

CANADA / JUDGMENT

Bertolami v. Money Family Projects Ltd.

2019 BCSC 1433

COURT

Supreme Court of British Columbia

DECIDED

26 August 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 1433 Bertolami v. Money Family Projects Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bertolami v. Money Family Projects Ltd.,

2019 BCSC 1433

Date: 20190826

Docket: S174917

Registry: Victoria

Re: In the Matter of Easements

And

In the Matter of Money Family Projects Ltd.

Between:

Attilio Bertolami

Plaintiff

And

Money Family Projects Ltd.

Defendant

Before: The Honourable Mr. Justice Myers

Reasons for Judgment

Counsel for the Plaintiff:

David T. Juteau

Counsel for the Defendant:

L. John Alexander

Lindsay R. LeBlanc

Place and Dates of Trial:

Victoria, B.C.

June 4-7 and July 25-26, 2019

Place and Date of Judgment:

Victoria, B.C.

August 26, 2019

I. Background

- [1] The parties own adjacent parcels of land on Saturna Island. The plaintiff, Mr. Bertolami, claims two road easements to his land over the defendant's land. The claim is based on contract and alternatively on proprietary estoppel.
- [2] The principal of the defendant is John Money and the significant dealings between the parties were between Bertolami and Money. Until this dispute, Bertolami and Mr. and Mrs. Money were friends, to the extent of having travelled with each other to Europe.
- [3] I will begin by describing the lands and the claimed easements. Without the aid of a map, this would be nearly impossible and accordingly I attach as an appendix a graphic agreed to by the parties.
- [4] Bertolami's lands, labelled "Bertolami Lands", are outlined in red in the colour version and by the broken line as indicated in the legend on the map. Bertolami also owns, together with another family, Block A, which is at the south end of the map. Bertolami has a home on Block A (although his pleading stated that it was on the south end of his own lands). He purchased Block A in 1979 and the Bertolami Lands in 1998.
- [5] The defendant owns the Harris Road Lot and lots 1 and 2 to the north of the Bertolami Lands.
- [6] One of the claimed easements runs off Harris Road, though the Harris Road Lot, to the north-east corner of the Bertolami Lands. That corner is on an escarpment and the claimed easement is its only access. The parties referred to this as "the triangle" of the Bertolami Lands.
- [7] The second claimed easement runs off Payne Road and through approximately the middle of Money's lots 1 and 2, to the northern boundary of the Bertolami Lands.

- [8] There is an existing easement beginning at Payne Road to the west of the claimed easement. That is a hillier road and more difficult to traverse than the claimed easement. Bertolami has constructed a road on his land that joins the south end of the claimed easement to the existing easement: it is labelled with a "K" on the map.
- [9] The facts relating to the two claimed easements are for the most part, but not entirely, discrete. In an effort to make my reasons more comprehensible, I will therefore deal with each of the claims separately.

II. The claimed Harris ROAD easement

A. Facts

[10] In 1998, the parties signed the following letter of understanding ("LOU"):

Letter of understanding between Money Family Projects Ltd. and llio Bertolami regarding road and service easements through the N.E. 1/4 of Section 8, belonging to Money Family Projects Ltd., to facilitate a three residents development on the N.E. corner of the S.W. 1/4 of Section 8, belonging to llio Bertolami.

John Money agrees to:

1. Provide Bertolami easements as agreed by both parties, to facilitate vehicles, power and water access to the subject areas.
2. Provide Bertolami water use rights to an existing well on Money Family Projects Ltd.'s property as necessary volume for three residents.
3. John Money will construct, or oversee the construction of, the necessary road, ditching and power line related clearing.

llio Bertolami agrees to:

1. Provide the costs to John Money for the construction of the road in question.
2. Provide the cost to construct the power requirements to the Bertolami property.
3. Provide the cost of water pipe and related materials to the Bertolami property. If and as financial potential exists (after consideration of requirements 1. and 2.), Bertolami agrees to provide pump, filter system as required, pump house and hydro connections.

It is mutually agreed that maintenance of the easements and utilities running on or in the easements will be born equally by the users.

