

CANADA / JUDGMENT

Dodsworth v. Madill

2019 BCSC 898

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dodsworth v. Madill,

2019 BCSC 898

Date: 20190610

Docket: S172401

Registry: Victoria

Between:

Dennis Fred Dodsworth

Plaintiff

And:

Richard Steven Madill

Lori Anne Lafave

Derek Robert Simmonds

Joyce Dorothy Simmonds

Defendants

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

L.J. Alexander

K.A. Smith

Counsel for the Defendants:

J.A. Angus

Place and Date of Hearing:

Victoria, B.C.

April 10-11, 2019

Place and Date of Judgment:

Victoria, B.C.

June 10, 2019

Introduction

[1] Pursuant to Supreme Court Civil Rule 9-7, the plaintiff, Dennis Dodsworth, seeks the following orders:

1. A declaration that the Plaintiff is entitled to an easement over the lands legally described as:

Parcel Identifier: 017-718-384

Legal: Lot 4, Block 7, Cowichan Lake District, Plan VIP53996

as shown on Easement EF30601 (the "Easement").

2. A declaration that the Easement prohibits the encroachment of buildings or structures within the area including a dwelling and concrete wall
3. An injunction to restrain the Defendants and any owner, occupier or user of Lot 4 from interfering with the Easement by maintaining or placing obstructions in the Right of Way.
4. A mandatory injunction to require the Defendants to remove any Encroachments or obstructions in the Right of Way within a time to be set by the Court or, in the alternative, damages in an amount required for the Plaintiff to hire professionals to remove any Encroachments or obstructions
5. General and special damages, interest and costs.

[2] The parties agree the matter is suitable for summary trial under Rule 9-7.

Background

- [3] Mr. Dennis Dodsworth is the owner of a waterfront lot at Lake Cowichan, B.C. It is Lot 3 in the relevant legal description. This lot was formerly owned by the plaintiff's father, Ken Dodsworth, who purchased it in 1968. The plaintiff inherited the lot from his father in September 2005.
- [4] The catalyst for the application occurred around 1991, when the local community purchased a CNR right of way that ran along the shore of Lake Cowichan. This CNR right of way had given road access to Lot 3. As a result of the sale of the CNR right of way, Lot 3 lost its road access.
- [5] However, Wayne Stolth, the owner of Lot 4 at the time, agreed to grant an easement over Lot 4 in favour of Lot 3, in order to give Ken Dodsworth access to Youbou Road, thereby providing road access to the waterfront lot.
- [6] Mr. Stolth deposes that when he bought Lot 4 in 1990, there were two buildings located on the property. One was a house near the lakefront, and the second structure, which he has referred to as "the Shack," was "upslope on the northwest corner of the property" and a "real eyesore." The defendants refer to this structure as "the Cottage." It is an older single story structure, dating from the 1970s or earlier. It currently has water, electricity, and a septic system. I will refer to it as the Dwelling.
- [7] Regarding the creation of the easement, Mr. Stolth deposes:
7. I went out to the Shack and measured the distance between it and the property line, to see if it was going to be wide enough to accommodate a driveway from Youbou Road to Lot 3. I realized that part of the building would need to be removed to create a useable driveway. I thought to myself that I could just chainsaw the part off and then bulldoze the rest. I did not want the Shack anyway because of the condition it was in.
8. I discussed the driveway, and easement and its location beside or through the Shack with Ken. It was apparent to me Ken knew that building was dilapidated, but Ken asked that I let the building remain as long as Gary Clarke was living in it. Gary was keeping an eye on my lot and I understood from Ken, Ken's property also. I agreed to let the Shack stay so that Gary could keep living in it, but told Ken, and it was always my intention, that if Ken wanted the Shack gone, I would happily remove it.
9. Having discussed and knowing all of this, in March of 1992, myself and Ken agreed to the driveway location and Easement agreement that is Easement EF30601 (the "Easement").
13. I was fully aware and made no mistake in creating the Easement knowing the Shack intruded onto the Easement because it was my intention that the Shack be torn down.
14. Ken and I agreed to let the Shack temporarily remain so long as Gary lived in it and kept an eye on both Lot 4 and Lot 3 for myself and Ken.

