

CANADA / JUDGMENT

BC Transportation Financing Authority v. Rastad Construction Ltd.

2020 BCSC 2064

COURT

Supreme Court of British Columbia

DECIDED

23 December 2020

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2020 BCSC 2064 BC Transportation Financing Authority v. Rastad Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

BC Transportation Financing Authority v. Rastad Construction Ltd.,

2020 BCSC 2064

Date: 20201223

Docket: S207794

Registry: Vancouver

Between:

BC Transportation Financing Authority

Petitioner

And

Rastad Construction Ltd.,

Spring Street Holdings Corp., Inc. No BC1174666,

Greater Vancouver Sewerage and Drainage District,

AGI Foundation Contractors, ULC, Incorporation No. BC0940381 and

City of Port Moody

Respondents

Before: The Honourable Mr. Justice M. Taylor

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

T.J. Quirk

Counsel for the Respondents:

No Appearance

Place and Date of Hearing:

Vancouver, B.C.

October 9, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 23, 2020

INTRODUCTION

[1] This is an application by the petitioner, the BC Transportation Financing Authority ("BCTFA"), for an order under s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377 (the "Property Law Act"), that the Registrar of Lands at the New Westminster Land Title Office ("Registrar") shall cause the following easement (the "Easement") to be cancelled:

Easement N30292 registered March 30, 1977, as against the following lands:

- a) PID 029-274-192, Lot 1 District Lot 190 Group 1 New Westminster District Plan EPP29640 (the "Consolidated Parcel", so described for reasons set out further below in these reasons); and
- b) PID 028-911-580, that part of Lot 60 District Lot 190, Group 1, New Westminster District Plan 37869 shown on Plan EPP12997 (the "Subject Parcel").

[2] In the alternative, the BCTFA seeks an order causing the Easement to be cancelled with respect to the Subject Parcel alone.

BACKGROUND FACTS

[3] The BCTFA is the registered owner in fee simple of the Subject Parcel, which it acquired (the "Acquisition") from the respondent, Rastad Construction Ltd. ("Rastad").

- [4] The Acquisition was completed pursuant to an agreement dated April 2, 2012 between Rastad and the Province of British Columbia under s. 3 of the Expropriation Act, R.S.B.C. 1996, c. 125 (the "Acquisition Agreement"). Upon acquiring the Subject Parcel, the BCTFA demolished the existing improvements and built a parking facility to serve the nearby SkyTrain station.
- [5] Prior to the Acquisition, Rastad was the registered owner of the following legal parcels:
- PID 005-024-536, Lot 79, Except: Parcel "A" (Explanatory Plan 53550) District Lot 1990, Group 1, NWD Plan 52176
- [known civically as 3006-3008 Spring St., Port Moody, BC]
- (the "Spring Property"); and
- PID 008-456-658, Lot 60, Except: Part Subdivided by Plan 52176, District Lot 190, Group 1, NWD Plan 37869
- [known civically as 60-84 Williams St., Port Moody, BC]
- (the "Williams Property").
- [6] The Williams Property was a corner lot and had frontages on two municipal streets in Port Moody, British Columbia: Spring Street and Williams Street. The Williams Property's frontage onto Spring Street contained a legal access to that public road.
- [7] The Easement was originally created pursuant to an easement agreement dated March 30, 1977 (the "Easement Agreement") entered into between James Wilson, the then owner of the Williams Property, and Rastad, which owned the Spring Property. The Easement charged the Spring Property as the dominant tenement and the Williams Property as the servient tenement. The purpose of the Easement was to provide parking and access to businesses in a new building built on the Spring Property, which was abutting the Easement area on the Williams Property.
- [8] On or about January 12, 1996, Rastad acquired the Williams Property. Rastad owned both the Williams Property and the Spring Property until the Acquisition in 2012.
- [9] The Subject Parcel resulted from a severance of the western portion of the Williams Property. The eastern portion of the Williams Property, which Rastad continued to own after the Acquisition in addition to the Spring Property, contains the majority of the original Easement area and the legal access to Spring Street. The western portion of the Williams Property acquired by the BCTFA contains only a small portion (in effect only a narrow "slice") of the original Easement area.