It is understood that as-built drawings and legal surveys and legally prepared agreements will be signed later by all parties in the spirit of the original agreement.

- [11] Bertolami described the events leading up the LOU. He said he wanted to take advantage of pending changes by the Islands Trust that he expected would allow for smaller lots on the north-west corner of his land above the escarpment, but without road access he would not be able to.
- [12] He said he scouted the proposed easement route in 1998, marking it with flags. He later walked the route with Money. Money agreed it was a viable route and would benefit his property. Bertolami said Money agreed that if Bertolami paid for the road and "did things such as a survey" Money would grant the easement.
- [13] Bertolami said it was agreed that if he paid for the installation of the power, Money would do the necessary preparatory work. He also said that at Money's request he would limit construction on the piece of land to three homes, as opposed to the allowed five.
- [14] Bertolami testified that Money drew up the LOU and gave it to him to sign at a pub on November 30, 1998. Bertolami signed the only copy Money brought. He queried Money as to whether he wanted a copy and Money said he would do up another original for signature. They met at Money's house on December 5, 1998 and signed the second original. Hence, there are two signed originals of the LOU, bearing those execution dates.
- [15] Money said he had no recollection of signing the LOU. In fact, before the trial he denied signing it and only resiled from that position after receiving an opinion from a handwriting expert. In contradiction to not remembering the agreement, Money said the choice of the word "easement" in the document was Bertolami's. He added: "The document could -- if, in fact, we came to agreement and made an easement, the document could be used for that."
- [16] With respect to the understanding regarding the easement, Money said he recalled having discussions about the road, hydro and water, and finishing the road. He said that if Bertolami was going to come up "with that kind of money" he would give him an easement. However:

every time money was approached, as it has been on just about everything, the subject got changed and it went away until finally I just gave up on -- on the discussions and thought there was no agreement and there wouldn't -- you know, there wouldn't be an easement and that Mr. Bertolami could continue to use the road personally.

- [17] Bertolami said that he paid \$15,000 for the road construction, which was done by Mr. Barry Crooks in 1999. He first paid \$5,000 for which he had a receipt and then \$10,000 for which he did not receive a receipt. He said that he did all of the slash and burning and cleared up the leftover material.
- [18] There was nothing on the parties' lands that required power or water at the time so he said "neither of us developed those needs".

- [19] Nothing further transpired between the parties with respect to the easement until 2008. Bertolami said this was because he spent the intervening time clarifying zoning with the Islands Trust. Money was aware of Bertolami's dealings with the Islands Trust.
- [20] Bertolami said that in 2008 Money approached him and said it would be an opportune time to widen the road for the benefit of both parties to enable vehicles moving in opposite directions to pass. Bertolami agreed to pay for the required blasting. Money hired the equipment and did the machine work. He presented a bill dated October 15, 2008 for \$7,456.84 to Bertolami for his share of the work.
- [21] Once the equipment was on site, Bertolami said he decided to prepare the site for a house for himself. He hired the blasters and engaged Money to operate the equipment. On November 15, Money invoiced Bertolami a further \$3,724.88 for half of the excavation work.
- [22] Bertolami said he paid for the invoiced work.
- [23] The next major event is a handwritten note from Money to Bertolami. The note is undated and although the evidence was inconsistent, I conclude it was given to Bertolami in 2009 or 2010. It says:

This is to verify that I have agreed to grant Mr. Ilio Bertolami easement [sic] in 2 areas of my property the remainder sec 8 Saturna Island one to gain access to the S.E. corner of his property leaving from Harris Rd and one to gain access to his home property leaving from the large rock on Payne rd. Neither of these leases will fetter Money Family Projects' use of the land or road on them. Susan Davis of Salvidor Davis has been instructed to by me to draw up draft easements ready for approval and signing on my return from my holiday in Britain. It is also understood that Ilio Bertolami has financed a significant portion of the cost of the roads on the easements and surveys.

