

CANADA / JUDGMENT

Cook v. Massey

2025 BCSC 1410

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1410 Cook v. Massey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cook v. Massey,

2025 BCSC 1410

Date: 20250723

Docket: S60929

Registry: Kamloops

Between:

Diane Margaret Cook and Justin Arthur Marshall

Plaintiffs

And

Brenda Massey, Roger Massey, Kevin Grant Watt,

Titan Fence Company Ltd., John Moffett Excavating Ltd.,

Creekside Plumbing Ltd., Westend Concrete Ltd.,

Kamloops Truss Ltd.; Rokstad Power (2018) Ltd.,

Mat Ward Construction Ltd., R M Insulation and Noremac Industries Ltd.

Defendants

Before: The Honourable Justice B. Smith

Reasons for Judgment

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M. Ward

Appearing in person on behalf of Noremac Industries Ltd.

M. Jittler

Place and Date of Trial:

Kamloops, B.C.

November 25-29, 2024; December 2, 2024; February 27-28, 2025

Place and Date of Judgment:

Kamloops, B.C.

July 23, 2025

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Introduction

- [1] This matter involves a dispute between neighbours about an easement. The plaintiffs say the defendants exceeded the terms of the easement and are liable to them in trespass. They seek damages and an injunction. The defendants all deny any trespass. The defendant Masseys, by way of counterclaim, say the plaintiffs are liable for private nuisance. They seek damages and oppose an injunction. Finally, the plaintiffs and the defendant Masseys seek a declaration concerning the interpretation of the easement.

Background

- [2] The plaintiffs, Diane Margaret Cook and Justin Arthur Marshall (together, the "Cooks") are the registered owners of a residential property located at 1013 Paquette Road in Chase, British Columbia (the "Cook Property"). Diane Cook is the mother of Justin Marshall.

- [3] The defendants, Brenda Massey and Roger Massey (together, the "Masseys") are spouses and the registered owners of a residential property located at 1015 Paquette Road in Chase, British Columbia (the "Massey Property"). The Cook Property and the Massey Property are neighbouring properties.
- [4] The Cook Property and the Massey Property originally comprised one land parcel owned by the defendant, Kevin Grant Watt, and his spouse, Joanne Watt (together, the "Watts").
- [5] The Watts subdivided the original land parcel (the "Original Parcel") into two lots and registered an easement against one (now the Cook Property) in favour of the other (now the Massey Property) (the "Easement").
- [6] The Easement is registered with Land Title Office registration number CA 7936884. The Cook Property is the servient tenement. The Massey Property is the dominant tenement.
- [7] The Masseys access the Massey Property through the Easement.
- [8] The Cooks purchased the Cook Property from the person who purchased it from the Watts. When the Cooks purchased the Cook Property it was already developed with a single-family residence.
- [9] The Masseys purchased the Massey Property from the Watts. When the Masseys purchased the Massey Property it was an undeveloped residential lot. The Massey Property is adjacent to Chase Creek. The Masseys purchased the Massey Property so they could build their retirement home (the "Massey Residence") on it. The Masseys hired several contractors for various aspects of construction of the Massey Residence, including the following ten defendants:
- Titan Fence Company Ltd.;
 - John Moffett Excavating Ltd.;
 - Creekside Plumbing Ltd.;
 - Action Concrete Pumping (2021) Ltd.;
 - Westend Concrete Ltd.;
 - Kamloops Truss Ltd.;
 - Rokstad Power (2018) Ltd.;
 - Mat Ward Construction Ltd.;
 - R M Insulation; and
 - Noremac Industries Ltd.

- [10] The claims against Titan Fence Company Ltd.; John Moffett Excavating Ltd.; Creekside Plumbing Ltd.; and Westend Concrete Ltd. have been concluded. The Cooks have obtained default judgment against Action Concrete Pumping (2021) Ltd., with damages and costs to be assessed. The claim against Rokstad Power (2018) Ltd. has been stayed. The claim against R M Insulation has been abandoned.
- [11] The remaining contractor defendants are: Action Concrete Pumping (2021) Ltd. (for the assessment of damages and costs); Kamloops Truss Ltd.; Mat Ward Construction Ltd.; and Noremac Industries Ltd.

The Easement Area

- [12] The easement area is a triangular portion of the Cook Property, adjacent to the Massey Property, fronting on Paquette Road (the "Easement Area"). From the perspective of someone standing on Paquette Road facing the Massey Property and the Cook Property, the Trans-Canada Highway is immediately behind both properties; Chase Creek is immediately to the left of the Massey Property, and the only way for a vehicle to enter or exit the Massey Property is by driving through the Easement Area.
- [13] Kevin Watt and the contractor defendants used the Easement Area on various days during construction of the Massey Residence. It is undisputed that at all material times Kevin Watt and the contractor defendants were the Masseys' invitees.
- [14] All the usage of the Easement Area complained of by the Cooks was in connection with construction of the Massey Residence. The construction activity was temporary and has now been completed. The construction activity included stopping, loading and unloading, and parking in the Easement Area.

