
CANADA / JUDGMENT

Beaton v. Towle

2019 BCSC 287

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 287 Beaton v. Towle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Beaton v. Towle,

2019 BCSC 287

Date: 20190220

Docket: S188721

Registry: Vancouver

Between:

Samuel Beaton and Lea Beaton

Petitioner

And

Martha Maria Towle and Douglas Towle

Respondents

Before: The Honourable Madam Justice Marzari

Oral Reasons for Judgment

Counsel for the Petitioner:

M.J. Wolf

Counsel for the Respondents:

K.W. Wince

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 16, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2019

Introduction

- [1] The parties, the Beatons and the Towles, are neighbours who purchased their waterfront homes on Gerrans Bay, in Madeira Park, on the Sunshine Coast in 2011 with aspirations of a happy retirement in this beautiful community. It appears that they got along as neighbours for 5 years after their respective purchases until, in 2016, it was discovered that a portion of the Towles' driveway, landscaping, fence and patio encroached on the Beaton's lot.
- [2] These two petitions are essentially cross-applications brought by the parties under s. 36 of the Property Law Act, R.S.B.C. 1996, c. 377 [Act], to address this encroachment. The Beatons seek an order that the Towles remove the encroaching improvements pursuant to s. 36(2)(c) of that Act, and the Towles seek an easement in their favour over the Beatons property with some compensation pursuant to s. 36(2)(a) of the Act.
- [3] I encouraged the parties to attempt to reach an agreement as between themselves before releasing these reasons, but I gather that their efforts have failed.

Issues

- [4] Section 36 sets out that where an encroachment of this nature is discovered, as it was in this case, either party may apply to the Supreme Court, and that Court may declare that the encroaching party either has an easement for a period and at a rate of compensation decided by the Court, or may order an owner to remove the encroachment.
- [5] The basis for making such a determination is the "balance of convenience" as between the parties. A set of principles has developed to assist in making this determination, originally set out in *Vineberg v. Rerick*, [1995] B.C.J. No .2506 (B.C.S.C.) [Vineberg] as follows:
 - 1. The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are 3 degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.

2. The nature of the encroachment: Was the encroachment a lasting improvement? What is the effort and cost involved in moving the improvement? What is the effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more these considerations will be weighed in favour of the petitioner.
 3. The size of the encroachment: How does the encroachment affect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.
- [6] For a number of years, a line of authority developed suggesting that the relief offered by way of s. 36(2)(a) and (b) whereby an encroaching party may obtain an easement or vesting of an encroaching area required that the balance of convenience be "decidedly in their favour." However, in *Taylor v. Hoskin*, 2006 BCCA 39, the Court of Appeal expressly found that this more restrictive approach to the remedies under s. 36(2) should be rejected in favour of a "broad, equitable approach" based on the particular facts, circumstances, and equities involved. The principles in *Vineberg* are only "predominant considerations" and do not foreclose consideration of other relevant factors that may arise on the facts of a case.
- [7] The issue before me in these two petitions is therefore whether the balance of convenience favours granting the Towles an easement or requiring them to remove the encroachments. If I find that it favours granting an easement, then I have to consider on what terms, including compensation. The parties are agreed that my discretion to determine the most equitable result is very broad.
- [8] I will go on to consider the three principles elucidated in *Vineberg*, modified as needed to address the evidence and equities as I find them in this case. I will begin with the nature of the encroachments before moving on to the parties' knowledge of them, and ultimately to their effect.

Discussion

The Nature of the Encroachment

- [9] The lots at issue are as follows:
- a) Lot 8 Block 7 District Lot 1362 Plan 13568 ("Lot 8") is a smaller lot owned by the Towles who seek an easement for their encroachment.
 - b) Lot 9 Block 7 District Lot 1362 Plan 13568 ("Lot 9") is a larger lot owned by the Beatons who seek an order removing the encroachment.
- [10] The following encroachments are at issue in these battling petitions:
- a) A long slice of an asphalt driveway and adjacent landscaped border used by Lot 8 running down the shared boundary on lot 9. According to the plan of encroachment, the encroaching area of the driveway is 100 feet in length, tapering from a point at the south end and over 7 feet wide at the north end, all on Lot 9.