- [10] Pursuant to the terms of the Acquisition Agreement, and after the Subject Parcel was severed from the Williams Property, the eastern portion of the Williams Property was then consolidated with the Spring Property to create a single parcel owned by Rastad (the "Consolidation"). The Consolidation, which created the single Consolidated Parcel as defined earlier in these reasons, was undertaken at the expense of the BCTFA and for the benefit of Rastad.
- [11] After the completion of the Acquisition and the Consolidation, Rastad then held the fee simple title to the Consolidated Parcel from 2012 until June 14, 2019, when it sold the Consolidated Parcel to the respondent, Spring Street Holdings Corp. ("Spring Street Holdco"). Thereafter, Rastad has retained a vendor mortgage with respect to the Consolidated Parcel, but no direct ownership interest.
- [12] An important effect of the Consolidation on the Easement was that the Consolidated Parcel thereafter contained both the dominant and servient tenements. A further effect was that the location of the lot line of the Spring Property thereafter no longer abutted the improvement on that property, and there was direct legal access from the Consolidated Parcel to Spring Street as well as space for vehicle circulation and parking.
- [13] Despite these significant effects, the Easement was not cancelled or amended at the time of the Acquisition and Consolidation. The BCTFA alleges that this was an oversight, and not intentional. No evidence was presented to the contrary on this application.

POSITIONS OF THE PARTIES

- [14] The respondents were all duly served with the BCTFA petition and a notice of hearing. The respondent, Spring Street Holdco, which is the owner of the Consolidated Parcel, and also the respondents City of Port Moody, AGI Foundation Contractors, and Greater Vancouver Sewerage and Drainage District, who are charge holders or hold other property interests relating to the Consolidated Parcel, all advised counsel for the BCTFA in writing in advance of the hearing that they would not be filing a response to the petition, would not be appearing and would take no position.
- [15] Counsel for Rastad initially advised on August 10, 2020 that it intended to file a response to the petition but requested a two-week extension, which was granted by counsel for the BCTFA on September 1, 2020. Despite the extension, Rastad did not file a response during the two-week extension period or thereafter, nor did it subsequently advise whether it would take a position or whether it would appear on the application. Ultimately, Rastad did not appear on the application and did not file any written materials or otherwise advise the BCTFA or the Court of its position.
- [16] No party appeared on this application other than the BCTFA.

APPLICABLE LAW

- [17] Section 35(2) of the Property Law Act provides that the Supreme Court may make an order to modify or cancel an easement on being satisfied that the application is not premature in the circumstances, and that:
- (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
 - (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
 - (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.
- [18] In *Vanderberg v. Olson*, 2010 BCCA 204 at paras. 23 and 25, Garson J.A. explained that s. 35(2) is a "comprehensive code" that displaces the common law, and that the authority of the court is constrained by the specific legislative grounds set out in s. 35(2).
- [19] The grounds in s. 35(2) are disjunctive. Thus, the onus is the BCTFA on this petition to bring itself within at least one of the grounds: *0730729 B.C. Ltd. v. Shoker and Shoker*, 2007 BCSC 540.
- [20] The BCTFA submits that the cancellation of the Easement is justifiable under ss. 35(2)(a), or in the alternative under ss. 35(2)(b) or (c). For the reasons that follow I agree with the BCTFA submission.
- [21] Before I proceed to address each of the specific grounds in turn, I find as a preliminary matter, as required by s. 35(2), that it is not premature in the circumstances to consider this application. Taggart J.A. in *Newco Investments Corp. v. BC Transit* (1987), 1987 CanLII 2662, 14 B.C.L.R. (2d) 212 (C.A.) at 222-223, considered the interpretation of "premature":