The Easement

- [15] The material portion of the Easement provides that:

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the premises and the mutual grants and covenants herein contained and the sum of \$1.00 now paid by the Grantee to the Grantor the receipt whereof is hereby by the Grantor acknowledged and of the due execution of these presents by the parties hereto, THE PARTIES HERETO HEREBY AGREE AS FOLLOWS:

1. The Grantor does hereby grant, convey and confirm unto the Grantee as owner of the Dominant Tenement and for the benefit of the Dominant Tenement and to be appurtenant to the Dominant Tenement for the use and enjoyment of the Grantee and its servants, agents, tenants, invitees and licencees and the owner or owners of the Dominant Tenement from time to time and all those claiming through them, the full, free and uninterrupted right, licence, liberty, easement, privilege and permission at all times and from time to time:

- a) to install, use, repair, replace and maintain a roadway, right of way or travel area and other controls and materials required in connection therewith (hereinafter called "the Works") over, under and through that part of the Easement Area shown on Plan EPP96886 for the purpose of supplying a travel corridor for ingress and egress to the Dominant Tenement and all related purposes (hereinafter called "the Purposes");
- b) to enter upon and pass and repass over the Easement Area for the purpose of ingress and egress for any of the Purposes;
3. The Grantee shall have the right to enter upon the Easement Area for the Purposes. Maintenance and repair shall, in the absence of an emergency, be undertaken at a mutually agreeable time.
4. In performing any work in the Easement Area the Grantee will take all reasonable steps to prevent soil slippage.
5. The Grantee agrees that all pipes, conduits and control appliances if comprising the Works will be buried and that the Easement Area will be graded after construction so that the surface will be graded evenly with the surface of the adjoining lands. Following the completion of any work done on the Easement Area the Grantee will restore the Easement Area or any other area affected by the work to the condition of the area prior to the commencement of the work to the satisfaction of the Grantor.
6. The Grantee agrees that following the installation of the Works it will landscape the Easement Area to the satisfaction of the Grantor.
8. The right, liberty and easement herein granted by the Grantor shall be construed as being extended to and may be exercised by the Grantee and its successors and assigns, the owners and occupiers for the time being of the Dominant Tenement and every part into which the Dominant Tenement may be subdivided and its and their respective licencees, invitees, agents, suppliers, contractors, servants and workmen, and all other persons with their express or implied permission.
9. This Indenture shall be construed as running with the lands, and shall attach to and run with each and every part into which the Dominant Tenement or any part thereof, may hereafter be subdivided, but no part of the fee of the soil thereof shall pass to or be vested in the Grantee under or by these presents.

Does the Easement permit stopping, loading and unloading, and parking in the Easement Area?

- [16] When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the time the agreement was entered into. Surrounding circumstances, that is, objective evidence of the background facts at the time of the execution of the contract are to be considered in interpreting the terms of the contract: *Robb v. Walker*, 2015 BCCA 117 at para. 31. The wording of the instrument creating the right-of-way should govern interpretation unless (1)

there is an ambiguity in the wording, or (2) the surrounding circumstances demonstrate that both parties could not have intended a particular use of the easement that is authorized by the wording of the document: Robb at para. 32.

- [17] The Cooks assert the Easement does not permit the Masseys or their invitees to do anything more than simply travel through the Easement Area between Paquette Road and the Massey Property. According to the Cooks, the Easement is for "ingress and egress only" and stopping, loading and unloading, and parking in the Easement Area is not permitted.
- [18] The Masseys respond that the Easement permits more than simply travelling through the Easement Area. According to the Masseys, stopping, including loading and unloading, is permitted within the Easement Area. The Masseys do not dispute that unrestricted parking in the Easement Area is not permitted.
- [19] The Cooks submit their position is supported by judicial interpretations concerning easements in other cases. In particular, they say the Easement is "nearly identical" to the easement at issue in *Hellmen v. Hartwick*, 2025 BCSC 45, a recent decision of Justice Hori, which involved a dispute over the interpretation of an access easement that granted rights in favour of one lot over another. At para. 6 of *Hellmen*, Hori J. described the easement:

The Easement is for the benefit of Lot 1 and is registered against title to Lot 2. On January 17, 1995, in a previous action between the previous owners of the properties, the Court of Appeal declared that the Easement was a

free and uninterrupted right of way, ingress and egress for persons, animals and vehicles, through, along and over that certain parcel of land described as: [legal description omitted].