- b) A portion of the Towles' concrete patio which sits on top of a large retaining structure, just above the waterline of both properties. The patio is located in an encroachment area of approximately 23 feet in length and 6-8.5 feet in width; and
 - c) A fence running the full length of the driveway and patio encroachment areas.
- [11] The total area that Lot 8 improvements encroach onto Lot 9 is 52.4m² or approximately 543 square feet.
- [12] The evidence establishes that the encroachments are long-standing, and based on an understanding of the property line that likely goes back many years, and numerous property owners. All are based on the location of the fence as indicating the property line, the current version of which was built by the owner of Lot 8 in or about 2000 at the request of the owner of Lot 9, and with the knowledge and consent of the then owners of both properties. The ornamental trees lining the fence and driveway were planted a couple of years earlier by the then owner of Lot 8.
- [13] The fence is now approaching 20 years old and it is agreed by both parties that it could be replaced. The landscaping and ornamental trees are mature now, but could be physically removed should that be necessary.
- [14] The driveway and concrete patio atop the retaining structure are much more substantial in their fixation to the land, and the cost involved in removing them.
- [15] With respect to the driveway, I am satisfied that removing the portion of the asphalt driveway that is encroaching onto Lot 9 would remove part of an access path for Lot 8 to the waterfront of the property and the boat dock, although it would not interfere with access to the main garage on that property. I also accept that while it may be possible for the Towles to move this driveway closer to their home to avoid the encroachment, that doing so would require substantial alterations to the topography of the property given its rocky and steeply sloping nature, and to the extensive rock-based garden between the driveway and the house.
- [16] With respect to the patio on the waterfront, I accept the evidence of the Towles that, although the encroachment is on a small portion of the patio in relation to the overall size of the patio, that the patio forms part of a concrete and rock retaining structure that supports the asphalt driveway where the two structures abut. While the Towles have agreed that they can remove a portion of this patio so that this portion of the encroachment is lessened and provides the Beatons' with the full width of their waterfront, they say that removal of the patio up to the edge of the driveway would undermine the driveway, and would necessitate the replacement of the entire patio. I accept this evidence.

- [17] I find that the consideration relating to the nature of the encroachment, particularly with respect to the driveway and the patio, favours the granting of an easement with respect to these elements. The nature of the fence and landscaping do not particularly favour the granting of an easement, as these are both movable and replaceable, or could be used by Lot 9.

The Parties Knowledge of the Encroachment

- [18] The parties state that they were not aware of the encroachment at the time they purchased their respective properties in 2011. The property purchased by the Towles, Lot 8, already had a house, the driveway, extensive landscaping, a patio and a dock. The property purchased by the Beatons, Lot 9, is more than twice the size of the Towles property, but was largely undeveloped at the time of purchase.
- [19] Both parties became fully aware of the nature and extent of the encroachment in the summer and fall of 2016, when the Beatons hired a surveyor to survey their lot line for the purposes of the development of landscaping and a path down the side of their lot bordering with the Towles.
- [20] However, the Beatons argue that the Towles either knew, or should have known of this encroachment prior to this date. Specifically, they point to the fact that the Towles were aware of two other areas in which Lot 8 encroached on their other neighbours' properties, and warned the Beatons that an encroachment might be found if the lot boundaries were surveyed.
- [21] The Towles deny that they knew or suspected that Lot 8 had encroachments onto Lot 9. Their evidence, which I accept, is that the encroachments with other neighbours were disclosed to them prior to their purchase of Lot 8, but no encroachment was disclosed with respect to Lot 9. Furthermore, they withdrew from the purchase of Lot 8 until the disclosed encroachments were settled through agreement or mutual easement. I accept their evidence that they would not have purchased Lot 8 had an encroachment been disclosed or suspected on Lot 9, and that the specific and substantial encroachments that have been determined to exist would have affected their willingness to purchase Lot 8.
- [22] Finally, I note that the topography of the two sites is such that the erroneously placed fence runs along a natural topographical boundary between the two properties, and that the topography of Lot 9 slopes steeply down from the base of the fence to the rest of that lot. Given this topographical feature, it is reasonable that the two parties would not have sought to survey this boundary before either purchase.
- [23] I therefore find that neither party knew or ought to have known about the encroachments. In terms of the Vineberg factors, I find that the Towles had an honest belief that their driveway, fence and patio were on Lot 8 when they purchased that lot. I also find that the Beatons had an honest belief that the encroachments were entirely on Lot 8 and not on their own lot. I find that the Beatons' willingness to purchase Lot 9 in 2011 believing that the

encroaching area was not part of their lot, and the Towles decision to purchase Lot 8 on the understanding that the encroaching area was part of that lot, is a factor that favours the granting of an easement in this case.

