

CANADA / JUDGMENT

Englehart v. Holt

2014 BCSC 1969

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1969 Englehart v. Holt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Englehart v. Holt,

2014 BCSC 1969

Date: 20141021

Docket: 48055

Registry: Vernon

Between:

Jeffrey Mark Louis Englehart

Plaintiff

And

Mark Gene Holt, Tara Lynn Holt and

Advanced Backhoe Ltd.

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 164 on February 5, 2015

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:

R.M. Moffat

Counsel for the Defendants:

R. Burke

Place and Dates of Trial/Hearing:

Kelowna, B.C.

September 18-20, 23-27, 2013

February 3 and 4, 2014

Place and Date of Judgment:

Vernon, B.C.

October 21, 2014

Introduction

- [1] The plaintiff Jeffrey Mark Louis Englehart and the defendants Mark Gene Holt and Tara Lynn Holt are owners of adjacent properties in Vernon, B.C. Advanced Backhoe Ltd. is a private company controlled by the Holts. Prior to any of these parties becoming owners, easements were registered on the properties and these easements affect and attach to the areas known as Parcel "A", "B", "C" and "D".
- [2] This case arises out of a dispute between the parties regarding the defendants' use of an area of land on the plaintiff's property which includes Parcel D. For the purpose of constructing an elevated road, the defendants arranged for a large quantity of fill to be placed on the plaintiff's land, both inside and outside the boundaries of Parcel D.
- [3] This case focusses on the proper interpretation of the easements and whether there was a separate contract between the parties relating to the construction. If the construction was not permitted under the easements or a contract, then the plaintiff claims compensation on the basis of trespass, nuisance, and his property rights.
- [4] For the reasons that follow, I would partially allow the plaintiff's claim. I conclude that no easement, contract, licence or other authorization granted the defendants the right to construct the road to its current specifications.

Background

The Relevant Properties

- [5] The properties in question are located in Vernon off Sutton and Spalding Roads. These two properties were formerly one property owned by previous owners, the Dase family. The Dase family subdivided that property to create the two properties owned by these parties, Lots 1 and 4.

- [6] A clear mental image of the properties is very important to understanding the issues in this case. Lot 4 is directly north of Lot 1, so that the southern border of Lot 4 is the northern border of Lot 1.
- [7] When the Dase family initially subdivided the land the first step was to create Lot 1 and leave a larger parcel, Lot 23, to the north. On or about May 2, 2005, as part of that subdivision, the Dase family registered the easements that are the focus of this litigation. Then Lot 4 was created from Lot 23, the larger parcel of land to the north of Lot 1. Sutton Road is a short north-south public road. Its northern terminus point connects with a narrow panhandle at the western boundary of Lot 4. The southern terminus of Sutton Road is an intersection with Spalding Road, which is the closest public road to these properties. Both Lot 1 and Lot 4 use Sutton Road as the most common point of entry.
- [8] To the west of Lot 1 and to the southwest of Lot 4, there are four other residential lots. Sutton Road is immediately west of these residential lots.
- [9] Most of the western boundary of Lot 1 is directly east of these four residential properties. However, Lot 1 has a narrow panhandle at its southwest corner adjacent to the southern border of the Bohn residence, the southernmost property of the four residential properties. This panhandle connects to Spalding Road at the eastern terminus of Spalding Road which is also the southern terminus of Sutton Road. This junction serves as the entry point to Parcel D and to Lot 1 generally. It is where the driveway for Lot 1 begins. In short, it is the only point of access to Lot 1.
- [10] Although Lot 4 directly connects to the terminus of Sutton Road, there is no evidence indicating there is or has been a private road or driveway connecting the defendants' residence to Sutton Road at that point.
- [11] Lot 1 is sloped with its high ground to the east and low ground to the west. There is a level area in the upper eastern part of the property where the plaintiff's residence is located. From that area the grade is generally consistent, meaning that as a person moves from east to west he or she goes more or less steadily downhill. Eventually the land evens out and the western portion of Lot 1 is again generally level.
- [12] Lot 4 also has what has been referred to as an "elevated bench" on the eastern part of the property. The natural slope from east to west described above begins to the west of this elevated bench.
- [13] The plaintiff's residence is located on the elevated bench on Lot 1 and was already constructed when the plaintiff purchased it in or about May 2006.
- [14] Lot 4 was purchased by the Holts in or about March 2007. There was no residence in existence on Lot 4 at the time of purchase and no residence was subsequently constructed. There was, however, a driveway on Parcel D which provided access to the lower portion of Lot 4 with a branch beginning on Parcel D to the elevated bench on Lot 4.

The Easements over Lots 1 and 4

- [15] Two easements were registered in 2005 on the titles of the subject properties as part of the development by the Dase family. The easements affect four portions of Lots 1 and 4 identified as Parcels A, B, C and D. The easements are registered with the Land Title Officer under numbers KX053148 ("Easement 148"), which affects Parcel A on Lot 4, and KX053149 ("Easement 149"), which affects Parcels B, C and D on Lot 1.
- [16] Parcel A is an irregular shape on the southeast section of Lot 4 that connects to the boundary of Lot 1.
- [17] Parcel D is an L-shaped area on Lot 1 and includes the panhandle portion of Lot 1 at its southwest corner connecting to Spalding Road. It then runs north-south across Lot 1 from its southern boundary to its northern boundary with Lot 4. Its north-south section is on the sloped portion of Lot 1; that is to say, the level portion of Lot 1 is to the west of Parcel D. Parcel D is twenty meters wide on its north/south leg.
- [18] Parcels B and C are not of importance to this litigation.
- [19] Easement 149 grants the owners of Lot 4 the use of Parcel D for the following permitted purposes:
3. PERMITTED USES -- Parcel "B" and "D".
- 3.1 The Transferee is permitted to use Parcel "B" and Parcel "D", with or without animals and expressly including motor vehicles, for the following:
- (a) to construct and maintain a roadway;
 - (b) to pass and repass be day or night for all purposes over and upon, for ingress and egress to the Dominant Tenement;
 - (c) to construct, install, maintain, alter, repair and replace from time to time on, under and within" Parcel "B" and Parcel "D", a water pipeline and Works necessary, useful or incidental to this use
 - (d) to convey water through the above pipeline, Works and services;
 - (e) to have underground service ducts for electricity, water, gas, sewage and drainage;
 - (f) to have above ground electrical power lines, power poles, and electrical power works, cable television lines, telephone lines and their respective Works and services generally;
 - (g) to convey and transport through the Works or any part thereof sewage effluent, water, waste water and other matter ordinarily transported and conveyed through such Works;
 - (h) to enter onto Parcel "B" and Parcel "D" together with machinery, material, vehicles and equipment as may be necessary from time to time for the full enjoyment by the Transferee of the rights hereby granted;

- (i) to break open the surface of Parcel "B" and Parcel "D" and excavate Parcel "B" and Parcel "D" for the purposes referred to this paragraph, provided however, that the Transferee must, within a reasonable time after making these excavations, fill in all these excavations and restore the surface of the Parcel "B" and Parcel "D" as nearly as may be practicable under the circumstances, to the condition in which it was found before the start of these excavations;

3.2 Public road dedication. If, at any time, the Transferee requires dedication of Parcel "B" and Parcel "D" as a public roadway for purposes of the subdivision of the Dominant Tenement and the dedication of the Parcel "B" and Parcel "D" as a public roadway by the Transferor, then the Transferor must, at the request of the Transferee, execute such plans and consents as may be required by any applicable regulatory authority to dedicate the Parcel "B" and Parcel "D" as a public roadway and upon such dedication this Easement must be released from the Servient Tenement.

[20] Under the heading "Interpretation", clause 9.3 reads as follows:

9.3 The exercise of the rights and use granted and permitted herein specifically include the following uses: alter, construct, dig, enter, improve, inspect, install (including install underground), maintain, operate, place, reconstruct, regulate, remove, repair, survey; together with all other works necessary, useful or incident to the above uses.

[21] These rights are granted to the owner of Lot 4 (the "dominant tenement") to be used "in common" with the owner of Lot 1 (the "servient tenement"). In the registered easements, the Dase family explicitly reserved the servient tenement's rights to use the easement area:

2.1 Grant. The Transferor does hereby grant, convey and confirm unto the Transferee, forever in common with the Transferor, the full and free right and liberty for the Transferee to use each Parcel Easement for the particular uses defined below. Provided, however, that the Transferee will not in any way obstruct the passage of the Transferor over the Easement Areas.

2.2 Sharing. The Transferor reserves unto himself the rights expressed herein in common with the Transferee but not so as in any way to obstruct the passage of the Transferee over the Easement Areas.