- [20] Justice Hori found that the language of the easement conveyed a right-of-way for ingress and egress to and from Lot 1 and nothing more: *Hellmen* at para. 22.
- [21] In my view, the easement at issue in *Hellmen* is clearly narrower in scope than the Easement, because the former makes no reference to a right to "install, use, repair, replace and maintain" a roadway, right-of-way or travel area through the easement area for the purpose of providing a travel corridor for ingress and egress to the dominant tenement and "all related purposes".
- [22] I find that, properly interpreted, the Easement authorizes certain activities (install, use, repair, replace and maintain) in relation to certain things (a roadway, right-of-way or travel area) in a certain place (through the Easement Area) for certain purposes (first, for providing a travel corridor for ingress and egress to the dominant tenement; second, for "all related purposes").
- [23] Respectfully, the interpretation urged by the Cooks ignores the existence and meaning of the phrase "all related purposes". The phrase "all related purposes" informs the interpretation of what providing a travel corridor for ingress and egress to the dominant tenement means. What the intention of the parties was at the time the agreement was

entered into must have included something in addition to simply providing a travel corridor for ingress and egress to the dominant tenement, otherwise there would have been no need to include authorization for "all related purposes".

- [24] In my view, the phrase "all related purposes" in the definition of "the Purposes" is key to the proper interpretation of the scope of the Easement and what the intention of the parties was at the time it was granted.
- [25] The phrase "all related purposes" is ambiguous. In order to interpret what it means, I must consider the surrounding circumstances, or factual matrix.
- [26] Concerning surrounding circumstances, the Cooks submit that as in *Hellmen*, at the time of the granting of the Easement, there was nothing preventing a vehicle from driving on and off the dominant tenement using the Easement. They say that in both *Hellmen* and the case at bar, the dominant tenement and the servient tenement were created by a subdivision and, at the same time, an "access agreement" was granted in favour of one of the lots created by the subdivision.
- [27] While it is undisputed that the easements in *Hellmen* and the case at bar came into existence in the same way, that is not dispositive of the interpretation issue.
- [28] The Watts granted the Easement to themselves. They were the owners of both the dominant tenement and the servient tenement. Their intention at the time they granted the Easement to themselves is what must be determined.
- [29] Neither Kevin Watt nor Joanne Watt testified at the trial. However, the factual matrix of facts which the Watts must have known at the time they granted the Easement to themselves includes the following:
- they owned the Original Parcel;
 - they subdivided the Original Parcel into two properties;
 - the only way for a vehicle to enter or exit the sub-divided property adjacent to Chase Creek would be by driving through the Easement Area; and
 - if a single-family residence was constructed on the subdivided property adjacent to Chase Creek, some stopping, loading and unloading, and parking for short periods of time, for the purpose of entering or exiting the property, would necessarily occur within the Easement Area during the period of construction.
- [30] Residential home construction sites are not serene environments. They are active. At times many activities occur at the same time. I have considered this contextual reality in determining what must have been within the contemplation of the Watts about the future use of the Easement, including during any future construction of a single-family residence on the sub-divided property adjacent to Chase Creek.

[31] I find that at the time the Watts granted the Easement to themselves, they contemplated that some stopping, loading and unloading, and parking for short periods of time, for the purpose of entering or exiting the property were included within the meaning of the phrase "all related purposes".

[32] I do not accept the submission by the Cooks that the Masseys ought to have considered that the Easement did not permit anything other than ingress and egress when determining the size of the house they were going to construct on the Massey Property, because, in my view, it does not accord with what I consider to be common-sense realities involved in construction of a single-family residence on a suburban property. To name just a few examples, at a residential home construction site in a suburban setting:

- contractors come and go, not necessarily on fixed schedules;
- equipment and materials are delivered by vehicles, which must stop, load and unload, and sometimes park for short periods of time, often while other construction activities are going on;
- equipment and material are often stored on site;
- equipment and material are often bulky, and must be delivered and unloaded and, in the case of equipment, reloaded, using large vehicles with specialized equipment; and
- unexpected issues arise, which can and do affect who is at the construction site at any given time, what they do while there, and how long they are there for.

Declaration

[33] The Cooks and the Masseys seek a declaration from the court concerning the proper interpretation of the Easement. I issue a declaration that stopping, loading and unloading, and limited parking on the Easement are all authorized within the Easement Area. These activities are all within the meaning of the phrase "all related purposes" in respect of the purpose of supplying a travel corridor for ingress and egress to the Massey Property. There is no right of unrestricted parking. Parking of five minutes or less within the Easement Area is permitted. Parking of more than five minutes is only permitted if there are objectively exceptional circumstances, such as existed from time-to-time during construction of the Massey Residence.

Did any one of the defendants trespass in the Easement Area?

[34] The only witnesses at trial were the Cooks and the Masseys. The non-viva voce evidence consisted of videos, still images from videos (including reverse mirror images), photographs, and various documents.

Credibility and Reliability: Justin Marshall and Diane Cook

[35] I have some concerns about the credibility and reliability of the testimony of both the Cooks. Nonetheless, the testimony of the Cooks was corroborated by one another, and to some extent, by videos and photographs. They both demonstrated a good recall of detail. Of the two, my main concerns are with the testimony of Justin Marshall.