[8] The easement provides, in part, as follows:

1. The Grantor hereby grants to the Grantee, its servants, agents, invitees and all others the licencees of the Grantee, the right at all times and from time to time together with the Grantor to pass and repass by any means necessary, for the purposes of ingress and egress to and from the Dominant Tenement over that part of the Servient Tenement more particularly described in the Explanatory Plan prepared by Richard Wright, B.C.L.S. and certified him on the 10th day of October, 1991 and attached hereto (hereinafter called the "Right-Of-Way").

...

3. The parties hereby covenant and agree with each other that no vehicles shall be parked on or other impediments left so as to restrict the free flow of the parties' ingress and egress over the Right of Way.
4. It is mutually agreed between the parties that:
 - a. Right-of-Way shall be construed as running with the land ...;
 - b. the expressions Grantee and Grantor herein contained shall be deemed to include the . . successors of such parties ...

[9] The explanatory plan depicting the easement area was certified correct on October 10, 1991, and registered on March 16, 1992 in the Victoria Land Title Office under Plan No. VIP54003. It shows and provides for a six-metre-wide easement, approximately 20 feet. It does not depict or mention the Dwelling. A subsequent sketch plan dating from 2004 clearly shows the Dwelling and its dimensions. That sketch plan indicates the Dwelling is 10.46 metres wide at its widest, and encroaches on the easement by 2.55 metres.

[10] This easement is a gravel driveway that the plaintiff has used to access Lot 3 for many years. He deposes that when he took possession of Lot 3 in 2005, he knew the Dwelling encroached on the easement. Along with a concrete wall that was installed by either the person who bought Lot 4 from Mr. Stolth, or a neighbour who owns the adjacent Lot 2, the presence of the Dwelling has resulted in part of the easement being narrowed from 6 metres to 2.96 metres, or 3.02 metres according to the measurements of Ms. Lafave, one of the defendants. I pause here to note that the plaintiff says he does not want to remove any portion of the cement wall as it provides stability along the west side of the driveway and as such is a benefit to him and his use of the right of way.

[11] The plaintiff deposes:

13. It was my belief, and I believed it to be true, that my father and Wayne [Stolth] had an agreement to not remove the shack until after Gary left. When I took possession of Lot 3 upon my father's death, I honoured the agreement I believed existed, and allowed the shack to remain encroaching as Gary still lived in the shack. Gary Clarke continued to keep an eye on Lot 3 for me, as he had done for my father.
- [12] Things changed, however, when the defendants purchased Lot 4 in March of 2016. On this point, Derrick and Joyce Simmonds, Ms. Lafave's parents, were not directly involved in the purchase of Lot 4. The other defendant, Mr. Madill, is Ms. Lafave's spouse.
- [13] Ms. Lafave deposes that the defendants wanted sole possession of both the Dwelling and the larger home on Lot 4, as the "existence of the rentable Cottage [was] the only thing that made the property financially attainable" for them. Their closing date was delayed until Mr. Clarke vacated the premises. Given this development, Mr. Dodsworth deposes that once Mr. Clarke left the property, "I felt I had upheld the agreement I believed existed and was free to deal with removing the Easement encroachments."
- [14] As a result, in the summer of 2016, the plaintiff spoke to the defendants "to notify them that the shack encroached on the easement and that I wanted the encroachment rectified." The plaintiff deposes that at the time he spoke to the defendants, the Dwelling "had not been renovated or altered and was in a very dilapidated state." According to Ms. Lafave, however, the defendants had already commenced significant renovations on the Dwelling and completed the majority of those renovations by the time the plaintiff approached them in July or August 2016.
- [15] The plaintiff's stated motivation to have the impediment rectified, in addition to Mr. Clarke no longer being resident in the Dwelling, was because the plaintiff was, and is, "unable to easily and without risk of damage to my vehicle use the Easement to access my property." In addition, the plaintiff deposes that he plans to build on the property and needs the "encroachment" removed in order to give construction and commercial vehicles access from Youbou Road to Lot 3 "without any difficulties."
- [16] The plaintiff deposes that his counsel sent a letter to the defendants on September 16, 2016, notifying them that the Dwelling encroached on the easement and requesting its removal. The letter is also in evidence. It advises the defendants not to proceed with renovations to the Dwelling, and instructs them to remove the Dwelling and the cement retaining wall within 90 days.
- [17] The defendants' application response claims they only received a letter from plaintiff's counsel in December 2016, by which point they had already completed their renovations and arranged for tenants to move into the Dwelling. I have affidavit evidence before me that indicates the Dwelling has been continuously rented to tenants since January 2017, but other than that, there is very little evidentiary support for the defendants' alleged timeline. As a result, I accept the plaintiff's version of events as to when the defendants were formally notified of the plaintiff's position.