[22] There is considerable similarity in the terms, language and structure of the two easements. Since Easement 149 concerns the multiple easement areas of Parcel B, C and Parcel D, and Easement 148 concerns only one easement area, there are some minor differences. However, the only substantive difference between them that is relevant to road construction is that Easement 148 does not have an equivalent to clause 3.2.

The Roads and Driveways on the Properties

- [23] The residence on Lot 1 is located at the northeast corner on the elevated bench near the eastern boundary of Lot 1. At the time of the plaintiff's purchase the driveway to the home began at Spalding Road and travelled east over a portion of Parcel D, then angled across the slope on the property in an east-of-north direction, and then turned back approximately 160 degrees near the top of the slope, and drove straight towards the residence. The 160-degree turn extends onto Parcel A.
- [24] This driveway on Lot 1 had an uphill grade as it left Spalding Road but particularly as it turned north and approached the 160-degree turn on Parcel A. It was sufficiently steep that without proper clearing equipment, the plaintiff was unable to use the driveway in the winter months. The surface material on the plaintiff's driveway was usable but not ideal.
- [25] Also in existence on Lot 1 at the time of the plaintiff's purchase were other relatively undeveloped roads or pathways. The purpose of these is not entirely clear on the evidence, but at least two of them extended across Lot 1 onto Lot 4. Aerial photographs taken in June 2000 suggest that, prior to the development, these pathways provided access to various parts of the then-larger Lot 23 with some landing areas on the eastern edges, including what became the building site for the residence on Lot 1.
- [26] One of the two pathways crossing from Lot 1 to Lot 4 primarily followed the shape of Parcel D. The other followed a similar path to the driveway leading to the Lot 1 residence; that is, outside of Parcel D to its east but lower than the driveway leading to the residence on Lot 1. Photographs show that this pathway crossed Parcel D at an uphill grade as it moved northward from the southern boundary of Lot 1 and that it was closer to level towards the northern boundary of Lot 1. In other words it gained most of its elevation on the southern portion of Lot 1.
- [27] After the defendants purchased Lot 4 in 2007, Mr. Holt brought in fill and placed it on Lot 4 in the general area near Parcel A. Parcel D was used by the defendants as the driveway and point of access to Lot 4. There was an elevation gain from the northern boundary of Parcel D (the boundary where Parcel D meets Lot 4) to where that fill was placed. However, this elevation gain was not quantified in any of the evidence nor is there any evidence that measures or estimates the grades before and after the road construction at issue in these proceedings was performed.
- [28] The adjoining property to the south of Lot 1 was purchased by Mr. McCreight in 2007. He began construction of his residence in the spring of 2009. His driveway was constructed along the southern boundary of Lot 1.

The Road Construction by the Defendant Mr. Holt

- [29] In September 2009, the plaintiff and the defendant Mr. Holt discussed the placement of additional fill on Parcel D. At that time the availability of the fill had not been confirmed. The content and legal significance of those discussions is one of the principal disputes in this litigation. I will address the conflicts in respect of this discussion later in the analysis section of this decision but it is clear that the discussion touched on the subject of Mr. Holt placing fill on Parcel D to alter the elevation of its surface. The conversation also touched on the subject of modifications to the plaintiff's driveway and the area in between the eastern boundary of Parcel D and west of the plaintiff's driveway.
- [30] Because of the general slope of the properties, elevation gain is necessary to access the elevated bench areas on the eastern parts of Lots 1 and 4 when approaching from the west. Raising the surface on Parcel D reduces the amount of elevation gain that is needed between the northern boundary of Lot 1 and the elevated bench area on Lot 4; that is to say, it would reduce the grade of the driveway on Lot 4 by spreading the necessary elevation gain over a longer distance.
- [31] No evidence was presented as to the viability of accessing that elevated bench area on Lot 4 from the panhandle of Lot 4 that connects to Sutton Road.
- [32] Mr. Holt did in fact secure a source of a large volume of fill material and arranged for its placement onto Lot 1. Some material was placed on Parcel D in the fall of 2009. Beginning in or about April 2010 and concluding in May 2010, a substantial volume of fill material was brought onto Parcel D and also to the east of Parcel D below and to the west of the plaintiff's driveway. Some portion of the fill was also placed to the west of Parcel D at the toe of the slope that was created.
- [33] The scope of the work carried out has been described by lay witnesses, including the parties, and experts, including surveyors and engineers. There is conflict in some of their evidence.
- [34] The effect of the work, however, was to significantly raise the surface of the ground in Parcel D. A surveyor, Scott McPherson, estimated the volume of fill material at 4,100 cubic meters, although he acknowledged that estimate is not precise at all. The elevation change that resulted from the work is not uniform throughout Parcel D and is the most significant at the northern end of Parcel D, but it is as much as six meters. From east to west the road surface is generally level. The result is to create a large step in the natural slope of Lot 1 and a slope that is steeper than natural on the west side of Parcel D (the "fill slope") before the natural slope again appears. This significant alteration of the natural slope is the key element of this dispute.
- [35] The fill slope resulting from the disputed construction is described in the defendants' report prepared by Mr. Williams from Onsite Engineering Ltd. as follows:

(p. 3 of Exhibit 7)

The driveway has side slopes of 65 to 75 percent approximately 12 to 16 metres long.

- [36] In a report for the plaintiff from EBA Engineering (Exhibit 6), the slopes are described as having a ratio of 1.6 to 1.5 parts horizontal to 1 part vertical.
- [37] Mr. McPherson surveyed the land and that survey indicates the height of the fill slope at the northern boundary of Lot 1 as being 20 meters high.
- [38] Parcel D is 20 meters wide in its north-south leg. The expert evidence indicates that with appropriate compaction and materials, the maximum stable gradient of the fill slope would be a ratio of no more than one vertical measure to two horizontal. If measured in meters, that would be two meters horizontal to every one meter vertical.
- [39] The plaintiff and defendant had communication during the construction. There is significant disagreement about the content of that communication but the height of the road surface was discussed.
- [40] The plaintiff was present at points in time when fill was being delivered. At those times, he did give the arriving trucks some direction with respect to the placement of their loads. Again, the parties give differing versions about the frequency and timing of these occasions.
- [41] On approximately May 16, 2010 the plaintiff objected to Mr. Holt that the road on Parcel D was too high. By approximately May 25, 2010 the placing of fill on Lot 1 had stopped. On approximately September 24, 2010 the plaintiff demanded that Mr. Holt stop any further work on the roadway. Since then no further work has been done.
- [42] There has been some deterioration on the land that was affected by the road construction work in the form of settling, erosion and sloughing. This has included material escaping the boundaries of Parcel D to the west onto the lower portions of Lot 1.
- [43] The plaintiff claims relief on the basis of the law of negligence, nuisance, and his property law rights. The plaintiff has also claimed damages for trespass although trespass was not specifically claimed in his filed pleadings. This issue is discussed in greater detail below.

Issues and Positions of the Parties

Preliminary Issue: Amendment of the Pleadings

- [44] As a preliminary matter, I will first deal with the plaintiff's application to amend the pleadings.
- [45] In the plaintiff's filed pleadings, relief is claimed on the basis of nuisance, negligence, and the plaintiff's property law rights under the easement. These pleadings made reference to trespass but did not seek any specific relief based on the allegations of trespass. Despite the absence of a claim, however, plaintiff's counsel expressly requests damages for trespass in his written submissions filed in advance of oral submissions.

- [46] The defendants objected to the plaintiff's request for damages for trespass.
- [47] In response to the defendants' objection, the plaintiff brought an application to amend the pleadings to include a claim in trespass as an alternative cause of action. The parties agreed to proceed on the basis that there would not be a written notice of application and they would incorporate their submissions on the issue of the amendment into their final written submissions. Those submissions have been received.
- [48] The plaintiff asserts that an amendment is required to have the pleadings conform to the evidence. They also say that having referenced trespass in the pleadings and taking into account all the circumstances it would be appropriate to include a prayer for relief for trespass.
- [49] The defendants respond that if the pleadings had included a claim for trespass, additional evidence would have been adduced to address the extent to which the defendants are responsible for any trespass to the west of Parcel D. They also argue that if such trespass occurred, there is a question of whether the plaintiff or the defendant caused the alleged trespass, and evidence could have been brought to answer this question.