[36] I found Justin Marshall was at times evasive in his answers to questions, for example, when he was asked whether he knew when he bought the Cook property that a residence would be constructed on the Massey Property. He was also argumentative, for example, when it was put to him that none of the photographs depict any alleged trespass in the Easement Area post-construction. I also found some of his testimony was just not credible. For example:

- when he suggested the Masseys could have applied to have an exit to their property from the Trans Canada Highway, and that he would have been okay with them getting approval for access over Chase Creek;
- when he denied responsibility for taunting anyone: in Video 1.144 at the 58 second mark he can be heard saying "that's a you problem" and "there's a new man in town"; in Video 1.39 he waves in an exaggerated fashion after the white pickup driving through the Easement Area from the Massey Property to the road; in Video 1.48 he is seen raising his hand towards the Masseys as they drive by him in what I find was him "giving the finger";
- in Video 1.39 in which he is depicted sitting on a concrete no-post bordering the Easement Area, he claimed that the white pickup which drove through the Easement from the Massey Property to the road was "driving aggressively" when I find it very clearly was not; and
- in Video 1.324 and Video 1.325 a red pickup drives into the Easement Area from the road, an elderly woman disembarks, and the pickup then pulls forward onto the Massey Property, which he claimed seemed like a taunt when I find it very clearly was not.

[37] My concerns about the reliability of Justin Marshall's evidence also stem from his willingness to repeatedly assert that particular videos or still images depict unauthorized use of the Easement Area, when it is not at all clear whether that was the case.

[38] Justin Marshall was willing to make certain concessions. For example:

- that he was aware contractors would have to come and go if a residence was built on the Massey Property; and
- that he understood that space was required to install foundations, floors and walls.

Credibility and Reliability: Brenda Massey and Roger Massey

[39] I generally have no concerns about the credibility and reliability of the testimony of either of the Masseys. Their testimony was corroborated by one another, and to some extent by videos and photographs. Brenda Massey demonstrated a good recall of detail, Roger Massey

less so. Brenda Massey was not evasive, she appeared to take care in answering all questions put to her, she was not argumentative and she made reasonable concessions. Roger Massey was at times evasive and argumentative, but not to the extent that I have any concerns about his willingness to tell the truth. He was less careful about answering some questions put to him, but not to the extent that I have concerns about the overall reliability of his evidence. He too made reasonable concessions.

Videos, Still Images and Photographs

- [40] Justin Marshall testified that he purchased and installed security cameras for the Cook Property, from which he obtained a number of videos and still images. The videos and still images typically depict the front yard of the Cook Property, including the Easement Area, and adjacent areas such as Paquette Road and part of the Massey Property.
- [41] The videos and still images indicate dates and times. Justin Marshall testified that all date and time stamps were accurate, and his evidence in that regard is undisputed. I accept them as reliable evidence of dates and times.
- [42] I found the videos, still images and photographs of limited assistance in determining the boundaries of the Easement Area. In many instances, I found it simply impossible to discern the boundaries of the Easement Area from looking at them. I attribute this to the difficulties inherent in trying to discern a line on the ground from photographs taken: at an angle; elevated by several feet; often with obstacles at or above ground level; and sometimes close-up, without uniform reference points. These problems were exacerbated by the fact that many of the still images were reverse (mirror) images, which I found further detracted from my already limited ability to discern the boundaries of the Easement Area.
- [43] At trial, Justin Marshall made markings on a number of the still images and photographs to depict what he considered to be the boundaries of the Easement Area. In some instances, it was obvious that he had difficulty doing so.
- [44] When the evidence of an alleged unauthorized use of the Easement Area consist of only a photograph, or a short snippet of video or a still image, I was unable to determine the duration of the alleged unauthorized use of the Easement Area. For photographs and still images, I could not conclude anything about the duration, because all they depict was a snapshot in time. For videos, all I could conclude about the duration is that it was at least as long as the video. Photographs and still images also did not reveal whether a vehicle was moving or stationary.
- [45] Many of the events depicted in the photographs, still images and videos were not witnessed by either Justin Marshall or Diane Cook.

Findings of Fact

[46] I will now identify my findings of fact drawn from the Cooks' evidence of alleged violations of the Easement by the defendants, consisting of their viva voce testimony, and the various books of materials and videos exhibited at trial. I have included my findings of fact about whether the evidence referred to depicts things: inside the Easement Area; outside the Easement Area; or where I am unable to determine whether they are inside the Easement Area or not. Where I refer to evidence of events outside of the Easement Area, they do not involve any trespassing on the Cook Property.