Interpretation of the Easement Document

- [18] The plaintiff says the words of the easement are clear and unequivocal and the extent of the right of way is properly defined. Indeed, there is no dispute that the registered plan provides for a six-metre-wide easement. The plaintiff therefore says his claim is *prima facie* established.
- [19] In support of his position, the plaintiff cites Joyce J.'s oft-quoted decision in *Avanti Mining Inc. v. Kitsault Resort Ltd.*, 2010 BCSC 1181 at para. 61:
2. The following principles that apply to the construction of a contract also apply to the interpretation of the Right of Way:
 - (a) The intention of the parties is to be determined by looking first to the plain and ordinary meaning of the words used, in the context of the whole of a contract and in a manner that does not render one part of the contract ineffective.
 - (b) The words must be read in the context of the surrounding circumstances when the contract was made, including facts known to both parties but not negotiations or evidence of subjective intent.
 - (c) The standard is an objective one.
 - (d) If the words of the instrument are unambiguous that is the end of the matter. If there is ambiguity or if the plain language leads to an absurdity, a result that both parties could not have intended, then regard may be had to extrinsic evidence to assist in determining the parties' intent.
 - (e) Evidence of context or surrounding circumstances must not be allowed to overwhelm the plain language of the document.
- [20] In *Grant v. Lowres*, 2016 BCSC 1654, on which the plaintiff also relies, Jenkins J. seemingly read *Avanti* as standing for the proposition that "surrounding circumstances" should only be considered if the wording of an easement is found to be ambiguous. He concluded that the wording in question was unambiguous, but also went on to consider the surrounding circumstances in case he was "incorrect in the above interpretation" (at paras. 27-30).
- [21] Justice Saunders upheld Jenkins J.'s ruling in *Grant v Lowres*, 2018 BCCA 311, but appeared to reject his suggestion that "surrounding circumstances" are a secondary consideration that only becomes relevant in the case of ambiguity. This rejection is implicit in her conclusion (at para. 23) that there was no "palpable and overriding error" because Jenkins J. had made findings regarding both "the wording of the document and the circumstances." It is somewhat more explicit in her summary of applicable interpretive principles, which does not make ambiguity a precondition for considering surrounding circumstances:
- [19] Easements are to be interpreted as contractual documents, which raises questions of mixed fact and law: *Robb v. Walker*, 2015 BCCA 117 at paras. 30-31.

