement of the portable curbs appears to me similar in principle to parking, and is not necessarily ancillary to the right of passage.
- [54] In my view, therefore, the language of the easement does not permit either parking or placing temporary curbs. Temporary stops within the easement by vehicles, including fuel and other service vehicles, are permissible.

V.

[55] I would vary the order appealed from concerning the turnaround by inserting in line 4 thereof the word "rectified" between the words "and" and "to", and by adding thereto a direction that: "Right-of-way HO1114 is interpreted to permit temporary stops by vehicular traffic, including stops by fuel trucks and other service vehicles, but to exclude the right to park, or to place temporary curbs or other objects within its boundaries".

"The Honourable Chief Justice Finch"

Reasons for Judgment of the Honourable Madam Justice Ryan:

- [56] I have had the privilege of reading in draft form, the reasons for judgment in this appeal prepared by the Chief Justice. I agree with his conclusion that s. 35 of the Property Law Act, R.S.B.C. 1996, c.377, was not available to modify the easement against the interests of the servient tenant. I agree with the conclusion of the Chief Justice that the easement in question permits temporary stopping on the easement, but not parking or the placement of portable curbs. I regret that I do not agree that rectification of the easement is available in this Court. I would return the matter to the trial court for a determination on that issue.
- [57] At trial the respondents relied solely on s.35 of the Property Law Act to modify the registered easement to include the area that has been referred to in this case as the "turnaround". They did not plead rectification. As a result the trial judge did not make the findings of fact that would seem to be required for this Court to now make that order.
- [58] The question of rectification was not addressed in the factums. Counsel for the respondents raised the issue for the first time during argument in this Court. As a result, while the appellants and respondents had the opportunity to review the evidence and the facts found by the trial judge, the appellants had no opportunity to provide a thorough analysis of the applicable case law.
- [59] What we are being asked to do here is to rectify the easement to reflect the wishes of the makers of the original document. I agree with the Chief Justice that, on the evidence called at this trial, it is an irresistible inference that the original homeowners, the Dilays, the couple who created the easement, did not intend to deprive themselves of the only means by which they could reasonably have access to and egress from their home by motor vehicle. The problem arises with the subsequent sale of the two pieces of property in question.
- [60] Assuming that rectification of the instrument creating the easement is possible and that the court may order that the easement recorded on the title to the properties be amended in accordance, the question becomes whether the appellants, were bona fide purchasers for value, or whether they purchased the property under the mistaken impression that the "turnaround" was part of the registered easement.

- [61] While there was evidence on the part of the Whites and Mrs. Kittleson, the former owner of the appellants' property, that the turnaround was always used for that purpose, there is conflicting evidence that all were under the mistaken impression that the turnaround was part of the registered easement.
- [62] The trial judge did not have this specific issue before him. He made no findings of fact with respect to it. Counsel for the appellants says that he would have called other evidence in support of his position had he been given the opportunity.
- [63] I am of the view that the equities in this case favour the respondents to the extent that they ought to be permitted to amend their pleadings to seek rectification. But I am also of the view that the state of the trial record does not permit this court to make the order they seek in this Court. I would allow the appellants' appeal on the grounds set out in the first paragraph of these reasons, but return the matter to the trial court for determination on the amended pleadings.
- [64] It is to be hoped that the parties can find a practical solution to the problem without resorting further to law and incurring additional costs.
- [65] As success on the appeal is divided, I would order the parties to bear their own costs of the appeal.

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Mr. Justice Low"

September 25, 2002

On page 6, paragraph 9, the second sentence should read as follows:

The turnaround is located on Lot 1, immediately adjacent to the modified boundary, and outside the area encompassed by easement H01114.

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Prepared on 29 October 2026 · Esheria