[47] I make the following findings of facts about the Cooks' evidence:

- a) On July 10, 2021, Brenda Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for;
- b) On July 19, 2021, Roger Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for;
- c) On July 24, 2021, Roger Massey's pickup was partially in the Easement Area on two separate occasions in different positions. The evidence does not establish how long it was there for on either occasion;
- d) On July 26, 2021, Brenda Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for;
- e) On August 22, 2021:
 - i. the unidentified grey sedan was not in the Easement Area; and
 - ii. the unidentified white pickup was not in the Easement Area;
- f) On August 23, 2021, Kevin Watt's pickup was partially in the Easement Area. The evidence does not establish how long it was there for;
- g) On August 25, 2021, an unidentified white pickup was partially in the Easement Area. The evidence does not establish how long it was there for;
- h) On August 26, 2021:
 - i. Roger Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for; and
 - ii. an unidentified flatbed truck was in the Easement Area. The evidence does not establish how long it was there for;
- i) On August 27, 2021, the unidentified white pickup was not in the Easement Area;
- j) On August 30, 2021, Roger Massey's pickup was not in the Easement Area;

- k) On September 1, 2021, Brenda Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for;
- l) On September 1, 2021, Roger Massey's pickup was partially in the Easement Area. The evidence does not establish how long it was there for;
- m) On September 9, 2021, Brenda Massey's pickup was not in the Easement Area;
- n) On September 10, 2021:
 - i. Brenda Massey's pickup was partially in the Easement Area. The evidence does not establish how long it was there for; and
 - ii. the evidence does not establish whether the Home Depot vehicle was in the Easement Area;
- o) On September 14, 2021, the evidence does not establish whether the unidentified white van was in the Easement Area and I am unable to determine how long the unidentified grey SUV towing a white trailer was at the entrance to Paquette Road;
- p) On September 15, 2021, the unidentified white pickup was not in the Easement Area;
- q) On September 16, 2021, the Noremac Industries Ltd. truck was not in the Easement Area. Justin Marshall testified that the outrigger of the truck passed over the Cook Property. While his evidence in that regard is undisputed, it is based on a photograph which does not definitively show whether the outrigger did so. There is no evidence that Justin Marshall witnessed this event, so I place no weight on his conclusory statement;
- r) On October 4, 2021:
 - i. Brenda Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for; and
 - ii. the evidence does not establish whether Roger Massey's truck was in the Easement Area;
- s) On October 15, 2021, Roger Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for;
- t) On October 18, 2021, Roger Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for;
- u) On October 19, 2021, a Kamloops Truss Ltd. truck and trailer was in the Easement Area. The evidence does not establish how long it was there for;
- v) On October 20, 2021:
 - i. a Mat Ward Construction Ltd. pickup was in the Easement Area. The evidence does not establish how long it was there for;
 - ii. a Mat Ward Construction Ltd. pickup (trailer attached) was in the Easement Area, unloading fencing; and

- iii. a Mat Ward Construction Ltd. pickup was in the Easement Area, dropping off a trailer;
- w) On October 25, 2021, Roger Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for;
- x) On October 26, 2021:
 - i. Roger Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for; and
 - ii. a Mat Ward Construction Ltd. pickup was partially in the Easement Area. The evidence does not establish how long it was there for;
- y) On October 27, 2021, Brenda Massey's pickup was in the Easement Area. The evidence does not establish how long it was there for;
- z) On November 3, 2021, a Mat Ward Construction Ltd. pickup was apparently dropping off a worker in the Easement Area. The evidence does not establish how long it was there for;
- aa) On December 10, 2021, a Kamloops Truss Ltd. truck and trailer was unloading trusses in the Easement Area using a crane. Diane Cook testified that she told the crane operator to stop and that the crane swung over the Cook Property. I place no weight on her conclusory statement. Video 1-237 depicts the crane lifting the trusses over the Easement Area;
- bb) On January 27, 2022, a Mat Ward Construction Ltd. pickup towing a trailer was in the Easement Area; another Mat Ward Construction pickup was partially in the Easement area, unloading equipment;
- cc) On January 28, 2022, a Mat Ward Construction Ltd. pickup was partially in the Easement Area, unloading equipment;
- dd) On May 10, 2022, a Noremac Industries Ltd. pickup turned around on the Cook Property without entering the Easement Area before going in the opposite direction on Paquette Road. Video 1-377 depicts that the rear wheels of the pickup spun as it pulled forward from the gravel front yard of the Cook Property to Paquette Road. I do not find anything untoward about anything depicted in the video. That the rear wheels of a pickup pulling forward from a gravel area onto a road might spin is unremarkable, and there is no evidence to establish it was done for an improper purpose;
- ee) Justin Marshall testified that Kevin Watt installed a "stub" in the Easement Area, which he asserted created an unspecified "hazard". While his evidence in that regard is undisputed, I place no weight on his conclusory statement. There is no evidence that the "stub" created any hazard;
- ff) In addition to the foregoing, there was some evidence of other people or companies no longer before the court as defendants being in the Easement Area on various days. In each case, the evidence does not establish how long they were there for.

[48] I find that on each of the foregoing occasions, the uses of the Easement Area were for a purpose which was related to the purpose of supplying a travel corridor for ingress and egress to the Massey Property, namely the delivery or removal of materials, equipment and/or workers associated with, and during, construction of the Massey Residence. Accordingly, I find that each of the foregoing occasions were authorized uses of the Easement Area. Concerning the alleged parking in the Easement Area, the evidence was simply too poorly developed for me to determine a) if the allegation of parking is correct; and b) if so, its duration. As noted earlier in these reasons, a photograph or still image captures only a moment in time. None of the videos show vehicles parked for longer than five minutes.