- [20] Contractual interpretation generally involves discerning "the intent of the parties and the scope of their understanding" by "read[ing] the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva [Capital Corp. v. Creston Moly Corp., 2014 SCC 53]* at para. 47. In *Sattva*, the Supreme Court of Canada explained the manner and extent to which surrounding circumstances may inform contractual interpretation:
- [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services [Hayes Forest Services Ltd. v. Weyerhaeuser Co., 2008 BCCA 31]*, at para. 14; and *Hall [Geoff R. Hall, Canadian Contractual Interpretation Law, 2nd ed. (Markham, Ont.: LexisNexis, 2012)]*, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc. (1997)*, 101 B.C.A.C. 62).
- [21] This court adapted those insights to the particular context of easements in *Robb v. Walker*:
- [31] 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 a contract: *Sattva* at para. 58.
- [32] 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: *Granfield v. Cowichan Valley (Regional District) (1996)*, 16 B.C.L.R. (3d) 382 (C.A.).
- [22] In the subject case, the plaintiff emphasizes that not only is it clear on the plain language of the Easement that he is entitled "to pass and repass by any means necessary" over the right of way, but the original grantor and grantee agreed to a mutual covenant that "no vehicles shall be parked on or other impediments left" on the right of way.
- [23] The plaintiff has urged me not to look "beyond the plain and obvious language of the Easement." However, he also submits the surrounding circumstances support his proposed interpretation of the easement text. Specifically, he alleges the original parties were aware of the structure's existence and encroachment on the easement at the time of drafting, knew part of the structure would need to be removed to permit full use of the driveway, and

drafted the easement with that intention and understanding. He relies on Mr. Stolth's affidavit evidence to support these submissions.

- [24] The plaintiff further submits that the original parties' post-registration conduct, that is, their failure to remove the structure and/or the concrete wall, is immaterial to this analysis because the only relevant surrounding circumstances are those that existed at the time the easement was created. I agree with the plaintiff on this point.
- [25] In my view, the language of the easement is unambiguous. However, on my reading of Saunders J.A.'s reasons in *Grant*, I must nevertheless interpret the plain language of the easement with regard to any objective evidence of background facts at the time of execution that is properly before me.
- [26] In my view, Mr. Stolth's affidavit provides such evidence. As the original grantor, he has highly relevant insight into the circumstances surrounding the creation of the easement, and as he disposed of Lot 4 over two decades ago, he is far removed from the proceedings. His evidence serves to confirm the clear, unambiguous meaning of the language of the easement: it gives the owner of Lot 3 a right to full, unrestricted use of the right of way. As a result, I am unable to agree with the defendants' submission that Mr. Stolth's affidavit is inadmissible. I agree with counsel for the plaintiff that the evidence from Mr. Stolth is not an attempt to add to or detract from the clear wording of the easement and therefore does not violate the parole evidence rule.
- [27] The defendants emphasize the fact that, unlike many cases involving easements, the encroachment in the present case pre-dates the granting of the easement. As a result, they say that where there is an existing obstruction, this factor must be considered when looking at the proper interpretation of the easement. The defendants seem to suggest that as the original parties to the easement were aware that the structure intruded onto the easement when the easement was drafted, they must have intended there to be an "implied term" that the structure would forever remain intruding onto the easement, or that the words of the grant should be "given a restricted meaning."
- [28] In support of this submission, the defendants rely on two English cases: *Mills v. Blackwell*, [1999] EWCA 1852, and *Charles v. Beach*, [1993] EGCS 124 (cited in *Mills*). They cite *Charles* for the proposition that if a potential obstruction to access existed at the time the easement was granted, "it is a matter of construction to determine whether the existence of that obstacle calls for the words of grant to be given a restricted meaning" and a court's willingness to "impute to the grantor any intention to give the dominant owner the right to insist on its removal" decreases in proportion to the obstruction's degree of solidity and permanence.

- [29] Based on Charles, the defendants appear to be suggesting that because the Dwelling is a solid, permanent obstruction that pre-dates the grant of the easement, I should be reluctant to impute to Mr. Stolth an intention to give the plaintiff's father and his successors a right to insist on the Dwelling's removal.
- [30] However, Mills and Charles are old decisions from a jurisdiction that lacks a Torrens registration system and does not register easements on title, unlike the system in this jurisdiction. As a result, I am not persuaded that the defendants' English authorities reflect the current state of the law in British Columbia, and I decline to follow them. The defendants' "implied reservation" argument does not afford them a defence to the plaintiff's application.