On such an application s. 31(2) [now s. 35(2)] requires the judge to first determine whether the application is premature. If it is he should dismiss it even if it might otherwise succeed on one or more of the grounds set out in s. 31(2)(a) to (e). Thus where it appears that considerations, material to a determination whether grounds exist under sub-clauses (a) to (e), have not yet materialized or where, for other reasons, it would be better to defer to a later date consideration of whether the covenant should be struck out the application should be dismissed. For example, an application under s. 31(2)(e) on the ground the covenants are unenforceable for uncertainty might be premature if it was shown that future events such as a pending agreement or a decision on arbitration could resolve the uncertainty. However, in this case it is my opinion the application

was not premature. The future events referred to by the trial judge in support of his conclusion of prematurity are not such as will offer clarification of the essential ambiguity of the covenants under consideration. Nor is there any reason to defer to a later date determination of the issues raised by the application.

[22] Applying the reasoning in *Newco*, I find that there are no future events such as a pending agreement or arbitration which could resolve the uncertainty and justify a conclusion of prematurity. As I will elaborate upon more fully below, the relevant circumstances justifying a cancellation of the Easement most likely crystallized at the time of the Acquisition and Consolidation in 2012 and certainly no later than 2015, and the continuing validity of the Easement was not asserted by any party until recently. This application was apparently motivated by the fact that Rastad recently commenced a small claims action against the BCTFA claiming damages of \$35,000 for "breach of easement agreement". In light of the pending small claims action, and the significant passage of time since the Acquisition and Consolidation, it is in my view necessary for this Court to resolve the issue in a definitive and timely manner to clarify the respective rights and obligations of the parties and preclude the possibility of any unnecessary or potentially duplicative litigation.

[23] Having found that this application is not premature, I will consider each of the grounds under ss. 35(2)(a), (b) and (c) of the Property Law Act in turn.

(A) THE INTEREST IS OBSOLETE

[24] Section 35(2)(a) states that a registered charge or interest may be cancelled if it becomes obsolete due to changes in the character of the land, the neighbourhood or other circumstances the court considers material.

[25] In *Collinson v. LaPlante* (1992), 73 B.C.L.R. (2d) 257, 1992 CanLII 685 (C.A.) at para. 18, Madam Justice Southin, citing *Chivas v. Mysek* (1986), [1987] B.C.W.L.D. 687, [1986] B.C.J. No. 2547 (C.A.), explained that obsolescence is determined by a consideration of the nature of the charge in the circumstances of the use of the relevant property. Madam Justice Southin further explained that the word "obsolete" is not to be given a technical meaning, but rather its ordinary dictionary definition, which is:

"1. That is no longer practiced or used; discarded; out of date.

2. Worn out; effaced through wearing down, atrophy, or degeneration."

[26] In considering any change in circumstances, the courts have made it clear that easements are to be interpreted as contractual documents: *Lafontaine v. University of British Columbia*, 2018 BCCA 307 at para. 50. The intention of the parties, as recorded in the contract at the time the easement was drafted, is the primary factor: *Paterson v. Burgess*, 2017 BCCA 298 at para. 23; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57; *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29 at para. 101.

[27] In this case, the key contractual document is the Easement Agreement. A review of the Easement Agreement clearly indicates that the original purpose of the Easement was to give access over the Easement area to businesses located on the Spring Property, and abutting the Easement area in the Williams Property, because the Spring Property had no direct access to the street at that time. The recitals to the Easement Agreement referenced the fact that Rastad was constructing a new building on the Spring Property and further referenced the fact that an easement was necessary over the Williams Property "for the purpose of passing, with or without motor vehicles, to and from the optioned lands and for the purpose of parking motor vehicles thereon." Section 1 of the Easement Agreement stated that the Easement had the purpose of:

"allowing free access by trucks, trailer trucks and other motor vehicles making deliveries to and pickups from the various business premises abutting the Easement Area and to keep the Easement Area clear for the said purpose and to permit temporary parking of vehicles of customers while actually engaged in doing business in such business premises "