- [24] Money said the note came about before a planned trip to England "in the early 2000s". He was in his driveway when Bertolami came by and said he was worried about what would happen if something happened to the Moneys on their trip. He said that under pressure he drew the note up to indicate to his estate that Bertolami had spent money on the road and that he could always use the road personally. He explained the use of the word "easement":

I used - my choice of words was very fast and very poor, and -- and it was always the promise that I would -- Bertolami could always use that road personally. I signed it. And in looking at it, it looked like easements and surveys was almost a -- an afterthought that maybe I was asked to put in there, along with other things because the surveys had not been done yet

- [25] In cross-examination he modified this to say he wrote the note so that Bertolami could either use the road personally or be reimbursed from Money's estate for what he paid. Money said that the use of the word "easement" was the wrong choice of words.

- [26] I will say here that this is not credible. Money was a trustee of the Islands Trust for approximately 22 years. He had constructed subdivisions. He had provided Bertolami with another easement in 2003. He granted an easement to a third party in 2006. His use of "easement" was deliberate.
- [27] Bertolami said that he paid \$6,500 for a survey by Mr. Wolf-Milner in 2013. Money acknowledged that Bertolami paid for all or part of the survey. Wolfe-Milner testified that he did the survey in 2010 and that date is on the survey plan. The plan prepared by Wolfe-Milner is titled, in part, "Reference Plan of Easement ". Wolfe-Milner testified that he would not have used the word "easement" without being instructed that he was surveying for that purpose and that the survey was intended to define the limits of an easement.
- [28] Bertolami testified that the parties then agreed that the registration for the easement could wait until after a planned subdivision by Money and be incorporated into that. The subdivision happened in 2013, but the easement was not created.
- [29] Bertolami said that in 2017, Money asked him to reduce the number of allowed lots in the triangle from three to one and he requested a right of first refusal for him or any future purchaser of Money's property. The parties had several discussions and email exchanges.
- [30] On November 7, 2017 the defendant entered into a contract of purchase and sale for the Harris Road lot to Max Tomaszewski. The permitted encumbrances did not refer to the claimed easement. Money acknowledged that at the time of the sale agreement he knew that Bertolami was maintaining his claim for an easement.
- [31] Money had a licence agreement prepared by his lawyer, which he showed to Tomaszewski. Tomaszewski said he could live with the agreement, although he also said he was concerned about the resulting loss of privacy from an easement. Money also told Tomaszewski that Bertolami's rights could be expunged by Money re-paying Bertolami what he had spent on the road.
- [32] Bertolami filed a caveat in November 2017 and filed this Petition (which was later converted to an action) on December 29, 2017. Tomaszewski withdrew from the contract.
- [33] In 2018, Bertolami installed a mobile home in the triangle.

B. Analysis

- [34] As I said above, the plaintiff claims in contract and in the alternative proprietary estoppel. He recognises, I think appropriately, that the stronger claim is proprietary estoppel.

Contract

[35] The existence of a contract depends on at least two things: a meeting of the minds (objectively established) and sufficiently certain terms: *Concord Pacific Acquisitions Inc. v. Oei*, 2019 BCSC 1190 at para. 311. What terms are required for sufficient certainty depends on the nature of the contract. Where these elements exist, the fact that the agreement calls for the execution of further documents is not fatal.

[36] The plaintiff relies on the requirements of an easement, set out in *Ellenborough Park, Re*, [1955] 3 All E.R. 667, [1956] Ch. 131 at 153, and frequently adopted in the British Columbia courts (see, for example, *Robinson v. Pipito*, 2013 BCSC 1670 at 19). These are:

- (a) there must be a dominant and servient tenement;
- (b) an easement must accommodate the dominant tenement;
- (c) dominant and servient owners must be different persons [section 18 of the Property Law Act, R.S.B.C. 1996 c. 377, now eliminates this requirement]; and
- (d) a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

[37] However, meeting the technical requirements of an easement is not the issue here. The real issue is whether a contract with sufficiently certain terms was formed for the grant of an easement. To put the matter another way, an "agreement" that contemplates the creation of an ill-defined right that is capable of meeting the requirements of an easement does not meet the requirements for contractual certainty. To pick an obvious example, an easement for a road must describe the route with sufficient clarity.

[38] Moreover, a document may deal with the *Ellenborough Park* requirements, but still be an agreement to agree.

