

CANADA / JUDGMENT

Brydon v. Thom

2015 BCCA 292

COURT

British Columbia Court of Appeal

DECIDED

25 June 2015

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2015 BCCA 292 Brydon v. Thom COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Brydon v. Thom, 2015 BCCA 292 Date: 20150625 Docket: CA42125 Between: Ann Brydon and Stewart Vinnels Appellants (Plaintiffs) And Alan Thom and Susanne Thom Respondents (Defendants) Before: The Honourable Madam Justice Newbury The Honourable Mr. Justice Lowry The Honourable Mr. Justice Frankel On appeal from: An order of the Supreme Court of British Columbia, dated August 1, 2014 (Brydon v. Thom, 2014 BCSC 1466, Victoria Docket 10-0768). Counsel for the Appellants: S. B. Armstrong, Q.C., G. B. Brandt and M. Power, Articled Student Counsel for the Respondents: K. M. Birney Place and Date of Hearing: Victoria, British Columbia June 10, 2015 Place and Date of Judgment: Vancouver, British Columbia June 25, 2015 Written Reasons by: The Honourable Mr. Justice Lowry Concurred in by: The Honourable Madam Justice Newbury The Honourable Mr. Justice Frankel Summary: Appeal from the dismissal of an action brought by the owners of one lakeside lot against the owners of the adjoining lot, the two lots being the product of the subdivision of one piece of property that the parties had jointly owned. At issue was the right of access the owners of one lot claimed to have to use a dock that had been jointly constructed and jointly used before and after subdivision, part of which ran across the lot line. At trial, the claim was based on an alleged agreement pertaining to the joint use of the dock after subdivision as well as a contention the natural boundary was not as shown on the plan such that no part of the dock actually lay across the lot line in any event. The judge found there was no agreement and the onus of proof with respect to the natural boundary was not discharged. On appeal, the contention was for a different agreement to the same effect and the existence of an easement. It was also contended the judge had erred in rejecting the case advanced on the natural boundary. Held: Appeal dismissed. If it could be properly entertained, the case sought to be advanced on appeal with respect to an agreed right of access and the entitlement to an easement was not made out on the evidence adduced at trial and the judge made no error in the conclusion she reached regarding the natural boundary. Reasons for Judgment of the Honourable Mr. Justice Lowry:

- [1] In 1992, Anne Brydon and Stewart Vinnels purchased a parcel of lakefront property with their friends Alan and Susanne Thom. The property was jointly owned until it was subdivided in 1996. In time, differences arose that led to the first couple (the owners of Lot 4) suing the second (the owners of Lot 3) over the sharing of lakefront amenities, in particular a jointly constructed dock. The action was commenced in 2010 and led to no less

than a 21-day trial that was conducted over the course of a year: June 2012 to June 2013. The judge began her reasons for dismissing the action as follows:

- [1] The facts in this case provide a cautionary tale for anyone considering purchasing recreational property with friends.
- [2] The construction of the dock was completed the year before the property was subdivided and it was jointly used for many years thereafter. As built, it consisted of a wooden walkway or wharf with a gazebo at the lakeside end, a float, and a hinged ramp that connect the wharf to the float. The wharf began on Lot 4. It extended across the lot boundary over a corner of Lot 3 and out over the foreshore to the gazebo where the ramp to the float was affixed.
- [3] The ramp was permitted to deteriorate and it collapsed in 2009. It was not replaced. The owners of Lot 3 informed their neighbours that because of the cost of liability insurance they were not willing to bear, they no longer wished to share the dock. They suggested the owners of Lot 4 construct a new dock entirely on their side of the lot line and that the whole of the existing structure be removed and sold. For reasons that are by no means clear, the owners of Lot 4 declined, electing instead to sue to establish their right to continue to use the jointly constructed wharf, which would then enable them to rebuild the ramp to the float. The owners of Lot 3 eventually posted a "no trespassing" sign and, we are told, following the trial they dismantled the part of the wharf that was on their property, as well as the gazebo, such that only the part constructed on Lot 4 now remains. The wharf has in the result not been used for over five years.
- [4] The case the owners of Lot 4 plead is very broad indeed. It includes allegations of negligent misrepresentation and unjust enrichment. It was, however, narrowed at trial to what the judge saw as essentially two issues: whether there is an agreement between the parties that provides the owners of Lot 4 with access to the whole of the wharf, and whether the wharf is actually entirely on Lot 4 in any event. The judge concluded there is no agreement and the onus of establishing the lot line to be other than shown on the subdivision plan was not discharged.
- [5] The judge is now said to have erred in respect of both issues: first, in failing to find access to the wharf after subdivision was agreed and that the owners of Lot 4 have an easement over the corner of Lot 3 where the wharf was constructed; second, in failing to find the natural boundary of Lot 3 is further inland than shown as the lot line on the subdivision plan.
- [6] The owners of Lot 4 seek an order requiring the owners of Lot 3 to rebuild the wharf, afford them the access they once enjoyed, and mutually share in all future expenses of maintaining the dock, although this Court's jurisdiction to make an order beyond recognizing any error in the judge's reasoning for dismissing the action would certainly appear doubtful.
- [7] I address, in turn, each of the grounds of appeal raised. The Agreement and Easement