[28] Further evidence of the original intention of the parties was provided in an affidavit sworn on this application by the property agent who represented the BCTFA in the negotiation of the Acquisition with Rastad, Doug Fourchalk. In his affidavit, Mr. Fourchalk deposed that his understanding, based in part on discussions at the time of the Acquisition with Dave Rastad, the owner of Rastad, was that the Easement was originally necessary because the building on the Spring Property was constructed with a "zero lot line" on its western boundary. In addition to the "zero lot line" condition, tenant access and loading was located along the western boundary of the Spring Property. Accordingly, Mr. Fourchalk explained in his affidavit, after the building on the Spring Property was constructed, the Easement provided the only legal access to the west side of the building and Spring Street.

[29] However, the evidence also demonstrates that circumstances have changed substantially as a result of the Acquisition and Consolidation. In particular, the Acquisition and Consolidation have resulted in the combination of the dominant and servient tenements on the Consolidated Parcel, and the removal of the "zero lot line", with the result that the Consolidated Parcel can now access Spring Street directly. There is also now space on the Consolidated Parcel for free access of vehicles and for tenants to park in front of their units without the need for access to the Easement area on the Subject Parcel.

[30] Taking into account the foregoing, it is my view that the Acquisition and the Consolidation effected a sufficiently material change in the character of the land and the neighbourhood to render the Easement obsolete. It is clear from the evidence that the original purpose is now out of date and that the Easement area on the Subject Parcel serves no practical utility for the Consolidated Parcel.

[31] Indeed, as will be discussed more fully further below, the BCTFA constructed a fence in 2015 at the request of Rastad along the lot line between the Consolidated Parcel and the Subject Parcel, to prevent SkyTrain users from accessing the Consolidated Parcel. This new fence

had the effect of physically separating the Easement area on the Subject Parcel, which is now a drive isle in the SkyTrain parking lot, from the Easement area on the Consolidated Parcel, thereby rendering it completely inaccessible to the Consolidated Parcel. It is difficult to believe in my view that Rastad would have made the request for the fence if its intention after the Acquisition and Consolidation had been to retain the benefit of the Easement.

- [32] Further, at the time of the Acquisition and Consolidation and thereafter, the evidence indicates that it was the intention of the parties that the Subject Parcel would cease to be subject to the Easement. Mr. Fourchalk deposed that, during the negotiation of the Acquisition, he advised Mr. Rastad that the existing structure on the Subject Parcel would be demolished and used as a SkyTrain parking lot. In the course of those negotiations, Mr. Fourchalk deposed that he did not recall Mr. Rastad raising the possibility of retaining the benefit of the portion of the Easement on the Subject Parcel. In addition, no evidence was presented to the Court that indicates Rastad had the intention of retaining the benefit of the Easement.
- [33] Thus, it is clear that the Easement no longer serves any purpose, is not used and is out of date, in accordance with the definition of "obsolete" set out by Southin J. in *Collinson*. I conclude accordingly that the requirement under s. 35(2)(a) is met.
- [34] While the BCTFA has argued as an alternative that an order could be granted causing the Easement to be cancelled with respect to the Subject Parcel, without cancelling the whole Easement altogether, this half-measure would in my view serve no practical purpose. This is because the Consolidation has eliminated the distinction between a dominant and servient tenement on the Consolidated Parcel, and the need for access to Spring Street, thereby rendering obsolete the purpose of the Easement on the Consolidated Parcel.
- [35] The foregoing analysis is sufficient to justify granting the relief sought in the application. However, even if this conclusion were not correct, it is my view that the relief sought can also be justified under subsections 35(2)(b) or (c) of the Property Law Act.
- [36] I will therefore now proceed to address these two alternative grounds for relief.

(B) REASONABLE USE OF THE LAND WILL BE IMPEDED

- [37] Section 35(2)(b) of the Property Law Act provides that a court may modify or cancel an easement if the reasonable use of the land will be impeded, without practical benefit to others, if the easement is not modified or cancelled.
- [38] In order to succeed under s. 35(2)(b), the BCTFA must establish both that the reasonable use of the land will be impeded if the Easement is not cancelled and that there is no practical benefit to others in keeping the Easement in place. Both subjective and objective factors may be taken into account, and those factors are to be considered in light of the object of the agreement: *Wallster v. Erschbamer*, 2011 BCCA 27 at para. 19; *Tri-X Timber Corporation v. Rutherford*, 2012 BCCA 71 at para. 26.