[39] The LOU has multiple uncertainties. It:

- refers to easements "as agreed"
- refers to water rights to be granted
- is subject, in part, to "financial potential"
- refers to future terms for cost sharing
- contemplates future drawings, surveys and "legally prepared agreements"
- does not specify the route for the road or its width.

[40] Moreover, Bertolami acknowledged in his evidence and argument that the agreement changed over time with respect to the power and water.

[41] In my view the LOU does not contain sufficiently certain terms for proposed easement and accompanying arrangements. I conclude there is no enforceable contract to provide the easement over the Harris Road property.

[42] Having reached that conclusion, it is not necessary for me to deal with the defendant's limitation argument.

Proprietary Estoppel

[43] The parties agree that the claim for proprietary estoppel is not subject to a limitation period.

[44] The requirements for proprietary estoppel are now well-established. The Court of Appeal set out the basic principles in *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451:

[49] From the foregoing I infer that although proprietary estoppel is, like most equitable remedies, flexible and aimed at doing justice, and although the basic elements of the doctrine are not to be technically confined, those elements must still be made out and an equity established. I reproduce again the encapsulation of the doctrine provided recently in *Sabey*:

1. Is an equity established? An equity will be established where:
 - a. There was an assurance or representation, attributable to the owner, that the claimant has or will have some right to the property, and
 - b. The claimant relied on this assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance.
2. If an equity is established, the court must determine the extent of the equity and the remedy appropriate to satisfy the equity.

[45] It is clear from the evidence, including the LOU and handwritten note, that the parties intended an easement to be provided to Bertolami and that Money represented this would be done. As I said above (para. 26), I do not accept Money's evidence that the use of the word "easement" in these documents was made by him in ignorance.

[46] While Money quibbled about the extent of the costs borne by Bertolami, there is no doubt that he paid for part of the road. Certainly, Bertolami paid the bills Money presented to him. It appears more likely than not that Bertolami did pay for one half of the road costs. At Money's request, Bertolami contributed to the cost of widening the road. Bertolami also paid for at least part of the survey. Those payments are a detriment.

[47] Whether Bertolami was misguided in his dealings with the Islands Trust, and whether his recollection of the events was accurate, it appears to me he took those efforts in reliance on getting the easement. I do not see this to be the major credibility point the plaintiff makes it out to be.

[48] Given the road is now built there is no uncertainty as to its route or its width. In any event the road has been surveyed.

[49] Although the defendant argued that the LOU is non-binding, it seeks to rely on it, arguing that Bertolami did not pay for hydro or power, to which the LOU refers. In its written argument, the defendant says:

Clearly the plaintiff cannot rely on a mistaken belief. The plaintiff relies on a written document he signed, and in respect of which he says he is NOT mistaken. Even if it were certain enough to constitute an agreement, he cannot show he mistakenly believed he did not have to incur costs to obtain easement rights. Any "assurance" was an assurance that he, Mr. Bertolami had NO RIGHTS until he provided consideration.

[50] I think this overstates the matter. The arrangement did not necessarily contemplate that an easement would not be granted until the hydro and power had been put in and paid for. Rather, I conclude that the parties contemplated that the power and water would be put in later and Bertolami's obligation to pay for those was an executory promise and not a condition precedent to an easement. Certainly, that is how events transpired. The fact is, the parties were not ready to deal with the servicing because servicing was not necessary. That remains the case to the time of the trial.

[51] Money argues that proprietary estoppel cannot be found where there has been a failed agreement for what is being sought through the estoppel remedy. I do not agree. The authorities do not support that. Rather, the fact that the parties contemplated an agreement is only one of the circumstances to be considered.

[52] There was reliance and detriment. The facts are sufficient to create a proprietary estoppel with respect to the road.

[53] What is the extent of the remedy necessary to do equity? I do not think a personal licence is sufficient. The point of the road was to allow the triangle to be developed. Bertolami intended either to have several homes in the triangle for sale (with or without an eventual subdivision) or to give to his family, or both. Money was aware of this. A personal licence would not be sufficient for either of those possibilities for obvious reasons.

[54] In my view, Bertolami is entitled, as argued, to a registerable easement for access over the road as currently constructed.