Substantive Issues

Overview

- [50] Although various remedies are claimed relying on a range of causes of action, the central issue in this litigation is the determination of the limits (particularly limits on the right to raise the terrain) and construction standards on the road work the defendants are able to carry out both outside of and within Parcel D.
- [51] The plaintiff argues those limits are defined by two separate agreements that bind the parties. The first agreement alleged by the plaintiff is an oral contract. He argues that the dialogue with Mr. Holt in September 2009 resulted in a contract that specifically addressed elevation of the proposed road. He says that contract incorporated the terms of Easement 149 in respect of quality and standards of construction. This requires a determination of whether a binding contract was indeed entered into and, if so, what its terms are.
- [52] The second relevant agreement is Easement 149. Obviously it is necessary to interpret Easement 149 to determine what limitations and obligations it creates in respect of elevation and construction standards.

Oral Contract

- [53] The plaintiff argues that a contract was created in the September 2009 discussion between the plaintiff and Mr. Holt. He says that contract contained various express and implied terms. Three of those terms are:

- that Mr. Holt would construct the roadway on Parcel D to an agreed height based on specific reference points (approximately 10 feet above natural or existing elevation);
- that Mr. Holt would construct a level bench to the east of Parcel D for the plaintiff's benefit; and
- that Mr. Holt would improve the plaintiff's driveway for all-season use.

[54] The plaintiff also says the contract incorporated the terms of Easement 149 including its description of permitted uses, and that the contract therefore incorporated a requirement that the defendants' road construction comply with public road standards.

[55] The defendant Mr. Holt, says that there was no oral contract because there was no consideration and the parties did not have an intention to contract.

[56] In the alternative he says that if there was a contract, there were no implied terms that incorporated the easement terms and there was no limit on the height to which the defendant could construct the road. Accordingly, if there was a contract it was not breached.

Easement Interpretation

[57] The plaintiff asserts that the correct interpretation of Easement 149 must take into account the "factual matrix" in existence at the time the contracting parties created the easement. The plaintiff argues that Easements 148 and 149 created identical "in common" rights benefitting both Lot 1 and Lot 4, meaning that the rights conveyed by the easements were to be held in common by both the servient tenement and the dominant tenement and their transferees and assigns. The plaintiff argues that these easements were made to facilitate possible future subdivision and development of either or both Lots 1 and 4. The plaintiff says that clause 3.2 of Easement 149 was created in contemplation of such subdivision and that clause necessarily constrains the height to which any road surface could be raised.

[58] The plaintiff also says that clause 3.2 requires that any road construction be completed according to public road standards.

[59] The defendants argue that the terms of Easement 149 are clear and unambiguous and that there is no need to look beyond the language of the easement itself for its interpretation. They say that reading clause 9.3 in conjunction with clause 3.1 makes it clear that there is no constraint on the plaintiff as to the height of the road surface within Parcel D.

[60] They also argue there is no requirement that the road be built to public road standards.

[61] Further, the defendants say that the plaintiff's reliance on the "in common" language is flawed. Specifically, the defendants argue that even if the rights and obligations under the easement could be interpreted in the fashion argued by the plaintiff, that interpretation would have only bound the original parties to the easements, not any subsequent parties, including the parties to this litigation.

Negligence

- [62] Separate from the issue of the standard to which the road was to be built is the question of whether the actual construction was negligently completed.
- [63] The plaintiff alleges negligence in the construction of the road by failing to use suitable material and adequate compaction to provide sufficient stability in the slopes and in the road surface itself.
- [64] The defendants acknowledge that there are deficiencies in the current state of the road surface but say they can be corrected and would have been corrected by Mr. Holt had the plaintiff not prohibited his re-entry onto Parcel D to complete the work. In effect the defendants say there was no negligence in construction but rather it is an unfinished project.
- [65] The defendants further assert that since they were not required to build the road surface to public road standards only modest remediation is required to bring the driveway to the standards appropriate for a private driveway.

Nuisance

- [66] The plaintiff also alleges nuisance on an ongoing basis given issues with the erosion and instability of the fill slope created by the works carried out by the defendants. He also says that excessive fill placed outside of the western boundary of Parcel D is a nuisance.
- [67] The defendants make similar arguments to those advanced in respect of the negligence issue. They say that when remediation work is completed the problems the plaintiff refers to here will be addressed. They say that the complaints would have been addressed long ago if the plaintiff had not prevented them from carrying on to complete the work.

Analysis

Pleadings Amendment

- [68] I do not intend to fully address this issue as it is not necessary given my findings below. If it was necessary to do so I would allow the amendment.
- [69] The issue of trespass was certainly raised in the evidence. Indeed in this case it is almost inextricably woven into the circumstances. The dispute about how and why fill came to be placed outside of Parcel D was dealt with by the parties at length in the evidence and argument.
- [70] The defendants assertion that they may have presented their case differently was not supported by any specific explanation of how that would have been so. One witness who may have had evidence on the point was Mr. Knight, the contractor who hauled the fill to the site. The plaintiff was highly critical of the defendants not calling Mr. Knight and asked that an adverse inference be drawn. The defendants responded to that request by indicating they

had hoped to call Mr. Knight but could not produce him as a witness. They attempted to rely on hearsay evidence of what Mr. Knight had said.

Work Outside of Parcel D

Overview

- [71] This case is unique because the work at issue was not confined to the easement area. The work could not have been at its scale and design if so confined.
- [72] As noted in para. 37 above, Parcel D is 20 meters wide in its north-south leg. The current slope on the west exceeds the 2:1 ratio and is supported on the east by the natural slope of Lot 1 because the fill extends outside of the easement area.
- [73] No specific calculation or measure was presented in the evidence, but it is obvious that the road surface must have a certain width to be usable as a driveway.
- [74] If the work was confined to the boundaries of Parcel D and constrained by the 2:1 fill slope ratio set out in the evidence of Mr. McPherson then the result would look much different. Unfortunately the engineering evidence does not set out just how high the road surface could be if so constrained. The limitations would be easy to identify if Parcel D was flat and level. For every meter the road surface is raised it must narrow by 4 meters, meaning 2 meters on each side. Given the 20 meter width of Parcel D the surface would narrow to a knife edge width at an elevation of 5 meters. If for example a useable road surface needs to be 4 meters wide it could be raised by no more than 4 meters or else it would not comply with the 2:1 fill slope ratio. Simply put, the work could not be done to its present elevation without having gone outside of the easement area.
- [75] As indicated above, the work was not constrained to Parcel D and fill was placed on the western slope of Parcel D. The parties offer very different explanations for why the work went outside the boundaries of Parcel D.
- [76] The plaintiff asserts that there was an oral contract between the parties. The defendants assert that there was no such contract but that the plaintiff authorized or directed the fill to be placed on Lot 1. I will discuss each argument in turn.

Was There an Oral Contract between the Plaintiff and Mr. Holt?

- [77] The first question is whether or not an oral contract was entered into between these parties. If there was an oral contract the next question is whether it effectively modified the nature and extent of work the defendants could carry out on Lot 1 separate from the work that is authorized by Easement 149.

- [78] The plaintiff says that he and Mr. Holt met and discussed the prospect of Mr. Holt bringing fill onto Parcel D and elevating the road. The plaintiff had an interest in improving his driveway and creating a level area to the east of Parcel D or a bench that would benefit him. As mentioned above, due to the natural slope of Lot 1, the plaintiff had difficulty using his driveway during winter and I am satisfied that a level bench and an improved driveway would be of considerable benefit to the plaintiff.
- [79] The plaintiff also says that he agreed to facilitate Mr. Holt's desire to elevate the road but only to a limited degree. He says that they discussed the height by reference to some survey stakes in place at the north end of Parcel D, and the height of the concrete slab of the garage in Mr. McCreight's construction to the south of Lot 1. The defendants acknowledge that there was a meeting and some discussion about the proposed construction but denies entering into any agreement. There was considerable disagreement between the plaintiff and the defendants on this issue.
- [80] Mr. Englehart in my view tried to be accurate with his evidence and he was generally credible. In addition, his evidence conveyed a logical course of conduct based on the discussion and his observations of the work as it progressed. He testified that in September 2009 he spoke with Mr. Holt about his desire to raise the surface of the road located on Parcel D. He stated that they discussed the parameters for the work and elevation was a concern for the plaintiff from the outset. He says that periodically during the work he spoke to Mr. Holt and that Mr. Holt repeatedly assured the plaintiff that the elevation would accord with the September 2009 discussion.
- [81] I find Mr. Englehart to be a credible witness and I believe that his testimony accurately reflects the general timeline of discussions between him and Mr. Holt, and that he has fairly represented the contents of their discussions.
- [82] Mr. McCreight, the property owner of the land adjacent to Lot 1, gave evidence supporting the plaintiff's position. Mr. McCreight testified that in April 2010 he and Mr. Holt had a conversation and that during this conversation Mr. Holt pointed to the northwest stake on Parcel D and identified that as the new height to which the road would be built. Counsel for the defence agrees that Mr. McCreight was generally honest but argues that he was mistaken. I agree that he was honest but I do not conclude he was mistaken. The substance of Mr. McCreight's evidence generally supports the plaintiff's depiction of events, and I prefer the evidence of Mr. McCreight to that of Mr. Holt where they are in conflict.
- [83] In contrast, I did not find Mr. Holt to be a credible witness. In his general presentation he was frequently argumentative. He often was not very responsive to the questions put to him and instead chose to say what he thought the Court should hear. When challenged on particular statements attributed to or made by him that were contradictory to his trial evidence he would tend to avoid providing any meaningful response by asking questions himself, trying to divert to other subjects or offering weak explanations to try to reconcile the inconsistencies. Overall, he seemed willing to say what he thought would help him

regardless of its accuracy.