- [39] In this case, it is my view that the evidence demonstrates that the BCTFA's use of the Subject Parcel as a parking lot will be impeded if the Consolidated Parcel, as a dominant tenement, is able in its sole discretion to demand use of the portion of the Easement area on the Subject Parcel, potentially requiring BCTFA to make modifications to its SkyTrain parking area or otherwise restricting its use of the land. For example, having requested that the BCTFA build a fence along the lot line, the owner of the Consolidated Parcel could in future theoretically require that the BCTFA remove the fence or otherwise limit its use of the Easement area in other ways.
- [40] Furthermore, the recent actions of Rastad relating to the Easement illustrate a different form of impeding the BCTFA's use of the land, which is the necessity to defend against potentially ongoing litigation. This is apparent from the fact that Rastad, which is only a mortgagor with respect to the Consolidated Parcel and not an owner, recently commenced a small claims action against the BCTFA claiming damages of \$35,000 for "breach of easement agreement". Obviously, to the extent that the BCTFA finds itself under threat of litigation now and in future as it attempts to make use of the Subject Parcel for its own purposes, reasonable use of the land will be impeded.
- [41] In addition to considering evidence on whether the use of the Subject Parcel has been impeded, s. 35(2)(b) also requires a consideration of the practical benefit to others in keeping the Easement in place. As discussed in *Wallster and Tri-X Timber Corporation*, the practical benefit must be measured against the object of the Easement. Here, the original object or purpose of the Easement was to facilitate vehicles coming to and from the businesses on the Spring Property and accessing Spring Street. Taking objective and subjective factors into consideration, the Easement no longer provides a practical benefit to the respondents because, following the Consolidation, the Consolidated Parcel now has direct access to Spring Street, as referenced in my earlier discussion under s. 35(2)(a).
- [42] A strong piece of evidence in support of the conclusion that the Easement no longer has a practical benefit is that the current fee simple owner of the Consolidated Parcel, Spring Street Holdco, has taken no position on this application in respect of the cancellation of the Easement. If the Easement still had a practical benefit, it is unlikely in my view that the owner of the dominant tenement would have taken no position on this application.
- [43] It is also significant, in my view, that the only interested party which has asserted the continued existence of the Easement has been Rastad, which is the mortgagor and not the land owner. The BCTFA submits compellingly that Rastad is asserting its rights with respect to the Easement not because it has any legitimate interest in the use of the Easement area for land-related purposes, but solely because it wishes opportunistically to now extract an additional payment from BCTFA over and above what it obtained under the Acquisition Agreement. Given that Rastad is not the land owner, there is no practical benefit to Rastad of such litigation other than an attempt to extract additional payments from the BCTFA.

[44] Accordingly, even if my conclusion under s. 35(2)(a) were incorrect, I would find in favour of the BCTFA under s. 35(2)(b) of the Property Law Act. However, even if this conclusion were also not correct, it is my view that the relief sought can also be justified in the further alternative under subsection 35(2)(c) of the Property Law Act.

(C) EXPRESS OR IMPLIED AGREEMENT

[45] Section 35(2)(c) of the Property Law Act requires the BCTFA to prove that the persons who are or have been entitled to the benefit of the Easement have expressly or impliedly agreed to it being modified or cancelled.

[46] The BCTFA asserts in the first place that the parties to the Acquisition Agreement never intended that the Easement would charge the newly created parcel acquired by the BCTFA, and the fact that the Easement Agreement was not removed from title was a mere oversight. In this regard, I note that s. 3 of the Acquisition Agreement stated that Rastad agreed to "do all things necessary to transfer the freehold estate, in fee simple, as prescribed under the Land Title Act, of the [Subject Parcel] to the Province (or at the direction of the Province, to the BCTFA." There was no specific mention in the Acquisition Agreement of the Easement.