III. The claimed Payne Road easement

Facts

[55] The facts relating to the claimed Payne Road easement are more brief.

- [56] As I said above, the route provides preferred alternative access to Bertolami's property than the registered easement because it avoids steep sections that prevent access by larger vehicles, including fire trucks and propane trucks.
- [57] Bertolami said that in 2003 he flagged the proposed easement. He told Money that he had done so, and he and Money walked the route. Money agreed to an easement and told Bertolami that he would use the new road for logging his property in the area.
- [58] Money's version of the inception of the road was somewhat different. He said that he believed he told Bertolami he was going to build it for logging purposes and Bertolami asked him if he could "join in". If so, Bertolami would extend the road on his property to join the existing easement. This would avoid a steep switchback on the original easement. Money said he told Bertolami it was fine and that he could use the road for his personal use.
- [59] Bertolami said that Money brought an excavator to the site. Money operated the excavator and Bertolami did the chain saw clearing. The next year Money logged the area.
- [60] Bertolami said he did more work the following year, clearing downed trees and doing "continuous clearing".
- [61] Money said that Bertolami only paid him for the work Money did on Bertolami's land. He said Bertolami "hung around with a power saw and helped me here and there".
- [62] Bertolami said that he paid Money \$11,000 for the road construction. Bertolami said most of that was for the work on Money's land because \$11,000 for the extension for the road onto his land would have been exorbitant.
- [63] At some point, Money told Bertolami that he wanted to make a section of the road public. Money told Bertolami that if he applied and paid for the application it would be to his advantage. Bertolami applied and a person from the Department of Highways came and assessed the route, which Bertolami paid for. The result was that rock fall protection would be too onerous and the plan to make the road public was dropped.
- [64] The parties never surveyed the road.
- [65] Bertolami used the road to bring in a portable sawmill and materials for a large greenhouse. He expanded his propane capacity; before that, he had a smaller tank that would not last a year. He said he did not believe that the larger propane truck would come up the original road. He set up a large water tank to collect water.
- [66] The handwritten letter set out above at para. 23 refers to this easement in addition to the Harris Road easement.

Analysis

- [67] There is no doubt that Money was prepared to give Bertolami access over the road and that the parties acted accordingly.

- [68] Relying on that, Bertolami paid at least for the construction of the road on his property that joins to the easement. He also likely paid for part of the construction on Money's land and assisted in its construction. As with the Harris Road easement, he paid the bills Money asked him to pay. I accept his evidence that he did some work maintaining the road. All of those are sufficient detriment to support a proprietary estoppel claim. See, for example, *Erickson v. Jones*, 2008 BCCA 379, *Moyer v. Mortensen*, 2008 BCSC 485, *Dykes v. Nagel*, 2011 BCSC 1549. It is therefore not necessary for me to deal with the defendant's argument that the installation of the sawmill, greenhouse and larger propane tank are insufficient detriment.
- [69] Money allowed Bertolami unrestricted use of the road from the time it was put in.
- [70] While the old road provides less desirable access, proprietary estoppel is not limited to cases where the plaintiff can demonstrate necessity.
- [71] As with the Harris Road easement, in my view the plaintiff has established a claim of proprietary estoppel to the right of way. The cases cited above, in para. 68, show that generally, in right-of-way cases, the minimum equity is generally the grant of a registerable easement. Further, that meets the expectations of these parties: Money's handwritten note refers to an easement.
- [72] As with the Harris Road easement, Bertolami is entitled, as argued, to a registerable easement for access over the road as currently constructed.

IV. Counterclaim

- [73] Money counterclaimed for the wrongful filing of the caveat. It follows from my rulings on Bertolami's claim that the counterclaim is dismissed.

V. Costs

- [74] Absent any offers to settle, the plaintiff is to have the costs of this litigation. If there were offers to settle that may affect costs, the parties may make written submissions.

VI. Form of easements

- [75] The parties should attempt to agree to the form of the registrable easements. If they cannot, they may make written submissions to me.

"E.M. MYERS J."

APPENDIX

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/14/2019BCSC1433.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bertolami-v-money-family-projects-ltd-2019>

Prepared on 30 October 2026 · Esheria