- [84] With respect to the existence of a contract, Mr. Holt adamantly denied that any agreement existed between him and the plaintiff. In his trial testimony he said he had been very careful in the discussions with the plaintiff in September 2009 to avoid entering any agreements. Specifically, he stated that "I knew I had to approach Englehart in a way that I wouldn't corner myself into any sort of contract or agreement I knew my property had rights. I was very skeptical about saying the wrong words I was in the conversation just to offer Mr. Englehart dirt to improve his lands There was no other speculations at that point in time". He was emphatic in saying that his conversation with the plaintiff did not generate any agreement.
- [85] This testimony at trial was in direct conflict with Mr. Holt's evidence at examination for discovery, in which he quite clearly described having entered into an agreement with the plaintiff regarding the construction of the road. He set out its terms at discovery. It is impossible to reconcile the evidence at trial with the discovery evidence. His response at trial when confronted with the inconsistency was to become angry and frustrated and suggest that there could not be an agreement unless he and Mr. Englehart shook hands. He testified that his discovery evidence was not true and then said he should have used the word "discussion" not "agreement". However, since Mr. Holt's testimony at trial was that he was extremely conscious of not entering any agreement in September 2009, it makes no sense that he would choose the wrong word at his discovery in March 2013 to describe what had occurred. Instead, I conclude that at his discovery he wanted to give evidence that he thought would advance his case, but as the trial unfolded he recognized that such evidence could be problematic to his case and so he tried to recast it.
- [86] As noted above I prefer the plaintiff's evidence as to the discussion on the limits of the construction and about the scope of the proposed work. The question is whether a contract was formed by the discussions between the plaintiff and Mr. Holt.
- [87] A contract is not validly formed unless the parties have a shared intent to create a contract and be bound by legal obligations. The intention to form a contract and assume binding obligations was summarized as follows by Hall J. in *British Columbia (Minister of Transportation and Highways) v. Reon Management Services Inc.*, 2001 BCCA 679:
24. The issue of the formation of a contract has about it a quality of the objective. The question to be asked is whether the reasonable observer, examining the interchanges between the parties, would conclude that a contract had been entered into. More particularly, in the instant case, would the reasonable observer conclude there was a settlement achieved?
25. As this Court observed in the case of *Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62, the issue of whether a contract has come into existence must be kept separate from the question as to what action may be required to implement the contract. It is trite law that a contract involves an offer by one party and acceptance of the offer by the other party. The parties must, on the evidence, evince their intention to be legally bound in a contractual

relationship. I believe the matter is well put by Sigurdson J. in the case of Witzke (Guardian ad litem of) v. Dalgliesh, [1995] B.C.J. No. 403 at paras. 58-60 of his Reasons:

In assessing the enforceability of an agreement, the court must balance a variety of opposing concerns. For example, the sanctity of contract must be weighed against the fairness of holding a party to a bargain made in consequence of a mistake. The resulting approach is described in S.M. Waddams, *The Law of Contracts*, 3d ed. (Toronto: Canada Law Book Inc., 1993) c. 3 at 97, as the "objective theory of contract formation." The author explains: "The principal purpose of the law of contracts is to protect reasonable expectations engendered by promises."

If it would appear to the reasonable person that the parties were in agreement as to a contract and its terms, then a contract would exist at common law. As stated in *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that the other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

In M.P. Furmston, ed., *Cheshire, Fifoot and Furmston's Law of Contract*, 12th ed. (London: Butterworths, 1991) c. 8 at 248, the authors refer to the task of assessing the reasonable expectations as a determination of "the sense of the promise", in that the court "decides whether a sensible third party would take the agreement to mean what A understood it to mean or what B understood it to mean, or whether indeed any meaning can be attributed to it at all." In the latter situation, the ambiguity of the circumstances are such that the "sense of the promise" cannot be determined.

26. Sigurdson J. went on to observe as follows at para. 76 of his Reasons:

Where parties are at cross-purposes and the apparent agreement is capable of either interpretation, there is no agreement. In *Raffles v. Wichelhaus* (1864), 159 E.R. 375, the defendant purchased cotton from the plaintiff "to arrive ex "Peerless" from Bombay"; the defendant pleaded that he meant a ship called the "Peerless" which sailed from Bombay in October, whereas the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the "Peerless" which sailed from Bombay in December. Although the question being determined was procedural in nature, the court held:

There is nothing on the face of the contract to show that any particular ship called the "Peerless" was meant; but the moment it appears that two ships called the "Peerless" were about to sail from Bombay there is a latent ambiguity and parol evidence may be given for the purpose of shewing that the defendant mean one "Peerless," and the plaintiff another. That being so, there was no consensus ad idem, and therefore no binding contract.

[emphasis added]

[88] In this case, I find that the parties did not validly form a binding oral contract.

- [89] First, I am not satisfied that the parties had a shared intention to create legal obligations. The discussions between Mr. Holt and Mr. Englehart in September 2009 were premised on the pre-existing rights under the easements. They discussed the parameters of the work to be done and the plaintiff saw an opportunity to benefit from the availability of fill material and equipment. The defendant recognized that his construction of a road would be simplified if he had the ability to place fill outside the eastern boundary of Parcel D. Both parties had erroneous and unexpressed understandings of their rights and obligations under Easement 149 that influenced their conduct and made any actual consensus from the discussion impossible.
- [90] As indicated in *Reon Management Services*, the proper question is whether or not a reasonable observer would understand their actions as objectively creating a contract. Mr. Holt's characterization of the discussion is unreliable but Mr. Englehart's evidence does not satisfy me that a separate contract was created. He said in cross-examination that at the time of the discussions he did not consider that he and Mr. Holt were setting out mutual legal obligations. I am satisfied based on the testimony of both Mr. Englehart and Mr. Holt that neither party believed they were making a binding agreement. Their discussions were just that: discussions that cannot be construed as making a binding legal obligation.
- [91] Second, I am not satisfied that a valid offer occurred. A valid offer must contain the complete terms of the parties' agreement. However, at no point were the full terms ever communicated to Mr. Englehart. For example, the amount of fill, or whether or not fill would be available at all, was not confirmed during their discussion in September 2009. Though the parties may have shared a general understanding, they never had a shared intention concerning fundamental terms. The extent to which the plaintiff argues terms should be implied is demonstrative of this.
- [92] Third, I am simply not satisfied with the evidence. Mr. Englehart has failed to prove on the balance of probabilities that he had formed an oral contract with the defendant. The plaintiff could not recall sufficient details of the discussion. The argument that their discussion generated a binding contract is, in my view, attempting in hindsight to attach a level of formality to it that is not justified. I accept that the plaintiff and Mr. Holt did discuss road height, the construction of a level bench to the east of Parcel D and improvements to the plaintiff's driveway. However, these discussions alone do not indicate an intention to form a contract. In fact, no evidence indicates that the parties took any steps beyond mere discussions.
- [93] In the result, I am not satisfied on the balance of probabilities that the parties formed a binding oral contract.

Did the Plaintiff Authorize or Direct the Fill to be Placed on Parcel D and the Adjacent Land?