Actionable Interference

- [31] The parties agree that, to be actionable, the interference with the plaintiff's use of the easement must be substantial: see *Smith v. Balen*, 2018 BCSC 918 at para. 85. The defendants submit that in the present case the plaintiff's claim should be dismissed because the Dwelling does not interfere with his use of the easement to a sufficiently substantial degree.
- [32] In support of this position, the defendants emphasize that for many years, even before he became the owner of Lot 3 in 2005, the plaintiff has been able to access the lot without that right being "unduly" interfered with. They submit that because the plaintiff and his father before him used the easement for many years without apparent complaint or any prior applications to have the impediment removed, "this must mean something." That is, in the defendants' submission, "historically" there has been no substantial impediment to the plaintiff accessing his property. The defendants take this position even though the plaintiff has deposed he has damaged his trailer approximately six times when making the difficult manoeuvre of coming off Youbou Road, negotiating the corner of the Dwelling, and then driving down the easement to his waterfront lot. Exhibit E to the plaintiff's affidavit indicates he had to pay for exterior repairs to this vehicle in 2011. This is the only direct evidence pertaining to damage to the plaintiff's vehicle.
- [33] While I accept the defendants' evidence that they have observed vehicles being driven up and down the easement without incident, I also accept the plaintiff's evidence that he has damaged his trailer in the past while navigating around the Dwelling. He has added that he does not "even want to try" bringing his boat trailer down the easement because "I'll never get it in there." The plaintiff also deposes that he intends to build on Lot 3, which would require construction vehicles to traverse the easement.
- [34] On this point, the defendants note that s. 7.06 of the Commercial Transport Regulations, B.C. Reg 205/2016, provides for a maximum vehicle width of 2.6 metres, such that in their view the plaintiff could get construction vehicles down the existing gravel drive unless they are oversize. The plaintiff points out, however, that this overlooks the fact that oversize commercial or construction vehicles can legally operate on a highway with a valid permit.

He says he should not be restricted in the type of machinery he can use to facilitate whatever clearing or excavation is required for him to legally use his property as he wishes. Even if the maximum vehicle width of 2.6 metres would technically allow construction vehicles of this width to come off Youbou Road and manoeuvre around the corner of the Dwelling, the plaintiff submits this does not mean that his right to egress and ingress "by any means necessary" is not substantially interfered with. I agree with the plaintiff's position on this point.

- [35] The fact of the matter is that the narrowing of a bone fide easement is "almost automatically a diminution of the practical benefit of the Easement": see *Langlois v. Tessaro*, 2018 BCSC 1463 at para. 35, quoting *Wallster v. Erschbamer*, 2011 BCCA 27 at para. 21. While both of those decisions involved applications to modify easements pursuant to s. 35 of the Property Law Act, S.B.C. 1996, c. 377, I am satisfied this statement is equally applicable to the question of whether there is a substantial interference with use of an easement.
- [36] Given the totality of the evidence, I am satisfied the Dwelling does substantially interfere with and restrict the plaintiff's right to "free flow of ingress and egress over the Right of Way."
- [37] I am also unable to accede to the defendants' submission that if the plaintiff can get most of his vehicles up and down the easement, he somehow does not have the right to use the full six-metre allowance, notwithstanding the clear provisions in the easement. On this point, the following comments of Fisher J.A. in *Tessaro v. Langlois*, 2019 BCCA 95, are apropos:
- [32] I cannot accept this submission. The judge did consider these factors, both in the context of his analysis under s. 35(2) of the Property Law Act and in granting the injunctive relief sought in the action. In respect of the Property Law Act, he found that the width of the Easement was a practical benefit to the respondents as it permitted them to construct the driveway they required to accommodate the size of vehicle and boat that they wanted to use, and any restriction on the defined area would injure them as persons entitled to the benefit (at paras. 35 and 46). In granting the injunction, he concluded (at para. 58) that the encroachments limited Mr. Langlois's lawful use of the Easement as he interpreted it.
- [33] In my view, there was ample evidence to support the judge's conclusion. The evidence of Mr. Langlois was that the width of his proposed driveway is to be approximately 21 feet, which is roughly equivalent to the widths of the driveways on Lots 3 and 4. Restricting him to the narrower width of the existing driveway would clearly constitute a substantial impairment of the right granted under the Easement and Modification. These circumstances distinguish this case from cases such as *Gardiner v. Robinson*, 2006 BCSC 1014, and *Merner v. D'Hollander*, 2012 BCCA 383, cited by the appellants.
- [38] Even though *Tessaro* involved a petition under s. 35 of the Property Law Act, the above comments are applicable to the present application. I am satisfied the plaintiff is entitled to the legitimate use of the full six-metre easement.