[49] I find that the Cooks have failed to prove on a balance of probabilities that there was any unauthorized use of the Easement by the Masseys or the remaining contractor defendants during the time period from May 30, 2021, up to and including May 2022. The evidence fails to establish that any of the defendants trespassed on the Cook Property as alleged.

Did the actions of the Cooks violate the terms of the Easement?

[50] The Easement requires the Cooks to provide the Masseys with "full, free and uninterrupted right, license, liberty, easement privilege and permission at all times and from time to time".

[51] Justin Marshall's testimony and the photographs, establishes that he parked his red car in the Easement Area on at least four occasions: July 6, 2021; July 21, 2021; August 20, 2021; and August 26, 2021. On October 11, 2021, Justin Marshall obstructed Roger Massey by standing in his way when he was trying to leave the Massey Property in his pickup to go to work. Roger Massey called the RCMP, they attended, and eventually had to physically move Justin Marshall from where he was standing. On another date, which is not identified in the evidence, Justin Marshall sat on a chair in the Easement Area and refused to leave, even when police attended. He was, as he put it in cross-examination: "protesting"; "proving a point"; and "standing my ground".

[52] I find that on each of these occasions, Justin Marshall violated the terms of the Easement.

Did the actions of the Cooks delay construction of the Massey Residence?

[53] The Masseys assert that the actions of the Cooks delayed construction of the Massey Residence. Specifically:

- On June 16, 2021, Diane Cook interfered with the work of a surveyor retained by the Masseys telling him to "get off her property". I find there is no evidence that any delay in completing the survey as a result of Diane Cook's actions delayed the construction schedule.

- On August 20, 2021, Justin Marshall interfered with the work of contractors delivering concrete by parking his red car partially in the Easement Area. Brenda Marshall testified this delayed the concrete delivery by 10 to 15 minutes in that it took longer to position the pumper truck. I find there is no evidence that any delay in positioning the pumper truck delayed the construction schedule.

· Justin Marshall made several reports to WorkSafe BC. The WorkSafe BC records show various construction-related violations that remained outstanding for different reasons over time. I find that while Justin Marshall's reports resulted in enforcement action, the reports were justified. I find the Masseys have failed to prove, on a balance of probabilities, that any delay as a result of having to deal with construction-related violations were attributable to unjustified reports by Justin Marshall.

· Roger Massey testified that the construction schedule was affected by delays involving roofing, plumbing and framing contractors; that truss delivery was delayed, being scheduled for October 10 or 12, 2021, but actually occurring in November, 2021; and that work was delayed because inspections could only happen on two days a week. He denied counsel's suggestion in cross-examination that construction took longer than it otherwise might have because there was not enough room on his property to have multiple trades working at the same time.

[54] I find the Masseys have failed to prove, on a balance of probabilities, that any of the alleged aforementioned delays were attributable to the Cooks.

Are the Cooks liable for private nuisance?

[55] The Masseys submit that the Cooks' actions rise to the level of private nuisance, worthy of an award of damages.

[56] In *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 [Antrim], the Supreme Court of Canada addressed the legal principles governing private nuisance. At para. 18, Justice Cromwell said that a nuisance "consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable". A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also reasonable in the circumstances: *Antrim* at para 19.

[57] A substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference: *Antrim* at para. 22. Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: *Antrim* at para. 23.

[58] The Masseys provided examples of the alleged nuisance, which I find they have proved on a balance of probabilities:

· Justin Marshall stands outside in an intimidating manner whenever the Masseys are outside. This allegation is corroborated by videos and Roger Massey's testimony. Video 1.48 depicts Justin Marshall pacing in the area where Paquette Road borders the Easement Area, the Masseys drive off the Massey Property through the Easement Area and, as they pass, he raises both arms in what I find was him "giving the finger".

- Justin Marshall idles his truck for extended periods of time in the front yard of the Cook Property, for no apparent reason than to generate exhaust fumes in the area of the Massey Property. Brenda Massey testified Justin Marshall moves his truck around his front yard and leaves the engine running such that exhaust fumes blow into her garage, which she leaves open so her dogs can go in and out. This is corroborated in part. Justin Marshall testified he does move his truck around his front yard and leaves the engine running;

- Justin Marshall and Diane Cook run out of their residence and threaten legal action against anyone who stops in the Easement Area. This is corroborated by photographs and videos, and the evidence of Brenda Massey, Justin Marshall and Diane Cook. Video 1.44 depicts the Cooks in a heated exchange with Kevin Watt when he was installing the sewer line for the Massey Residence through the Easement Area. I find this video depicts the Cooks, particularly Justin Marshall, aggressively taunting and goading Kevin Watt. Diane Cook can be heard using expletives. The Cooks submit they were simply doing what they were legally entitled to do. I disagree. They were not simply exercising their legal rights as property owners to communicate information to others. Their behaviour went far beyond that. I find they were confrontational, aggressive, and belligerent towards Kevin Watt, who was working in the Easement Area as licensees of the Masseys, and at their request. Justin Marshall in particular acted as if he were spoiling for a fight; and

- Brenda Massey's undisputed testimony that she has had to start taking medication as a result of the actions of the Cooks, and fears for her safety.