- [94] The defendant argues that there was no oral contract that allowed him to place material outside the easement area but instead says the plaintiff initiated that placement on his own. The plaintiff is very clear in his evidence that he agreed to some elevation increase and the placement of some fill to the east of Parcel D but nowhere near what the defendant actually did. As noted I accept the plaintiff's evidence in this regard.
- [95] The defendants have argued that Mr. Englehart authorized or directed the fill to be placed on Lot 1 outside of the easement area of Parcel D. The plaintiff did want a level bench area to be created to the east of Parcel D but at a specific elevation. Whatever acquiescence or direction the plaintiff gave regarding placement of the fill was given in the context of repeated assurances from Mr. Holt that the finished height would accord with the height benchmarks referenced in their discussion in September 2009. I do not accept the defendants' evidence or argument in this regard.
- [96] Mr. Holt testified that some fill material that encroached over the west boundary of Parcel D was placed on the plaintiff's property based on the plaintiff's directions to the fill hauler, Mr. Knight. However, the plaintiff denies this and the defendant did not call Mr. Knight as a witness. Separate from my conclusions as to Mr. Holt's credibility, Mr. Holt was not present for any of the communications between the plaintiff and Mr. Knight. His evidence relating to what Mr. Knight and the plaintiff discussed is inadmissible as hearsay. Even if I am wrong and the evidence could be admitted under the principled approach to hearsay I would give it minimal weight.
- [97] Mr. Holt also testified that some encroaching fill material was placed at the direction of the plaintiff given to the drivers hauling the material. One of those drivers was called by the defendant as a witness, Mr. Wale. Mr. Wale said that material was dumped on the last day of hauling. On that date, the plaintiff was away from the area and could not have given that direction.
- [98] The plaintiff did acknowledge being present when some fill was deposited but says he simply followed Mr. Holt's directions on where to direct the drivers and that he relied on Mr. Holt's assurances that the finished project would accord with their discussions. I accept the plaintiff's evidence that as more fill was placed on Lot 1 he repeatedly expressed his concerns about the amount and placement of fill to Mr. Holt.
- [99] Given the lack of credible evidence that the plaintiff directed the fill to be placed on his property outside of Parcel D, I am satisfied on the balance of probabilities that the encroaching fill was placed on Lot 1 at the direction of the defendant Mr. Holt.
- [100] The defendants have also argued that the plaintiff authorized them to place this encroaching fill on Lot 1 outside of Parcel D. They did not expressly rely on the concept of licence. Even if raised by inference, however, I would not conclude that the plaintiff granted Mr. Holt a licence to place fill outside of the easement area in the manner that he did. If there was a licence to place some fill then Mr. Holt exceeded the grant of that licence by building a road beyond the height benchmarks identified by the plaintiff and by

dumping excessive amounts of fill: see *Baird v. Salle*, 2008 BCSC 1232 at para. 52. As discussed above, I accept the plaintiff's testimony that he only agreed that Mr. Holt could elevate the terrain to the height of the slab on the McCreight property and the survey stakes and use a reasonable amount of fill to do so.

Did the Plaintiff Authorize the Road Construction to be Completed to its Final Height?

[101] For the same reasons discussed above, I find that the plaintiff did not authorize the defendants to construct the road on Parcel D to the finished height.

[102] Mr. Holt testified that during discussions about the height of the road in September 2009, he felt that under the terms of Easement 149 he was entitled to raise the road surface as much as he wanted. As a result he did not seek any authorization. He says there was nothing in his discussions with the plaintiff about any specific height or reference points. Mr. Holt then testified that in a subsequent conversation with the plaintiff Mr. Holt referred to a log with some flags above it as the height to which he was building, which he says is the height to which the road was actually raised.

[103] This testimony conflicts with Mr. Holt's evidence at discovery. During discovery, Mr. Holt stated that he had told the plaintiff of his intention to build the road to the height of the northeast corner pin of Parcel D. However, the flagged logs referred to in his testimony are significantly higher than the height of the northeast corner pin of Parcel D. Mr. Holt did not provide any satisfactory explanation for this inconsistency.

[104] This inconsistency again indicates that Mr. Holt is not a reliable witness. Based on all the circumstances I find it is reasonable to draw the inference that this contradiction in Mr. Holt's testimony was due to Mr. Holt believing that his defence would be best served by recasting his evidence at trial.

[105] In summary, I find that the plaintiff did not authorize the defendants to construct the road up to the finished height and that no contract, licence or other binding authorization applies to these circumstances.

Do the Terms of Easement 149 Permit the Defendants' Road Construction Work and Placement of Fill?

The Validity of the Easement

[106] Neither party argues that the Easement 149 is not valid. Nonetheless some observations regarding the law on the validity of easements is instructive because it is relevant to their interpretation. Circumstances can arise where the scope of use in an easement is too broad to be enforceable. In *Robinson v. Pipito*, 2014 BCCA 200, the Court said at para. 44:

As demonstrated by the jurisprudence cited by counsel and the decisions of this Court in *Grant*, *Wong*, and *Granfield*, in particular, the courts have been loath to invalidate instruments and have sought to interpret grants in such a manner as to preserve some proprietary rights in the hands of the owners of servient tenements. Where that cannot be done without doing violence to the easement agreement, grants that practically curtail any such interests will be set aside.

[107] I note that the obligation in clause 3.2 of Easement 149 states that the dominant tenement "must, at the request of the Transferee, execute such plans and consents as may be required by any applicable regulatory authority to dedicate Parcel 'B' and Parcel 'D' as a public roadway and upon such dedication this Easement must be released from the Servient Tenement". I also note that the execution of such plans and consents might extinguish the servient tenement's title or exclusive possession of Parcel D by actually or effectively transferring Parcel D to a governmental authority at the instigation of the dominant tenement.

[108] To the extent that the exercise of clause 3.2 would prevent the servient tenement from preserving any proprietary rights over the easement area, this provision may not be valid. The British Columbia Supreme Court has generally held that it is inappropriate to adjudicate hypothetical disputes, and particularly hypothetical disputes over the interpretation of an easement, which frequently implicate the rights of third parties and involve guessing what future relevant facts will occur: see *McKinnon v. Canada (Attorney General)*, 2002 BCSC 1053 at paras. 35-38. Therefore, since the issue of validity was not argued I decline to make any ruling on it.

Proper Principles of Interpretation

[109] With no contract or other enforceable authorization in place the only source of authority or right for the defendants to do any work on Lot 1 is Easement 149.

[110] The applicable law regarding interpretation has been the subject of recent comment by our Court of Appeal in *Robinson*. In a section of the decision headed "First Principles" the Court of Appeal included these comments:

[18] This Court in *Grant v. MacDonald* (1992), 68 B.C.L.R. (2d) 332, adopted Lord Evershed's description of the characteristics of an easement in *Re Ellenborough Park*, [1955] 3 All E.R. 667 at 673:

- (i) There must be a dominant and a servient tenement:
- (ii) an easement must accommodate the dominant tenement:
- (iii) dominant and servient owners must be different persons: and
- (iv) a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.

[The third requirement has now been abrogated by s. 18 of the Property Law Act, which provides that owners in fee simple may grant easements to themselves.]

[19] Mr. Justice Seaton, for the court, addressing the last criterion in Grant, accepted the proposition that where no proprietary interest or right in the property described in the easement is reserved to the servient tenement, the agreement does not constitute an easement. Adopting the words used in *Shelf Holdings Ltd. v. Husky Oil Operations Ltd.*, [1989] 3 W.W.R. 692, 56 D.L.R. (4th) 193 (Alta. C.A.), also cited by the judge in this case, he held that an easement cannot amount to a claim "quite at variance with the property rights of the servient owner."

[20] Every easement will, to some extent, exclude the servient owner from the property and prevent the servient owner from exercising some proprietary rights over the property reserved for the easement. The degree of occupation or possession, and the question whether that degree of occupation or possession is compatible with the existence of an easement, should be governed by the document conceding the grant. The conduct of the parties in the purported exercise of the rights granted under the easement is not helpful as a guide to interpreting the document; they may misapprehend their legal rights.

[111] At para. 34 reference was made to *Granfield v. Cowichan Valley (Regional District)* (1993), 79 B.C.L.R. (2d) 303, rev'd in part (1996), 16 B.C.L.R. (3d) 382 as follows:

The Court referred to two "pillars" upon which any judgment in a matter of this kind must be founded, one of which is that the grantee of an easement has the right granted to him and no more. The Court cited with approval a passage from *Halsbury's Laws of England*, vol. 14, 4th ed., (London, UK: Butterworths, 1980) at 26 that reads, in part as follows:

The nature and extent of an easement created by express grant primarily depend upon the wording of the instrument. In construing a grant of an easement regard must be had to the circumstances existing at the time of its execution; for the extent of the easement is ascertainable by the circumstances existing at the time of the grant and known to the parties or within the reasonable contemplation of the parties at the time of the grant, and is limited to those circumstances

[112] When interpreting the terms of an easement, a court must first construe the intentions of the parties from the document itself. The court must determine what the parties intended by the language of the agreement, viewed objectively, in the circumstances in which the agreement was made: see *Burke v. Kroeker*, 2004 BCSC 27 at para. 17. As with any other legal document, the words of the easement must be interpreted in light of the whole document and the intention of the parties expressed therein: see *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489 at para. 20.