- [39] I also agree with the plaintiff that simply because he waited for Mr. Clarke to no longer be living in the Dwelling before taking action to have unrestricted use of the full width of the right of way does not permit the defendants to argue this lack of enforcement affords them relief from the plaintiff's application to have the easement clear of the impediment.
- [40] As plaintiff's counsel has submitted, non-use is not a ground to prevent the grantee from having full use of the easement, even if the plaintiff was seeking to modify the easement pursuant to s. 35 of the Property Law Act. The fact that the plaintiff did not seek to enforce his right to have the full six metres free of any impediments until 2016 does not undermine the fact that this properly registered charge on the land remains in full force and effect and permits the plaintiff, when he so chooses, to advise the defendants of his intention to utilize the full width of the easement. The comments of Hinkson C.J. in *Birch v. Brenner*, 2015 BCSC 466, rev'd on other grounds 2017 BCCA 22, are equally applicable to the circumstances in the present case:
- [99] [T]he failure to object does not indicate an implied agreement sufficient to cause either Easement to be cancelled. Failing to object to the presence of the gate is an insufficient ground upon which to cancel the Easements. The fact that an encroachment on an easement has existed for many years cannot excuse the use of the area of the easement contrary to its terms.
- [100] Furthermore, as a matter of law, even non-use of an easement is not sufficient to constitute an implied agreement to cancel or modify the easement; non-use must be accompanied by an intention to abandon: *Lafontaine v. University of British Columbia*, 2012 BCSC 805 at para. 43. No such intention has been made out in this case. Indeed, the letters written by Ms. Bakewell's parents express the intention to use the Easement in the future.
- [101] Similarly, the fact that Ms. Bakewell did not "object" to the impediments has no bearing on the enforceability of the 1973 Easement.

Estoppel

- [41] The defendants initially pleaded promissory estoppel as another defence to the plaintiff's claim, citing *Young v. Beck*, 2017 BCCA 248. However, during submissions defendants' counsel submitted it was more a case of proprietary estoppel, which had not been pleaded. Be that as it may, both forms of estoppel would require the defendants to prove detrimental reliance on representations made by the plaintiff.
- [42] In this regard, the defendants submit that by the plaintiff's "conduct and acquiescence, both before and after the defendants purchased their property and for many years before," he "led the defendants and their predecessor in title to believe that the continued presence of the Cottage within the right of way did not constitute an interference" with his access, "and the Defendants have acted to their detriment in that belief." They argue that because for years "nobody said the cottage might have to come down," and because they were only able to afford to buy the property because the Dwelling would be a source of revenue, it would be

inequitable to order them to remove or alter the Dwelling after the plaintiff has not enforced "the full terms of the easement" for many years, even though Ms. Lafave acknowledged at her examination for discovery that she was aware of the existence of the easement.

- [43] In reply, the plaintiff says he has done nothing that would lead the defendants to form a mistaken apprehension or be under any misapprehension as to his interest in the property. On the contrary, he asked the defendants to remove the structure shortly after they purchased Lot 4. He says he did not, by either his words or conduct, make a promise or give any assurance to the defendants that would lead them to believe he would not seek to enforce the full right of way granted by the easement. He submits there is insufficient evidence to conclude the defendants detrimentally relied on something he did or said vis-à-vis the Dwelling and the easement, and as such, equitable principles should not now preclude him from having an encumbrance-free easement.
- [44] In my view, the following passage from our Court of Appeal in *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451, provides a complete answer to the defendants' defence of estoppel:
- [47] As I noted in a concurring judgment in *Trethewey*, these five elements have been overtaken "by a broader and less literal approach to proprietary estoppel" which does not require "fraud" or that the representor knew of the existence of its right or that it was inconsistent with the claimant's understanding. Thus Halsbury's (4th ed., Vol. 16) describes the doctrine as follows:

The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. [T]he true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief [Emphasis in original.]