The Effect of the Encroachment

- [24] The Beatons are forthright in their admission that the encroachment area does not affect their ability to continue to develop the property in their desired manner at this time. Other than the patio area, the encroachment area is a thin strip along their side yard that is not easily accessible due to the steep incline leading up to it. Their plans to build a path down to their waterfront would be below this incline. Furthermore, their plans to develop and build a new dock and foreshore lease area is not affected by the encroaching patio.
- [25] There was some concern that an alternative form of relief, the vesting of the encroachment area in Lot 8, would decrease the property size of Lot 9 such that Lot 9 would lose its rights under zoning to apply for expanded uses, such as a rental suite. However, it was conceded that there is no evidence that an easement over the encroaching area would have this legal ramification. In any event, the Towles modified application as they presented it to this Court would reduce the area of the encroachment such that the lot size would likely not be an issue.
- [26] Nevertheless, the Beatons say that the encroachment affects their overall enjoyment of their property and its future development, and the patio encroachment in particular takes up and blocks access to a portion of their waterfront. They say this is enough of a negative impact upon them to warrant the requirement that the improvements be removed, and they say that the negative impacts on the Towles of removal are overstated.
- [27] In this respect, the Beatons provide engineering evidence that the area of the encroachment is unstable, and would require replacement in any event. They have an engineering report that hypothesizes that the signs of some cracking and subsidence at the top of the slope, and in the encroachment area and driveway, is a result of the placement of fill that was improperly compacted, and recommends the removal of that fill and the regrading of the entire slope or re-compaction.
- [28] I note, however, that the engineering report states that a subsurface investigation would be required to confirm that fill is in fact present and the cause of the apparent subsidence. The report also says that the signs of instability may also have been created by the removal of lateral support. The Towles say that the removal of lateral support is the more likely explanation, given that there were no subsurface investigations, and the evidence of the previous owner of Lot 8 who built the fence in 2000 is that there was no fill placed in this area. More significantly, the risk of subsidence is one that is largely to Lot 8 and not to Lot 9, and one that the Towles are content to manage in their own way without removing the driveway or landscaping.

- [29] I find that the encroachment area has significant value to the use and enjoyment of Lot 8. The fence and landscaped area, including the mature ornamental trees provide mainly aesthetic values that likely enhanced the value of Lot 8 when they purchased it, and continue to do so. More importantly, the current location of the driveway is of significant importance to the Towles and any future owner of Lot 8, as it provides access to the boat dock along the waterfront of Lot 8. Although the Towles do not currently have a boat docked there, and their evidence is limited to the use of this driveway for gardening and landscape work, I find nevertheless that it is a significant feature of Lot 8, and the removal of it would diminish the future value and use of that property. I find this despite the evidence that the driveway could still be up to 9 feet wide if the encroaching portions of it were removed. The additional width of the driveway is important for the types of vehicles and trailers that would generally be expected to use the driveway and to navigate its significant turn.
- [30] With respect to the patio, I find that this has a significant impact on Lot 9 to the extent that it encroaches on prime waterfront area in a physically and visually dominant manner. These lots are not so large that this structure and the fence do not have a visual impact on the areas of active use of Lot 9. I also find that the encroaching area of the patio could be removed without significant detriment to the use and enjoyment of Lot 8, were it not for its attachment and integration with the retaining wall structure for the driveway and the remaining portion of the patio. The Towles have agreed to remove approximately half of the patio encroachment up to the waterfront, returning to the Beatons the full length of their waterfront, but retaining the portion of the patio closest to the driveway to maintain the driveway's stability.
- [31] The driveway encroachment area has relatively little value to Lot 9 given the topography of the site. With respect to the side yard area of the property, moving the more easily moved encroachments, such as the fence and landscaping, would provide the Towles with a roughly 3 foot strip of land along the top of a steep incline on the side of their property. The main value of this to Lot 9 is the ability to control the aesthetic appearance of that area, as it is unlikely to be accessed or physically used. However, I find that the mature ornamental trees currently present in the encroachment are a positive influence on the aesthetics of both properties.
- [32] With respect to the waterfront portion of the property and the encroaching patio, this raises obvious issues with respect to access to waterfront, which is always at a premium in British Columbia. However, the particular topography of these lots, as shown on the photographs provided to me, suggest that the encroaching patio area is separated by a topographical depression from the yard access available to Lot 9. Provided that the patio and fence in this area is partially removed, as proposed by the Towles, to allow a clear line of view and access to the full length of Lot 9's waterfront, I am satisfied on the evidence that the encroachment will not have a significant impact on the use, aesthetics, or enjoyment of Lot 9, but that these encroachments should not be indefinite.