- [8] The agreement upon which the owners of Lot 4 based their case at trial was, as pleaded, alleged to have been made in 1996 at the time the property was subdivided. It was alleged to have been reduced to writing and addressed a number of considerations associated with the parties' continuing obligations to each other upon the subdivision of the property. The owners of Lot 4 alleged their neighbours had breached the agreement in several ways that included denying them access to the part of the wharf that was on Lot 3 and the opportunity to replace the collapsed ramp. The document that was said to have contained the agreement had never been properly executed and the judge found the parties had not reached an agreement in any event.
- [9] Her finding is not questioned on this appeal. Rather, the owners of Lot 4 now contend for another agreement that is said to have been made orally in 1992 at the time the property was purchased. They say that at trial there was no question that the lakefront amenities continued to be jointly owned after the subdivision of the property. They then say it was agreed that there was to be shared access to shared amenities both before and after the property was subdivided such that they are entitled to the access for which they contend despite the judge's determination with respect to what was said to be an agreement that was made in 1996 for which they contended at trial.
- [10] An agreement made in 1992 is said to be "clear on the evidence" of both parties, although absolutely no reference is now made to the testimony of any witness that is said to support such an agreement. Significantly the judge said she considered the conduct of the owners of Lot 4 and the testimony of the owners of Lot 3 to be inconsistent with the notion that the decision to share the use of lakefront amenities when the property was purchased was irrevocable (para. 16). The owners of Lot 4 point to the fact the wharf was jointly used both before and long after the property was subdivided, but what may be evidence of neighbourly accommodation does not prove the arrangement was by agreement irrevocable. If anything is evident, it is that the parties recognized they would have to come to an agreement that would govern their relationship as the owners of adjacent lots using common amenities after subdivision, as they attempted but failed to do.
- [11] The owners of Lot 4 acknowledge they did not advance the recognition of an easement as part of their case at trial. At the end of the trial, however, they did apply to further amend their amended statement of claim to seek the declaration of an easement based on proprietary estoppel. The judge dismissed the application and gave comprehensive reasons addressing each of the five recognized considerations that govern amendments to pleadings sought at the conclusion of a trial: *Macdonald v. Macdonald*, [1996] 8 W.W.R. 160, 29 B.C.L.R. (3d) 379 (S.C.). The owners of Lot 4 contend the judge erred in principle in refusing to permit the amendment but the reasons they give amount to little more than a contrary view of some of the considerations the judge addressed. It is not said the judge made any error in the law she applied or in her understanding of the facts on which her decision is based. Her decision was an exercise in discretion and is entitled to deference. It is not for this Court to interfere.

- [12] The owners of Lot 4 say the judge was nonetheless in error not to recognize the existence of a common law easement.
- [13] They contend for an implied easement based on what is referred to in the authorities as one of apparent accommodation (see Halsbury's Laws of Canada, 1st ed. (Markham, Ont.: LexisNexis, 2012) at HRP-307). They say the three criteria for the recognition of such an easement are satisfied: the dock was an apparent and continuous access to the lake at the time of subdivision; access to the lake via the dock was necessary for the reasonable enjoyment of their recreational waterfront; and the dock was jointly used for access to the lake prior to (and after) subdivision for the beneficial use of the property.
- [14] Quite apart from the entitlement to an easement not being claimed in the prayer for relief, the existence of such requires findings of fact that were not pleaded, not sought at trial, not made by the judge, and cannot be made by this Court. Most significantly, there is no basis on which it could now be determined access to the lake via the dock was, at the time of subdivision, necessary for the reasonable enjoyment of the waterfront by the owners of Lot 4. They simply say it is "clear on the record", but that is by no means the case.
- [15] The only evidence to which reference is made in this regard is a registered covenant the owners of Lot 4 gave in obtaining approval for the subdivision. It provides: Hereafter, no building shall be constructed, or mobile home located, nor shall there be any removal of vegetation or other changes by the hand of man made, within fifteen (15.0) metres of the natural boundary of [the lake], without the prior written permission of the Regional Manager of Ministry of Environment, Lands and Parks, Fish and Wildlife.
- [16] The owners of Lot 4 maintain the covenant forecloses the construction of a new dock on their side of the lot line if the existing dock were to be dismantled. The covenant makes no reference to anything like a dock and, while it is indeed questionable that it has any application to such, there is no evidence that any effort has been made to obtain ministerial approval for a new dock since 2009 when the owners of Lot 3 suggested one be built on Lot 4. The owners of that lot have simply not established access to the lake via the dock that existed at the time of subdivision was necessary for the reasonable enjoyment of their lot. They have, after all, apparently been accessing the float on the lake (or a large extension they built and attached), without the wharf and ramp, for more than five years.
- [17] The owners of Lot 4 also contend for an implied easement based on common intention. They say the evidence is clear the parties built the dock for the property before it was subdivided and agreed to jointly own and use it following subdivision with the knowledge that access over Lot 3 would be necessary to give effect to the agreement. But the contention requires the parties be found to have so agreed and, as explained, no such agreement is established.
- [18] It is less than clear that the case the owners of Lot 4 seek to advance on this appeal is one this Court can properly entertain in any event. At trial they contended for an agreement made in 1996 when the property was subdivided that entitled them to have access to that