[47] Moreover, as noted above, Mr. Fourchalk deposed in his affidavit that he did not recall Rastad ever raising the possibility of retaining the benefit of the Easement over the Subject Parcel. Rastad did not appear on this application, despite being served and initially advising counsel for the BCTFA that they intended to respond. Accordingly, I make an adverse finding against Rastad that it never did raise the possibility of retaining the benefit of the Easement, and that it was the intention of the parties at the time of the Acquisition Agreement that the BCTFA would acquire fee simple title to the Subject Parcel free and clear of the Easement.

[48] In the alternative, and in any event, Rastad's actions subsequent to the Acquisition are evidence of the fact that it impliedly agreed to the Easement being cancelled no later than 2015. Doug Fourchalk deposed in his affidavit that, in or around January of 2015, Rastad requested by email that BCTFA construct security fencing along the newly created lot line between the Subject Parcel and the Consolidated Parcel. This email correspondence was attached as an exhibit to Mr. Fourchalk's affidavit, and it clearly confirms that the request came from Dave Rastad on behalf of Rastad. The email, which made no reference to the Easement, stated in part as follows:

"we now feel that some fencing would be desirable at the north ends of the 3060 and 3010 Spring St. buildings to prevent easy access to a potential dumping site or occupation by the homeless, etc., as those areas are isolated and out of site making it difficult to monitor."

- [49] The fencing requested by Rastad was subsequently installed at the expense of BCTFA in 2015, after further dialogue and agreement with Rastad concerning the nature, height and location of the fencing. I note that a key effect of the fencing was to isolate the portion of the Easement on the Subject Parcel from the remainder of the Easement on the Consolidated Parcel, thereby rendering the Easement portion on the Subject Parcel physically inaccessible to the Consolidated Parcel.
- [50] The courts have recognized that evidence of an intention to abandon an easement, over and above evidence of mere non-use of the easement, can ground the relief contemplated by s. 35(2)(c): *Lafontaine v University of British Columbia*, 2012 BCSC 805 at para 43, *aff'd* 2018 BCCA 307; *Owners, Strata Plan NW1837 v. Owners, Strata Plan NW2794*, 2003 BCSC 1037, paras. 50-51. In this case, my view is that the installation of the fencing was clear evidence of an intention to abandon the Easement, over and above mere non-use. By requiring the BCTFA to take proactive steps, and incur costs, to erect a barrier between the Consolidated Parcel and the Easement area in the Subject Parcel, when three years had already passed after the Acquisition, it is my view that Rastad implicitly agreed at the very latest in 2015 to the fact that the Easement had ceased to apply to the Subject Parcel (assuming, that is, that it had not previously agreed to this at the time of the Acquisition and Consolidation, which I have also found above).
- [51] Accordingly, even if my conclusions under s. 35(2)(a) and (b) were incorrect, I would find in favour of the BCTFA under s. 35(2)(c) of the Property Law Act. That said, I note that if s. 35(2)(c) were the sole basis for this decision I would order the more narrow remedy of causing the Easement to be removed from the Subject Parcel, without cancelling the Easement altogether. This is because the evidence is less definitive as to Rastad's intention to cancel the Easement area on the Consolidated Parcel alone, as distinct from the Subject Parcel.

CONCLUSION

- [52] On the basis of all the foregoing, I order that the Registrar shall cancel the Easement, and that such cancellation shall apply with respect to the Easement area on both the Subject Parcel and the Consolidated Parcel.
- [53] The BCTFA will have its costs of this application as against Rastad, in any event of the cause. There will be no costs ordered against the other respondents as, unlike Rastad, they clearly notified the BCTFA in advance that they were taking no position.
- [54] The BCTFA shall also have leave to bring to the attention of the Court any additional information that may be relevant to the issue of costs as against Rastad.

"M. Taylor J."

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