[59] I find from the aforementioned examples that the Masseys have proved on a balance of probabilities that the Cooks, individually and together, interfered with the Masseys' use or enjoyment of the Massey Property in a way which was non-trivial in nature, substantial, and unreasonable. Consequently, I find that the Cooks are individually and jointly liable to the Masseys for private nuisance.

[60] Examples from the evidence, which I find do not prove private nuisance on a balance of probabilities, are:

- Justin Marshall smoked cannabis and blew smoke in the direction of the Massey Property. Brenda Massey testified she has seen Justin Marshall blowing smoke into her yard. Roger Massey testified he has smelled cannabis smoke while inside his garage, which he assumes is attributable to Justin Marshall. Justin Marshall conceded that he smokes cannabis outside while watering his trees. I find it would be unlikely that Justin Marshall could blow smoke onto the Massey Property from a position adjacent to the trees along the edge of the Massey Property. A more plausible explanation is that some of the smoke simply drifted over to the Massey Property from the Cook Property;

- the Cooks objecting when the 81-year-old mother of the Masseys' tenant was dropped off in the Easement Area for a visit with her daughter at Christmas. The source of this information was not identified, and it appears to be inadmissible hearsay or double-hearsay;

- the Cooks depositing "Caution" tape on their property and spray-painting cardboard signs outside their residence indicating that there is "toxic gas" coming from the Massey Residence, something which the Cooks apparently find amusing. While these signs are unsightly, they are not physically damaging the Massey Property or interfering with the Masseys' health, comfort or convenience;
- the Cooks confronting Brenda Massey in her driveway. The evidence about this allegation was poorly developed;
- Justin Marshall operating a drone in such a manner as to capture aerial footage of the Massey Property. This is corroborated by photographs, and the testimony of Brenda Massey and Justin Marshall. Brenda Massey testified that one day she was in her kitchen and saw a drone over the fence. She went upstairs and saw Justin Marshall in his backyard with a drone. Justin Marshall admitted operating a drone, but denied it was ever over the Massey Property. I find the evidence does not establish, to the standard of a balance of probabilities, that the drone was ever over the Massey Property;
- Justin Marshall following the Masseys to determine where they were living during construction of the Massey Residence. Brenda Massey testified that on October 4, 2021, she and Roger Massey were at the Massey Property. They left together in Roger Massey's pickup. Justin Marshall followed them in his red car. This concerned them enough that they drove to the Chase RCMP detachment. Justin Marshall testified that he was not following the Masseys, but going to a gas station. His route happened to partly coincide with the route driven by the Masseys. I find the Masseys' concerns are speculative. Justin Marshall denied the motivation attributed to him by the Masseys. Justin Marshall's evidence about what actually happened is plausible, particularly as Chase is a small community. I find the evidence does not establish, to the standard of a balance of probabilities, that Justin Marshall followed the Masseys for the reason they claim, or for any inappropriate reason;
- the Cooks pointing their security cameras at the Massey Property. The evidence in this regard was poorly developed;
- the Cooks placing a "no trespassing" sign pointed at the Massey Property on top of a 10' to 12' high fence. The sign is not physically damaging to the Massey Property or interfering with the Masseys' health, comfort or convenience;
- Justin Marshall making various complaints to government authorities at the federal, provincial and municipal level, including:
 - Ø the Chase RCMP (complaint on May 30, 2021);
 - Ø the federal Department of Fisheries and Oceans (emails on August 18, 2021, September 9, 2021 and April 28, 2022; report on August 23, 2022);
 - Ø the provincial Ministry of Forests;

Ø WorkSafe BC; and

Ø the Village of Chase.

[61] Justin Marshall was acting within his legal rights to make the complaints, which he claims were motivated by his concerns about personal safety and property (RCMP), as well as for the environment (Ministry of Forests, Department of Fisheries and Oceans, Village of Chase) and the construction activity (WorkSafe BC). With the sole exception of the complaints to WorkSafe BC, none of the complaints resulted in any enforcement action against the Masseys.

[62] The Masseys also make the following additional claims against the Cooks relating to the Easement.

Driveway and Remediation of Easement Area

[63] It is undisputed that the driveway on the Massey Property is currently unpaved. It is also undisputed that the Easement Area requires some remediation as a result of the contractors' use of it during construction of the Massey Residence.

[64] The Masseys would like to pave their driveway and remediate the Easement Area, but are concerned about problems with the Cooks. There is no evidence about what such work would cost, how long it would take, or who would be prepared to do it. I find the Masseys' concerns reasonable, but speculative.

Loss of Rental Income

[65] The Masseys assert they have lost rental income due to the actions of the Cooks.