[113] In *Sherbinin v. Jackson*, 2011 BCSC 74, Fitzpatrick J. summarized the law regarding the proper interpretation of an easement in this way:

30. Interpretation of an easement is subject to the same principles of judicial interpretation as govern other documents. When interpreting an easement, the Court must have regard primarily to the words of the easement in determining the intention of the parties. However, if there is ambiguity, the Court may also have regard to the surrounding circumstances when the document was made: *Avanti Mining Inc. v. Kitsault Resort Ltd.*, 2010 BCSC 1181 at paras. 39 and 61; *Granfield v. Cowichan Valley (Regional District)* (1993), 79 B.C.L.R. (2d) 303, 31 R.P.R. (2d) 303 (S.C.) rev'd (1996), 16 B.C.L.R. (3d) 382, 1 R.P.R. (3d) 211 (C.A.).
31. Surrounding circumstances may not include evidence of the subjective intent of the parties. Moreover, evidence of surrounding circumstances must not be allowed to overwhelm the plain language of the document: *Avanti*, at paras. 43, 61.
- [114] It is unnecessary to consider any extrinsic evidence if the document is clear and unambiguous on its face: see *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at paras. 55-56. However, the words of a legal document must be read in the context of the surrounding circumstances that were prevalent at the time of contracting: see *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70 at para. 17.
- [115] It is at least arguable that the terms of the easements in this case are capable of bearing more than one meaning. It is therefore appropriate to review the factual matrix that existed at the time when the easements were created to assist with interpretation.
- [116] This approach was used by the Supreme Court of Canada in *Laurie v. Bowen*, [1953] 1 S.C.R. 49. In this case, the Court construed the meaning of an agreement that granted a right of way to the respondent. To help the Court construe the terms of the easement, the Court examined certain elements of the factual matrix that existed at the time of the easement's creation. Kellock J. explained this interpretive process as follows at p. 56:
- Just as the circumstances existing at the time of the grant may be looked at for the purpose of ascertaining the intention of the parties as to the dominant tenement and as to the location and termini of the way, the circumstances may also be looked at for the purpose of construing the conveyance as to the nature and extent of the rights conveyed.
- [117] The agreement in *Laurie* contained several ambiguities, including uncertainty as to what area of land was subject to the grant and uncertainty as to whether the grant constituted an easement or merely a personal licence. To determine the nature and extent of the rights conveyed, Kellock J. considered the circumstances existing at the time of the grant including the farm lanes being used, nearby buildings, use of the land and the possibility of future subdivision. I would adopt a similar approach in this case. Any ambiguity should be resolved by reading the provisions of the easements in the context of the factual matrix that existed at the time of their creation.
- [118] In *Bradshaw v. Engelson*, [1998] B.C.J. No. 3128 (SC), Shabbits J. found that the layout of the land and the history of road construction on and near the disputed properties was an important part of the factual matrix. Similar to the easement in *Bradshaw*, Easements 148

and 149 were created to govern properties that were intended to be subdivided and developed. It does not matter whether the contemplated development was likely or whether it may face regulatory impediments. Those conditions can change. What is important here is the intention or objective of the parties who executed the easements. In these circumstances, the circumstances that existed at the time of their creation are relevant to determining the intended meaning of the easements.

[119] Finally, even if a certain right is not expressly granted to the dominant tenement in an easement agreement, the dominant tenement may be entitled to exercise that right if it is reasonably necessary to use or enjoy the easement. This concept of ancillary rights was discussed in *Fallowfield v. Bourgault* (2003), 180 O.A.C 101. The Ontario Court of Appeal upheld an order requiring the defendants to remove a fence that restricted the plaintiff's use of an easement to a shared maintenance area. In the course of its decision, the court provided a review of the doctrine of ancillary rights in relation to easements, including the following comments at para. 11:

In interpreting the meaning and intent of an express easement, the concept of ancillary rights arises. The grant of an express easement includes such ancillary rights as are reasonably necessary to use or enjoy the easement. However, to imply a right ancillary to that which is expressly granted in the easement, the right must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable.

[120] I would summarize the law applicable to the interpretation of the easements as follows:

- An easement is valid if it has the easement characteristics referred to in *Ellenborough Park* as modified in *Robinson*: there must be a dominant and a servient tenement, the easement must accommodate the dominant tenement, and the rights granted must be capable of forming the subject of an easement.
- If the easement prevents the servient tenement from exercising occupation or possession over the easement area to such an extent that it is incompatible with the existence of an easement, the easement is invalid (*Shelf Holdings Ltd. v. Husky Oil Operations Ltd.*, [1989] 56 D.L.R. (4th) 193 (A.B.C.A.)). The determination of whether the grant is incompatible with an easement should be governed by the document conceding the grant (*Robinson*).
- The court must determine what the parties intended by the language of the easement agreement, viewed objectively, in the circumstances in which the agreement was made (*Burke v. Kroeker*, 2004 BCSC 27). As with any other legal document, the words of the document conceding the grant must be interpreted in light of the whole document and the intention of the parties expressed therein (*Group Eight Investments Ltd.*).
- It is unnecessary to consider any extrinsic evidence if the document is clear and unambiguous on its face (*Eli Lilly*). However, if there is an ambiguity, the court may have regard to the surrounding circumstances when the document was made (*Sherbinin*).

- The elements of the factual matrix that will help to construe an easement will vary based on the specific case at bar. In certain cases this could involve testimony from the parties (Wong v. Rashidi, 2011 BCCA 489) and in other cases it could involve the physical layout of the land and its historic uses (Laurie). However, this analysis should be limited to the circumstances that existed at the time of the easement's creation.
- The grant of an express easement includes such ancillary rights as are reasonably necessary to use or enjoy the easement (Fallowfield).

Application to the Case at Bar

[121] In accordance with these principles of interpretation, the necessary and logical starting point is to look to the language of the document itself. Clause 3.1 allows for excavation of the surface for the construction and maintenance of a roadway but it contains a limitation that ".the transferee must, within a reasonable time after making these excavations, fill in all these excavations and restore the surface of Parcel "B" and parcel "D" as nearly as may be practicable under the circumstances, to the condition in which it was found before the start of these excavations." This specific requirement that the dominant tenement perform remedial work for its excavations should be read along with clause 9.3, which, for convenience, is provided again below:

9.3 The exercise of the rights and use granted and permitted herein specifically include the following uses: alter, construct, dig, enter, improve, inspect, install (including install underground), maintain, operate, place, reconstruct, regulate, remove, repair, survey; together with all other works necessary, useful or incident to the above uses.

[122] In my view, clause 9.3 clarifies the rights that are provided by clause 3.1. The "rights and use granted and permitted herein" includes the road construction work permitted by clause 3.1(a), and clause 9.3 clarifies that certain ancillary rights that may be necessary or useful to complete the road construction work are also granted under the easement, such as the right to dig and alter the terrain. However, this general grant does not have any language indicating an intention to overrule clause 3.1(i), which requires remedial work in the specific circumstance that Parcel D is excavated. It is my view that to the extent that clause 9.3 and clause 3.1(i) are interrelated, clause 9.3 is general and is constrained by 3.1(i) which is specific regarding the scope of permissible use.

[123] The defendants argued that clause 9.3 effectively removes any constraint that may arise from clause 3(1)(i) and the use of words such as "construct" and "place" extend to the terms of clause 3(1)(i). If that argument were to succeed, it would essentially render clause 3(1)(i) meaningless. Words in a contract are presumed to have meaning, and the court should strive to give meaning to the agreement and reject an interpretation that would render one of its terms ineffective: see *Hanna Collision Repair (1984) Ltd. v. Insurance Corp. of British Columbia*, 2009 BCSC 1200 at para. 17). This principle applies in these circumstances. An interpretation that rendered clause 3(1)(i) meaningless would not be supported by the

language of the agreement.

