

CANADA / JUDGMENT

# Bertolami v. Money Family Projects Ltd.

2020 BCSC 1351

## COURT

Supreme Court of British Columbia

## DECIDED

11 September 2020

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2020 BCSC 1351 Bertolami v. Money Family Projects Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bertolami v. Money Family Projects Ltd., 2020 BCSC 1351 Date: 20200911 Docket: S174917 Registry: Victoria Between: Attilio Bertolami Plaintiff And Money Family Projects Ltd. Defendant Before: Master Harper (As Registrar) Reasons for Decision on Settlement of Order Following Trial and Terms of Easements Counsel for the Plaintiff, appearing via teleconference: D. Juteau Counsel for the Defendant, appearing via teleconference: L.J. Alexander Place and Dates of Hearing: Victoria, B.C. July 30 and August 25, 2020 Place and Date of Decision: Victoria, B.C. September 11, 2020

## Introduction

- [1] This matter is before me to settle the terms of the order following trial. In reasons for judgment indexed at 2019 BCSC 1433 (the "Trial Reasons"), Justice Myers determined that the plaintiff is entitled to registrable easements over the defendant's lands.
- [2] The parties were unable to agree on the form of order or the terms of the easements and, therefore, made written submissions in accordance with the Trial Reasons, resulting in the trial judge providing directions as to the form of easements (the "Easement Reasons" indexed at 2019 BCSC 2262). The trial judge directed that if the parties were still unable to agree on specific wording of the easements, they were to have the registrar settle the terms of the order including the terms of the easement (Easement Reasons, para. 11).

## Analysis

- [3] Rule 13-1(11) of the Supreme Court Civil Rules provides: An order must be settled, when necessary, by a registrar, who may refer the draft to the judge or master who made the order.
- [4] Settling the order is based on the record before the court: Westeel Fabrication Ltd. v. Envoy Construction Services Ltd., 2018 BCSC 2176, para. 6. Although some interpretation of the reasons is permissible, the registrar must not impose terms that were not granted.

- [5] Counsel exchanged versions of the order and the easements. The easements are complex, commercial documents. Resolving drafting disputes in this case is a task that is outside the usual scope of a registrar's duties in settling an order. In a commercial context, the party seeking an easement and the party seeking to grant it are united in a common endeavour: to reach a mutually acceptable deal. In the present case, the easements have been imposed on an unwilling participant by court order. I note that the defendant has appealed the trial decision. As a result, the usual give and take is, unfortunately, absent.
- [6] The parties could have chosen to jointly retain a solicitor with expertise in the drafting of easements to assist them in resolving their disputes, but to do so would have required a level of cooperation and willingness to compromise that the parties currently do not enjoy.
- [7] Both counsel made lengthy oral submissions over two days of hearings. Both counsel submitted (for different reasons) that I can take judicial notice of commercially-reasonable terms of an easement and incorporate those into the easements. I cannot take such notice and I am unable to read into either the Trial Reasons or the Easement Reasons the terms each counsel wishes to include in the easements.
- [8] I have reached the conclusion that, although I can probably settle some of the disputed terms of the easements within the permissible bounds of interpreting the trial judge's reasons, I cannot settle all of them. Therefore, the terms of the easements are referred to the trial judge.
- [9] The order has only two disputed terms. If only the order needed to be settled and not the easements, I would be able to do so with only a modicum of interpretation of the trial judge's Trial Reasons being required. However, there is no practical utility in settling the order but referring the easement back to the trial judge.
- [10] Rule 13-1(14) provides that the court may review and vary the order as settled. If I settled the order, the dissatisfied party could seek a review and variation by the court. Such a process would be inefficient given that I am referring the terms of the easements to the trial judge. Therefore, I have determined that the order must also be referred to the trial judge.
- [11] I will provide a brief summary of the arguments of each party in the hope that doing so will streamline the next steps.
- a) The order Paragraph 7 The defendant's version The plaintiff's application for an order that the easement referred to in paragraph[s] 3-5 of this Order shall benefit or be appurtenant to Block A, Section 5, Saturna Island, Cowichan District is dismissed, and the said easement will not benefit Block A. The plaintiff's version The easement referred to in paragraph 3 of this order shall not benefit Block A, Section 5, Saturna Island, Cowichan District.