- [49] 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] While I accept Ms. Lafave's assertion that the defendants would not have bought the property nor have proceeded with renovations to the Dwelling had they known the Dwelling was to "come down" if and when Mr. Clarke ceased to reside there, this does not undermine the plaintiff's legal right to have unfettered use of the six-metre-wide right of way, as the evidence does not establish that he said or did anything to give the defendants a false sense of security.
- [46] Given the evidence, I am not persuaded the principle of promissory or proprietary estoppel affords the defendants a defence to the plaintiff's claim for enforcement of the easement.

Trespass and Nuisance

- [47] The plaintiff also seeks general damages for trespass and private nuisance. The defendants did not specifically respond to these claims.
- [48] The plaintiff relies on *City of Burnaby v. Thandi et al*, 2005 BCSC 1478 [Burnaby], which defines trespass as follows:
- [113] Trespass to land is defined in G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) at pp. 37-38:

Trespass to land consists of entering upon the land of another without lawful justification, or placing, throwing or erecting some material object thereon without the legal right to do so. Such interference must be direct rather than consequential. To constitute trespass the defendant must in some direct way interfere with the land possessed by the plaintiff. The requirement of directness differentiates trespass from nuisance, which is committed when the defendant makes a use of his land [that] indirectly affects the land of the plaintiff.

- [114] Trespass to land is not limited to a single act, but can be a continuous act. Repeated acts of trespass will give rise to a continuing cause of action: See Fridman, *supra*, at p. 40.
- [49] Relying on Burnaby, the plaintiff submits that "[p]lacing, erecting or maintaining some material object on the land of another, without the legal right to do so" constitutes a direct interference with the land that amounts to trespass. He says the Dwelling has "constitute[d] a continuous trespass" since "the moment the Plaintiff requested the Shack be removed," in the latter half of 2016.
- [50] On my reading, however, Burnaby does not stand for the proposition that "maintaining" a material object is in itself a direct interference with land that gives rise to a trespass. The Fridman definition of trespass requires proactive interference with another's land in the absence of a legal right to do so, and those elements are not made out here. The Dwelling pre-dates both the defendants' purchase of Lot 4 and the creation of the easement; it was not erected by the defendants, nor was it erected "upon the lands of another," being wholly situated on unencumbered Lot 4 lands at the time of construction.

- [51] I note that the plaintiff's notice of application also cited *Shaman v. Meek*, 2019 BCSC 9, in support of the proposition that "maintaining" a material object on another's land constitutes trespass. In fairness to the plaintiff, I will briefly consider this case even though counsel did not raise it in oral or written submissions.
- [52] Shaman's discussion of the law of trespass draws heavily on *Herauf J.A.'s* summary of applicable legal principles in *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124. That case, in turn, makes reference to an Australian treatise that suggests a subsequent owner can be liable in trespass for failing to remove a material object that was placed on another's land by a previous owner. In other circumstances, that proposition could support a trespass action against a new owner who failed to remove an encroaching structure. In the circumstances of this case, however, I find it does not assist the plaintiff, as the Dwelling was not "placed on another's land" when it was created, and thus there was no "initial intrusion" attributable to the direct interference of a previous owner.
- [53] Given these circumstances, I am not persuaded the plaintiff has established a trespass on the part of the defendants.
- [54] As far as private nuisance is concerned, the plaintiff refers to *Baker v. Rendle*, 2017 BCCA 72:
- [41] [T]he requirements for proof of private nuisance are two-fold. First, a plaintiff must prove a substantial, non-trivial interference with his use and enjoyment of his property. Second, he must establish that the interference is unreasonable. The focus is primarily on the effect on the complainant rather than on the alleged tortfeasor's conduct (*Antrim* at para. 28)
- [55] The plaintiff submits the Dwelling constitutes a nuisance because it causes unreasonable, substantial interference to his use and enjoyment of the property. In written submissions, he refers to costs he has incurred due to vehicle damage, as well as his inability to get large vehicles down the easement to carry out the construction work he has deposed he plans to begin "in the near future."
- [56] In my view, there are two fatal flaws in the plaintiff's proposed action in nuisance. Firstly, unlike trespass, "nuisance is not actionable without proof of material loss or damage" (*Drager v. Lojstrup*, 2016 BCSC 1447 at para. 26). The plaintiff has failed to provide sufficient proof of material loss or damage he says he has suffered since the defendants took possession of Lot 4 in 2016.
- [57] Secondly, as *Cromwell J.A.* (as he then was) noted in *Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd.*, 2007 NSCA 92, nuisance and trespass are distinct in the sense that "trespass is direct entry on another's land while nuisance is the infringement of the plaintiff's property interest without direct entry" (at para. 130, emphasis in original). As *Cromwell J.A.* explained:

[127] [N]uisance is concerned with unreasonable interference with the enjoyment of land resulting from another's conduct elsewhere. The interference with the plaintiff's enjoyment of land must be indirect rather than direct

[128] [T]here is virtually no doubt that nuisance is concerned with indirect, not direct, interference with the plaintiff's enjoyment of his or her land in the sense that the interference must originate elsewhere than on the affected land itself.

[Emphasis in original.]

[58] Justice Voith of this Court endorsed a similar proposition in *Grant v. Warman*, 2009 BCSC 886 at para. 33.

[59] In the case before me, only the 2.55-metre portion of the Dwelling that encroaches on the easement actually interferes with the plaintiff's use and enjoyment of his property. That interference is direct and "originate[s] on the affected land itself," so it does not satisfy the test for nuisance. The portion of the Dwelling that sits just outside the easement boundary is located "elsewhere than on the affected land itself," but that portion of the Dwelling has no effect whatsoever on the plaintiff's rights, so it, too, fails to satisfy the test for nuisance.

[60] For the above reasons, the plaintiff's action in nuisance is dismissed.

[61] Notwithstanding this conclusion, I feel compelled to state that, even if I were satisfied that the defendants were liable in trespass or nuisance, any damages would be nominal, given the unique circumstances in this case: see *Arbutus Bay Estates* at paras. 28-30.

Conclusion

[62] I find the evidence has established that the plaintiff is entitled to the declaratory and injunctive relief he seeks. Due to the permanence of the Dwelling that encroaches on the right of way, I will give the defendants a reasonably lengthy period of time to consider their options in order to comply with the following orders:

1. A declaration that the plaintiff is entitled to an easement over Lot 4;
2. A declaration that the easement prohibits any building or structure within the six-metre-wide area of the easement;
3. An injunction restraining the defendants and any owner, occupier or user of Lot 4 from maintaining or placing obstructions in the right of way;
4. A mandatory injunction requiring the defendants and any owner of Lot 4 to remove, at their expense, from the right of way that part of the Dwelling that encroaches on the right of way by December 1, 2019, unless the parties agree to a different time. If the right of way is not free from the encroachment of the Dwelling by December 1, 2019, the plaintiff is at liberty to remove the Dwelling or any part of it that encroaches on the easement and be reimbursed by the defendants for the reasonable costs of doing so.

5. The plaintiff is at liberty to remove that part of the cement wall that encroaches on the easement at his own expense any time after December 1, 2019.

[63] The plaintiff acknowledges his claim for special damages is "tenuous." Whilst he has not formally abandoned that claim, the evidence is insufficient to justify an award for special damages.

Costs

[64] The plaintiff has been substantially successful and is entitled to costs on Scale B.

"The Honourable Mr. Justice B.D. MacKenzie"

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