- [124] Since there may be some ambiguity in the scope of the grant, it is appropriate to consider the circumstances in existence at the time that the easement was created. Looking at Easement 149 in the context of this factual matrix supports the above interpretation.
- [125] There is no direct evidence of the original parties' intentions or objectives but inferences can be drawn from the wording of the easements and the circumstances that existed at the time they were registered.
- [126] At that time Lot 4 did not exist. The dominant tenement at the time of registration was Lot 23 from which lot 4 was later subdivided. It is apparent from the existence of clause 3.2 that the parties to Easement 149 had in mind possible future development of at least Lot 23. There is no indication that their focus was on providing a driveway which maximized its elevation gain within Parcel D or that such a goal was even considered. In fact, since no residence existed on the property at the time when the easements were created, there is nothing to show that the principle concern was a driveway for a potential residence at all.
- [127] It is not clear that elevation of the road on Parcel D would assist any possible development of Lot 23 as it was or Lot 4. It may even serve as an impediment. There is simply no evidence on that point. However, I note that the creation of building lots on Lot 4 would likely include the lower westerly portion of Lot 4 and any road to such buildings would traverse Lot 1 on its lower natural elevation through Parcel D. It seems logical in these circumstances to infer that radically elevating the land on Parcel D could make it harder to access residences that might be built on the westerly areas of Lot 4 which would be at a lower elevation.
- [128] Similarly, the southern boundary of the larger Lot 23 connected to both Sutton Road and another road further to the west called Cunningham Road. When Lot 4 was created the panhandle referred to above ensured that Lot 4 retained a connection to Sutton Road. Therefore, if any residence was to be built on the elevated portion of the property, it is not clear that a road from Parcel D would be the best path to use to reach that residence. Depending on the development, it might be significantly more efficient to construct a separate road that uses Sutton Road as the point of access and travels along the panhandle.
- [129] I have also noted that the wording in clauses 2.1 and 2.2 purports to grant the servient tenement rights "in common" with the dominant tenement. The submissions of counsel spent some time on the use of the language "in common" in these clauses. In my view that debate is answered by reference to the concept in the authorities of an "excessive user".
- [130] The path of reasoning relied upon by the plaintiff appears to be that the in common language means that the servient tenement is granted the same rights as the dominant tenement. Therefore it acquires the right to have the road on Parcel D dedicated to support development of Lot 1. A corollary of that assertion is that any road construction must be to public road standards and cannot be elevated.

- [131] A fundamental flaw in this reasoning is that a servient tenement cannot grant itself rights with an easement. Further, clause 3.2 of Easement 149, if it is valid, is very specific that right can only be invoked for the purpose of the subdivision of Lot 4. On its face, a plain meaning reading of clause 3.2 does not support the plaintiff's interpretation of Easement 149.
- [132] In addition, none of the authorities in my view support the plaintiff's interpretation. In particular, I find that the easement cases concerning "ancillary rights" and "excessive user" do not assist the plaintiff.
- [133] As mentioned above, the grant of an express easement includes such ancillary rights as are reasonably necessary to use or enjoy the easement. However, these ancillary rights must be necessary to enjoy the easement, not just convenient or even reasonable: see *Fallowfield* at para. 11.
- [134] There is no evidence that elevation of the driveway was necessary to the road construction at issue. Mr. Holt said in cross-examination that the road on Parcel D could have been built at its original elevation to provide access to his property. He made it clear that he felt he was not constrained in any way to build at a certain height and that he could build it up as much as he wanted. During these proceedings, Mr. Holt gave no explanation to show that any particular elevation change was necessary. This accords with the technical information provided by Onsite Engineering Ltd. and EBA Engineering, neither of which provided any evidence that a certain height was necessary to provide access to Mr. Holt's property.
- [135] This also accords with the circumstances that existed prior to the road construction. The roads in existence before Mr. Holt's construction of the road at issue included one road running across Parcel D to the lower portion of Lot 4, and another road running east of Parcel D through Lot 1 to the elevated portion of Lot 4. Aerial photographs taken in 2000, 2003 and 2007 show that various configurations of roads provided access to the upper and power portions of Lot 4. No evidence was presented to show that the road built by Mr. Holt was the only reasonable way to gain access to that part of Lot 4. No mention was made in the evidence of the access to Lot 4 from the northern terminus of Sutton Road and why it could not be used for a driveway to the upper bench on Lot 4 or even for future development.
- [136] It is difficult to convey the magnitude of the construction in the context of this decision without the aid of the photographic evidence. The effect of it is to isolate the western lower portion of the plaintiff's property from the remainder of the property and place it at the base of a steep, dirt embankment. The survey evidence shows that the height of the slope created by the work at the northern boundary of Lot 1 is just in excess of 20 meters. In the geotechnical report of the plaintiff's expert the fill material vertical depth was measured as being between 4.8 m (16 ft) and 6.1 m (20ft).

[137] This analysis is also relevant to the authorities concerning "excessive user" when used in the interpretation of easements. This part of the interpretation of an easement deals with the limits of a permissible use and introduces reasonableness to the analysis. When considering the reasonableness of the defendants' road construction work, it should be borne in mind that although the construction does not prevent the plaintiff from accessing Parcel D, it does significantly alter Lot 1 despite the owner's objections. It was also construction work that, as discussed above, was not proven to be necessary to use the easement.

[138] Use of an easement that amounts to an "excessive user" was discussed in *Brundrett v. Muckle* (1997), 72 A.C.W.S. (3d) 596 (B.C.C.A.). Similar to the case at bar, the easement in *Brundrett* granted the dominant tenement an easement over specified lands "in common with the owners". The plaintiff servient owner applied for an injunction requiring the defendant dominant tenement to remove a constructed driveway built on property subject to an easement, and to cease parking on the easement area. The application was dismissed and the plaintiff appealed. Justice Southin allowed the appeal in part, stating:

11. Here the issue is whether the words "right to cross over the Easement area to and from the dominant lands and Brookridge Drive" upon their true construction carry with them the right to build this particular concrete and blacktop area and use it for parking. The question is one of construction in light of the circumstances at the time of the grant.
12. I have no difficulty in saying that the grant, in these words, does not carry with it a right of parking. A right to cross over may carry with it the right to tarry for a brief moment or two, but no more. Does it, then, carry with it the right to build what was built? To call it a driveway is to beg the issue, which is whether, under a right to cross over, the respondents could install a hard surface of the dimensions of this hard surface. In my opinion, there is much to be said for the proposition that their doing so is an excessive user. At present, however, I am not minded to say that the relief sought of a mandatory injunction should be granted.
13. I would allow the appeal and grant the appellants an injunction restraining the respondents from parking vehicles or permitting vehicles to be parked on the easement area.

[139] As can be seen from the excerpt above, even when the grant is valid but not specific about what may be constructed, there is still the requirement that any construction be reasonable and not amount to an "excessive user". This is a logical corollary from the principle that a valid easement cannot grant exclusive use of the land or be incompatible with the continued property rights of the servient owner. A classic statement of the principle of excessive user is found in *Stephens v. Gordon* (1893), 22 S.C.R. 61, where Sedgewick J. stated at p. 99:

The result of the cases I think is this, that where no way is specified in the instrument of grant the grantor may assign a way, but that way must be a reasonable one -- a way that will enable the grantee to enjoy, in a reasonable manner, the thing granted. If the grantor does not assign a way,

or if he assigns a way that is unreasonable, the grantee may select a way, a way that is "most direct and convenient," for himself, but one, the use of which will not unreasonably interfere with the grantor in the enjoyment of his rights upon the servient tenement. And, finally, questions of this character are not questions of law, but of fact, to be determined by the jury upon evidence.

[140] Even in cases where the particular words of the easement agreement state that the grantee will have "full, free and uninterrupted right" to the land, this does not mean that rights of the grantee must take precedence over the rights of the grantor (*Gardiner v. Robinson*, 2006 BCSC 1014 at para. 22). As stated by Justice Southin in *Granfield v. Cowichan Valley (Regional District)* (1996), 16 B.C.L.R. (3d) 382 (C.A.) at para. 37, one of the pillars of a judgment concerning easements is that:

The grantee of an easement has the right granted to him and no more. Thus, if on the servient tenement he does an act beyond his grant, he becomes, to the extent of that act, commonly called "excessive user", a trespasser.

And, at para. 46, she continued:

a type of user, which is within the words of the grant, will become excessive and, therefore, a trespass if it is of such an extent as to interfere substantially with the rights of others to pass and re-pass, which others include the owner of the servient tenement.

[141] There is nothing in Easement 149 that specifically addresses the prospect of elevating the road or changing the elevation of the ground for the purpose of constructing and maintaining the roadway. Clause 9.3 uses the words "alter", "place", "construct" and "improve", and read with clause 3.1 and in particular clause 3.1 paragraphs (a) and (i), the meaning is clear: a roadway can be built, the surface can be excavated for purposes of facilitating construction, and the surface should be restored as nearly as may be practicable in the circumstances after the construction is completed. Minor changes in elevation incidental to the excavation and road construction would certainly be permissible. It is not, however, permissible for the defendants to fundamentally change the character of Lot 1 without regard to that change, as Mr. Holt did here.

[142] This interpretation is supported by reading these clauses alongside clause 6.3, which requires that the rights be exercised "in such a way and at such times to cause as little inconvenience and nuisance as possible". This provision was not at all complied with by the defendants. Both Mr. Holt's actions and the interpretation that the defence urges this Court to adopt are completely inconsistent with the limitation in clause 6.3.