part of the wharf that was on Lot 3. Having failed, and despite the shortcomings in their pleadings, they now seek to advance a much different case based on what they maintain is a different agreement as well as the existence of a common law easement. It is well established that this Court is not a forum in which to raise new factually based issues by advancing a case that might have been, but was not, advanced at trial. What was said by Lord Halsbury long ago in *Browne v. Dunn* (1893), 6 R. 67 at 76 (H.L.), as recently quoted in *Terry v. Bryson*, 2014 BCCA 433 at para. 14, is germane: you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it. The Natural Boundary

- [19] At trial, the owners of Lot 4 sought to establish that none of the wharf was on Lot 3; all of it was on their lot and the foreshore. This was said to be so because the natural boundary from which the lot line was to have been determined was not as shown on the subdivision plan but had been further inland. To this end, they led the expert evidence of two witnesses together supporting an opinion to that effect. The owners of Lot 3 led competing evidence from an expert witness who expressed the opinion that, while the natural boundary was no longer discernable, it appeared to him to have been more aligned with the subdivision plan than with the boundary for which the owners of Lot 4 contend. The difference in the two opinions lay largely in the significance of the interference with vegetation and land structures along the water's edge attributable to clearing the parties had done after the property was purchased.
- [20] Although no claim to amend the title documents was pleaded, the judge recognized she could correct an incorrect title document and that, while the registered instruments give title, a lot is determined not by them but by what is on the ground: *Hegel v. British Columbia (Ministry of Forests)*, 2011 BCCA 446 at para. 27. However, she preferred the opinion on which the owners of Lot 3 relied over that relied upon by their neighbours. She said she was not prepared to accept the natural boundary is different than what is depicted on the subdivision plan. She concluded the onus borne by the owners of Lot 4 to prove the plan was not correct had not been discharged; part of the wharf was on Lot 3 to which they had no right of access.
- [21] The owners of Lot 4 contend the judge made an overriding and palpable error in accepting the expert opinion she preferred. Further, they say the judge erred in failing to make a finding as to where the natural boundary actually is. This, they say, was an error of law.
- [22] There would appear to be no merit in this ground of the appeal. The owners of Lot 4 contend the expert evidence upon which they rely was based on a much more thorough inspection than was the competing evidence. But that does not mean the judge was bound to accept that evidence if she found what the owners of Lot 3 relied on more persuasive, as she did. There is no error in her having done so much less an overriding and palpable error. Further, she was not bound to make a finding as to the location of the natural boundary if, as she determined, the preferable evidence established the boundary was no longer discernable.

She made no error of law or otherwise in concluding the owners of Lot 4 had not discharged the onus they bore.

- [23] Despite the case the owners of Lot 4 advance based on an agreement and the existence of an easement with respect to the shared use of the dock after subdivision as well as the natural boundary of the two lots, they contend in their factum that, by virtue of their riparian rights, they were entitled to access the part of the wharf that has been dismantled even if it was on Lot 3. They maintain the contention rests, at least in part, on the evidence regarding the mean annual high water mark given by one of the expert witnesses whose opinion concerning the natural boundary the judge did not accept. When asked for reference to the evidence supporting the contention in the course of argument at the hearing of the appeal, counsel offered nothing and little more was said on the point on either side. It is certainly not at all clear the riparian rights that affect access to the lake over the foreshore adjacent to Lot 4 could, in the circumstances, affect the access to the part of the wharf that was on Lot 3. Absent a sound factual base, demonstrably supported by accepted evidence, the contention advanced cannot be further considered.

Disposition

- [24] It follows that I would dismiss the appeal. "The Honourable Mr. Justice Lowry" I agree: "The Honourable Madam Justice Newbury" I agree: "The Honourable Mr. Justice Frankel"

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Prepared on 29 October 2026 · Esheria