[66] Brenda Massey testified that she and Roger Massey originally planned to move in during April 2022, but actually only moved in during August 2022. They planned to have rental income in case Roger Massey's deteriorating health prevented him from earning income. They planned to have a tenant from June or July at the latest, but instead have only had one since the end of December 2022.

[67] The evidence concerning the reasons for any delays in completing construction was poorly developed. Although Roger Massey testified that certain trades were delayed, in order to assess such delay, I would have needed evidence which is not before the court, including about why those trades were delayed, over what time period, and the impacts of the delay, if any, on the next trade.

[68] I find that the Masseys have failed to prove, on a balance of probabilities, that they suffered any loss of rental income due to the actions of the Cooks.

Fence Encroachment

- [69] It is undisputed that the fence erected by the Cooks slightly encroaches on the Massey Property. The encroachment was discovered during the course of preparations for trial.
- [70] The Cooks are willing to replace the fence, but doing so would require them or their contractors to access the Massey Property. The Masseys do not want Justin Marshall, Diane Cook, or their contractors, to have any such access.
- [71] The Masseys submit that in the circumstances the appropriate way to resolve this issue is to grant an easement in favour of the Cooks for the life of the fence, and award compensation for the encroachment, an approach which was adopted by Justice D. MacDonald in the recent case of *Abel v. Harlton*, 2024 BCSC 1072.
- [72] Regarding quantum of compensation, counsel submits an award of \$5,000 would be appropriate, which is the same amount awarded by D. MacDonald J. for an encroachment of several inches by a fence between two residential properties.
- [73] The Cooks take no position concerning granting an easement or awarding compensation as being the appropriate way to resolve the fence encroachment. Counsel notes that the fence was built by the predecessor in title, the property disclosure statement did not disclose any encroachment, and the Cooks only became aware of the encroachment during the litigation. Concerning quantum of compensation, counsel submits that \$5,000 is "profoundly excessive and disproportionate".
- [74] I am not satisfied that Justin Marshall, Diane Cook, or anyone on their behalf, should be permitted access to the Massey Property in order to move the existing fence. The nature of the relationship between the Cooks and the Masseys is such that the less they have to do with each other the better, particularly in matters concerning their respective property rights.

Fence Easement

- [75] I grant an easement in favour of the Cooks for the life of the fence and award compensation for the encroachment as set out below.

Disposition

Cook Claims

- [76] The Cooks have failed to prove their claims against any of the remaining defendants on a balance of probabilities. Accordingly, their claims against those defendants are dismissed. Based on my interpretation of the Easement, their application for an injunction is also dismissed.

Massey Counterclaim

[77] The Masseys have proved on a balance of probabilities their counterclaim that the Cooks:

- interfered with the Masseys' rights under the Easement; and
- are liable for private nuisance, having interfered with the Masseys' use or enjoyment of the Massey Property in a way that is non-trivial in nature, substantial and unreasonable in all the circumstances.

[78] The Masseys are entitled to damages in respect of their counterclaim.

Damages

Interference with rights under the Easement

[79] For Justin Marshall's interference with the Masseys' rights under the Easement, as set out in para. 51 of these reasons for judgment, I assess and award damages in the amount of \$5,000, payable by Justin Marshall to the Masseys.

Private Nuisance

[80] For the Cooks' interference with the Masseys' use or enjoyment of the Massey Property, as set out in para. 58 of these reasons for judgment, I assess and award damages for private nuisance in the amount of \$5,000, payable by the Cooks to the Masseys.

Easement for encroaching fence

[81] In the circumstances, I find that a fence easement in favour of the Cooks for the life of the fence is appropriate. Regarding the easement area, it will be as determined by reference to Appendix C of the survey conducted by BC Land Surveyor Mathew Jacard in February 2024.

Compensation for fence encroachment

[82] I agree with counsel for the Cooks that compensation for the encroachment of the fence on the Massey Property in the amount of \$5,000 would be excessive. I find that compensation in the amount of \$1,500 is appropriate.

[83] I order a one-time payment of \$1,500.00 as compensation, payable by the Cooks to the Masseys.

Action Concrete Pumping (2021) Ltd.'s trespass in the Easement Area

[84] The Cooks have obtained default judgment against Action Concrete Pumping (2021) Ltd. for which I must assess damages and costs. For Action Concrete Pumping (2021) Ltd.'s trespass in the Easement Area, I assess and award damages in the amount of \$2,500.00, payable by Action Concrete Pumping (2021) Ltd. to the Cooks.

Costs

[85] The Masseys are entitled to their costs of defending the claim, as well as their costs of the counterclaim, at Scale B, payable by the Cooks.

[86] Kamloops Truss Ltd.; Mat Ward Construction Ltd.; and Noremac Industries Ltd. are each entitled to their costs of defending the claim, at Scale B, payable by the Cooks.

[87] The Cooks are entitled to their costs of prosecuting the claim against Action Concrete Pumping 2021 Ltd. at Scale B, payable by Action Concrete Pumping 2021 Ltd.

"B. Smith J."

B. SMITH J.

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