[143] Finally, I also note that a public road dedication is contemplated in clause 3.2. However, this is a wholly separate provision. Even further, it is significant that this provision is totally silent on the issue of construction, and that it only requires the execution of plans and consents that will facilitate the eventual construction of a public road. I find that clause 3.2 is not intended to affect the right to construct a private road under clause 3(1)(a). Rather,

clause 3.2 was setting out a wholly separate and distinct right to require assistance with the formalities necessary to have Parcel D become a dedicated public roadway. Therefore, clause 3.2 does not require the private road be built to a public road standard.

- [144] In my view the proper interpretation of Easement 149, based on the language in the document and considering the factual matrix, is that a change in elevation of the road beyond that which is incidental to and necessary to provide a suitable surface with any permissible services is not permitted. Easement 149 allows the construction of a road but at the time of completion the surface must be "as nearly as may be practicable under the circumstances" the same as it was before the start of the excavation.
- [145] For the sake of completeness, since this remedy is granted pursuant to the terms of the easement, it is the owner of the dominant tenement that is obligated to remedy the terrain. The defendants have argued that Tara Holt is not responsible for the road construction and that no claim against her should be granted. I disagree.
- [146] Tara Holt is liable as a joint owner over the dominant tenement. This is a property law remedy for private nuisance. No fault or negligence is required to make out the tort of nuisance: see *Suzuki v. Munroe*, 2009 BCSC 1403 at para. 40. Therefore the defendant Tara Holt is liable as a joint owner of Lot 4, which is in breach of Easement 149.

Were the Defendants Negligent in Their Construction of the Road?

- [147] This issue is related to the state of the road as built. Given my findings as to the proper interpretation of Easement 149 there is no need to deal with this at length. The remedies the plaintiff is entitled to as a result of the interpretation of the easement will resolve the quality of construction issues. Some comment is needed however.
- [148] To the extent that the road construction in its current form poses an unreasonable risk of future harm to the plaintiff, I am satisfied that the defendants have breached the standard of care owed to the plaintiff. However, the plaintiff has failed to show that he has suffered any damage.
- [149] First I will discuss the standard of care. The defendants acknowledge there are deficiencies in the road in its present state. The parties' respective experts both articulate the specifics of those deficiencies but reach different conclusions. The differences in those opinions are primarily a result of the different standards against which the experts assessed the road built. I agree with the defendants that there is no requirement for the road to be built to public road standards.
- [150] Again, clause 3.2 of Easement 149 is specific to the dominant tenement. The plaintiff's argument regarding the "in common" language is flawed. The servient tenement retains its property rights subject to the easement. This would allow the servient tenement to upgrade the road but it does not require the dominant tenement to do so merely because the servient tenement might desire such an upgrade.

[151] Second, in terms of injury to the plaintiff, I am not satisfied that he has suffered any harm in this case. To the extent that there has been any damage to the plaintiff's property or interference with the plaintiff's use of that property, the proper claim is nuisance, not negligence. In terms of injury to the plaintiff himself, there is no evidence of any such harm. The plaintiff is required to prove actual damage, not merely potential damage or risk of harm: see *Linden and Feldthusen*, Canadian Tort Law, 9th ed. (Markham, Ontario: LexisNexis, 2011) at 116-117. The plaintiff has failed to prove any such damage.

Are the Defendants Liable for Nuisance for Placing Excessive Amounts of Fill on Lot 1 and Constructing the Road at an Unreasonable Height?

[152] Mr. Englehart's nuisance claim is successful. I find that the excess fill on Parcel D and the adjacent fill slope substantially interferes with Mr. Englehart's enjoyment of his property, and that it poses a non-trivial risk of damage to his property through soil erosion, harm to vegetation, and potential landslide. I also find that Mr. Holt's placement of the fill and elevation of the road were unreasonable in the circumstances and not based on necessity. Mr. Holt stated in his testimony at trial that it would have been possible for him to have a serviceable driveway to Lot 4 without raising the road surface to the height at which it was constructed.

[153] Negligence is not required to make out the tort of nuisance: see *Suzuki* at para. 40. The mere fact that the defendants have substantially interfered with Mr. Englehart's use and enjoyment is sufficient.

[154] In these circumstances, it is not appropriate to order the defendants to pay damages for the nuisance. The reconstruction and remedial work that will be done to make the road comply with Easement 149 will provide a sufficient remedy in these circumstances. Although I have found that the defendants' actions are nontrivial and that they were a substantial interference with the plaintiff's use of Lot 1, the reconstruction and remedial work will involve significant efforts and will fully remedy the nuisance, so I do not find that a damage award for the interference to date or during the period of reconstruction is appropriate.

Are the Defendants Liable for Trespassing on Lot 1?

[155] Where a defendant has placed an object on a plaintiff's property, the claims of nuisance and trespass may overlap to some extent: see *K & L Land Partnership v. Canada* (Attorney General), 2014 BCSC 1701 at para. 47 and see generally *Moyer v. Mortensen*, 2010 BCSC 1528. For the same reasons that apply in my discussion of nuisance, I find that Mr. Englehart's claim of trespass is made out but that the appropriate remedy is the remediation of the site.

Remaining Issues

Section 35 of the Property Law Act

[156] The plaintiff has applied for modification or cancellation of an easement under s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377. For ease of reference, the relevant sections are as follows:

35(1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:

- (a) an easement;
 - (b) a land use contract;
 - (c) a statutory right of way;
 - (d) a statutory building or statutory letting scheme;
 - (e) a restrictive or other covenant burdening the land or the owner;
 - (f) a right to take the produce of or part of the soil;
 - (g) an instrument by which minerals or timber or minerals and timber, being part of the land, are granted, transferred, reserved or excepted.
- (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
- (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
 - (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
 - (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
 - (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
 - (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

[157] Section 35 of the Property Law Act was not substantially argued at trial and I am not satisfied that any of the grounds for modifying or cancelling an easement set out in s. 35(2) apply to these circumstances.

- [158] Specifically, I find that s. 35(2)(c) does not apply for the same reasons that no oral contract was created. Although the express or implied agreement required by s. 35 does not need to amount to a contract, in this case there was no agreement between the parties that could be understood as creating legal obligations. No subjective or objective agreement was reached between the plaintiff and Mr. Holt during the September 2009 discussions or afterwards.
- [159] I decline to make any ruling regarding the application of s. 35(2)(e) to these circumstances. As discussed above, although clause 3.2 of Easement 149 may not be enforceable, this was not pled by either party and I decline to rule on this issue without submissions from the parties.

Proprietary Estoppel

- [160] The plaintiff has also claimed proprietary estoppel. The requirements for a claim of proprietary estoppel are well-established, and were recently summarized in *Sabey v. Rommel*, 2014 BCCA 360 at para. 25:

The foundation of a claim in proprietary estoppel is an equitable right arising out of the conduct of the parties. In *Crabb v. Arun District Council*, *reflex*, [1976] Ch. 179 at 192-93, [1975] 3 All E.R. 865 (C.A.), Scarman L.J. stated the test in a claim for a proprietary right on the basis of equity:

1. Is there an equity established?
2. If so, what is the extent of the equity?
3. What is the relief appropriate to satisfy the equity?

- [161] Again, this issue was not argued at length at trial, and it is not clear that a claim for proprietary estoppel has been made out. However, given the remedial work that has been ordered, no further remedy should be granted on the basis of estoppel. If any such claim had been successful then the appropriate relief would have been the restoration of the terrain, which would remedy the detriment suffered by the plaintiff. It would be inappropriate to grant the plaintiff compensation for the defendant's failure to improve the plaintiff's driveway. Such a remedy would put the plaintiff in a better position than where he began and would be disproportionate to the detriment he suffered.
- [162] The defendant did not raise any claim to estoppel, proprietary or otherwise, and it would be inappropriate to rule on the possibility of such a claim.

Conclusion

- [163] The defendants Mark Holt and Tara Holt, as the owners of Lot 4 are responsible for remediation of Lot 1 so that any works remaining within Parcel D are in compliance with the interpretation of Easement 149 set out in this judgment.

[164] The area of Lot 1 outside of Parcel D is to be returned as nearly as practicable to its condition before the work that is the subject of this litigation. I specifically exclude the plaintiff's driveway from the scope of such remediation work.

[165] The parties are at liberty to apply for further directions as to any further or more specific terms regarding the obligations arising from this order. I am of course seized of any such applications.

[166] The claims against Advanced Backhoe are dismissed.

"D.A. Betton J."

The Honourable Mr. Justice Betton

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