Conclusion Balance of Convenience

- [33] Had these lots been flatter, and the topographical features not so distinct, I may have come to a different conclusion. However, on the evidence presented to me, I find that the balance of convenience favours the granting of Lot 8 an easement over the encroaching area, with the modification shown on the attached plan ("Schedule A"). This would provide Lot 9 with unobstructed access to the full length of its waterfront by removal of the fence and a portion of the patio from the point that the fence changes direction at its north end to the lot boundary, where it meets the natural boundary.
- [34] I will now turn to the terms of such an easement.
- [35] The parties are agreed that any such easement must include standard terms relating to maintenance, insurance, and indemnity by the owners of Lot 8 to the owners of Lot 9 with respect to the encroachment area.
- [36] They are also agreed that some compensation should be paid, but not with respect to the amount. The Towles say that the compensation should be based on a calculation taking into account land values, the percentage of the property involved, and the fact that this is not a vesting but an easement. The evidence established that they offered the Beaton's \$10,000 in May 2017, and also to contribute \$5,000 towards engineering and landscaping work to stabilize the boundary area. Their position is that the easement that they are seeking is not worth more than \$7,000 based on a percentage of the assessed value of the land value of both properties. The Beatons object to the admissibility of this late and lay opinion evidence, and consider this loss of a portion of the property to be considerably more valuable to themselves both now and in the future, and they rejected the above offers.
- [37] They also disagree as to the term of any such easement. The Towles seek a permanent easement for the benefit of Lot 8 in perpetuity, or at the very least the lifetime of the home on the property. The Beatons say that if there is any such easement, it should only be for the benefit of the Towles while they live at the property, and that it should be a term of any transfer to a new purchaser that the encroachments be removed.
- [38] Both parties are in agreement that I have broad discretion to set the terms of compensation, and that I'm not bound by the rules that govern an expropriation of land for the purposes of an easement; See *Svenson v. Hokhold* (1993), 26 B.C.A.C. 26. In *Rowse v. Halloran*, [1997] B.C.J. No. 2213 at para. 23 the court said this in awarding an amount above the assessed value per square foot of the encroachment area:

The compensation to be awarded to the petitioners is not, as I have said, to be based on an expropriation formula. This is because relief under s. 36 is equitable relief and must take into account the overall impact on the parties of the order granted, not just the estimated value of the portion of the property affected.

- [39] In this regard, I consider that such a level of compensation would be entirely inadequate. Unlike an expropriation, the Towles do not have a right to this property by law, but only in equity on the condition of appropriate compensation being paid. They are not seeking it for a public purpose, but their own private use. The value of the encroachment is significant to them, and is obviously also significant to the Beatons. There is some precedent for the value to be assessed on the basis of the value to the lot obtaining the easements, as opposed to the value to the lot granting it: *Langley v. Yang*, 2012 BCSC 1520. In any event, I have very little evidence before me that can be relied upon to set the value, and I must do my best on the basis of the evidence before me.
- [40] In my view, the compensation that should be paid for this easement should be more than what was offered initially by the Towles to the Beatons. The value of the easement has not been established with objective or admissible opinion evidence, but it is clear that the Beatons value the easement area above what was offered to them, and particularly for the future potential of their property. I consider that compensation should be set directly in relation to the length of the term of the easement in such a way as to provide a commensurate level of compensation while the encroachment is in place. In doing so, I do not wish to foreclose the ability of the parties to extend the easement or consider other options for a more permanent resolution.
- [41] I therefore grant an easement over the encroachment area shown on schedule A to these reasons, excluding the area marked "to be removed," on the following terms:
- a) The term of the easement shall be 25 years, subject to any extension of time agreed to by the current or future owners of Lots 8 and 9;
 - b) The compensation to be paid for the easement shall be \$25,000, which amount shall be paid by the owners of Lot 8 in the amount of \$5,000 on March 1, 2019, and \$1,000 a year on March 1 of each subsequent calendar year for the next 20 years; and
 - c) The owners of Lot 8 shall maintain the easement area in a safe condition, indemnify Lot 9 against any losses or damages arising from their control of the easement area, and carry appropriate liability insurance with respect to it.
- [42] The Towles must remove the fence and the portion of the patio shown on Schedule A as "to be removed" by September 1, 2019;
- [43] The Towles shall consult the Beatons with respect to any new fence they intend to place in the easement area, and accommodate any reasonable requests such as the colour and composition of the fence as it may be seen from Lot 9, provided that these requests do not add more than 20% to the Towles' costs for the fence; and
- [44] This order shall be registered on title to Lot 8 and Lot 9 and shall be enforceable by future owners of these lots.

[SUBMISSIONS ON COSTS]

[45] As neither party was entirely successful in their petition success has been mixed. There will be no costs to either party in these petitions.

"Marzari J."

Schedule A

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