- [12] The plaintiff says that there was no application or, if there was, it was not dismissed but abandoned (Easement Reasons, para. 9). The Easement Reasons say that the "Payne Road easement should not benefit Block A". The plaintiff says that the paragraph should not go further than the words the trial judge used. Paragraph 8 The defendant's version The plaintiff's claim to enforce a contract to provide easements is dismissed.
- [13] The position of the defendant is that the contract claims were dismissed and the easements were granted based on promissory estoppel.
- [14] The plaintiff says that paragraph 8 should be deleted. There is no language in the Trial Reasons that says the claim to enforce a contract is dismissed. The Trial Reasons at para. 41 say: "there is no enforceable contract to provide the easement over the Harris Road property".
- [15] The trial judge, at para. 9 of the Easement Reason, says: "I agree with the defendant that the Payne Road easement should not benefit Block A. As it pointed out, the relief was not sought in the Petition and the plaintiff abandoned it at trial, choosing not to seek an amendment."
- b) The Harris Road Easement Section 1.3 The defendant's version As an executory promise, to be fulfilled prior to or concurrent with the construction of any dwelling on the Dominant Lands, the Transferee shall at his cost, obtain all required permits and approvals and cause to be installed a water supply system and a system of overhead poles and wires within the Easement Area to supply water and electricity across the Servient Lands and to the Dominant Lands, in accordance with all utility regulations applicable, sufficient to serve the Dominant Lands (maximum 3 dwellings), and to serve the Servient Lands, and shall at his cost repair and make good the driving surface to the standard set out in Section 2.1(b) below at his cost.
- [16] The defendant says that the plaintiff has to pay for services (Trial Reasons, para. 50).
- [17] The plaintiff says that the paragraph as drafted by the defendant contains substantial terms not found in the trial judge's Trial Reasons or Easement Reasons at all and, therefore, this paragraph should be deleted. Paragraph 1.4 The defendant's version If at any time after the date of this Easement Lot 1 is subdivided by any means, the Easement will not in any event extend over or to any part of Lot 1 except the Dominant Lands, the benefit of the Easement shall not extend to the benefit of any more than one lot, and the benefit of the Easement shall not extend to, or be appurtenant to any other portion of Lot 1.
- [18] The defendant says that para. 3 of the Easement Reasons allows this wording: "The parties now appear to agree that the easement is to benefit only the triangle portion of Lot 1 and for a maximum of three homes. That was, in fact, the intent of my decision." The Plaintiff's version If at any time after the date of this Easement Lot 1 is subdivided by any means, the Easement will not in any event extend over or to any part of Lot 1 except the Dominant Lands, the benefit of the Easement and for a maximum of three homes shall not extend to, or be appurtenant to any other portion of Lot 1.

- [19] The plaintiff says that the defendant's version is not contained in the Trial Reasons or the Easement Reasons. Sub-Paragraphs 2.1(b) and (c)
- [20] These sub-paragraphs have to do with maintenance. The defendant's version regarding para. 2.1(b) The determination of Maintenance required from time to time will be made in the first instance by the Transferor acting reasonably. The Maintenance requirements will be determined by reference to the expected standard for an all-weather driveway suitable for delivery trucks and licenced motor vehicles in accordance with generally accepted private access road standards prevailing in the southern Gulf Islands, B.C. (the "Standard").
- [21] The plaintiff agrees with the first part of the paragraph but says "the Transferor" should be changed to "by agreement of the parties".
- [22] The plaintiff objects to the inclusion of all of the second sentence. The defendant says that the easement must read in a "standard". The plaintiff says a "standard" was not in the judgment. The defendant's version regarding para. 2.1(c) No party shall expend any money on Maintenance that the party intends to claim from the other, without agreement between them, unless subsequently it is determined to have been required to meet the Standard. Once expended, the party who owes any share of the cost of Maintenance shall pay to the other party that share within 30 days of delivery of a proper accounting of the works done, and cost incurred.
- [23] The defendant repeats its position that the easement must read in a "standard". The plaintiff says that all the words starting with "unless subsequently " must be deleted as the trial judge did not make that ruling and the judgment does not refer to a "standard". Paragraph 3.1(e)
- [24] This sub-paragraph deals with insurance.
- [25] The plaintiff objects to the wording: "with the owner(s) of Servient Lands names as an additional insured(s)".
- [26] The plaintiff says this term would require it to insure limitless numbers of insureds in the future.
- [27] The defendant says that this is standard wording.
- [28] Paragraph 7 of the Easement Reasons provides that "the plaintiff should be required to maintain insurance. However, if the defendant is to use the road, it appears equitable to require it to bear half the costs."
- c) The Payne Road Easement Paragraph 1.2 The defendant's version The Easement is restricted to use and user for the benefit of the Dominant Lands only in common with the Servient Lands, and not any other land. In particular, the Easement grants no rights or benefits to Block A Section 5, Land District 16 Saturna Island, except part in Plan 25360 and cannot be used to access the said land. Any use in excess of these restrictions shall constitute excessive use and user of the Easement, and the Transferor shall be entitled to restrain any further or additional use.

- [29] The defendant says that this wording is traditional for a solicitor-prepared document. Counsel for the defendant says that it is illogical to say that access is not prohibited. The plaintiff's version The Easement benefits the Dominant Lands only in common with the Servient Lands, and not any other land. In particular the Easement does not benefit Block A Section 5, Land District 16 Saturna Island, except part in Plan 25360.
- [30] The plaintiff says that its wording uses the trial judge's wording. There is a difference between "benefit" and "access". Counsel for the plaintiff pointed out that there is another easement (an old one) that I understand was not the subject of this lawsuit. The plaintiff says that the defendant is trying to avoid a future dispute by slipping in wording that was not before the trial judge. Counsel for the plaintiff suggests that the "old easement" could be the subject of a new court action. Paragraph 1.3 The defendant's version If at any time after the date of this Easement the Dominant Lands are subdivided by any means, the Easement will not in any event extend over or to any part of the Dominant Lands, except the lot that is immediately serviced by the Easement Area, and for the benefit only of the lot which has a boundary coincident with the southerly end of the Easement Area. The effect of Section 223 of the Land Title Act is expressly excluded from this instrument.
- [31] The defendant says that the intent of the judgment is to benefit a single lot only and not to benefit many lots in the future.
- [32] The plaintiff says that this paragraph should be deleted because it is not part of the Trial Reasons or Easement Reasons. Paragraph 2.1
- [33] This paragraph is about maintenance and is drafted in the same way as the Harris Road Easement. The parties repeat their positions. Paragraph 3.1(j)
- [34] This sub-paragraph (misnumbered) deals with insurance. The defendant makes the same objection as in the corresponding paragraph in the Harris Road easement. Paragraph 3.4 (misnumbered as the second Paragraph 3.4) The defendant's version If at any time in the future the Servient Lands are subdivided or developed, the Transferor is at liberty to alter, move, or replace the Easement Area with dedicated roads and or an alternate Easement Area (at its cost) provided that the replacement route provides access to the Dominant Lands at the same point on the north boundary of the Dominant Lands as shown on the Easement Area plan existing on the date of this Easement, or such other point that provides equal functional utility as an access to the Dominant Lands.
- [35] The defendant says this is standard easement wording.
- [36] The plaintiff says this wording was not in the judgment, the court ordered easements on the existing road as currently constructed, and the trial judge did not give reasons that would allow this paragraph to be included in the easement. Therefore, it should be deleted entirely. The plaintiff says that the defendant's version allows the defendant to change the location of the road. The defendant says that the plaintiff's concern that the defendant might move the road is illusory.

## Conclusion

- [37] The order and easements are referred to the trial judge pursuant to Rule 13-1(11).
- [38] The parties are directed to submit to the trial judge's attention through Supreme Court Scheduling their respective forms of order and their respective revised forms of the easements (to remove previously-disputed terms that are now agreed to) so that the trial judge has clean copies of each version before him. "Master Harper"
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