

CANADA / JUDGMENT

Koskoski v. Russell

2025 BCSC 1579

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2025 BCSC 1579 Koskoski v. Russell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Koskoski v. Russell,

2025 BCSC 1579

Date: 20250815

Docket: S235422

Registry: Vancouver

Between:

Kenneth John Koskoski and Cheryl Lynn Koskoski

Petitioners

And

Sherry Colleen Russell and Lance Russell

Respondents

Before: The Honourable Justice Ahmad

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

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I. Introduction

- [1] The petitioners, Kenneth and Cheryl Koskoski, and the respondents, Sherry and Lance Russell, are neighbours residing in Delta, British Columbia. In November 2022, the respondents erected a fence on their property line.
- [2] The petitioners object to the fence, which they say contravenes the height restrictions of a restrictive covenant that was specifically intended to preserve the view from their property. They seek a declaration that the fence violates the restrictive covenant and an injunction requiring that respondents remove the fence.
- [3] The respondents dispute that the restrictive covenant precludes them from erecting the fence. However, they also apply for an order to modify its terms to expressly allow the fence.

II. Background**A. The Properties**

- [4] The petitioners' property is located at the top of a bluff. Most of the respondents' property is located at the bottom of the bluff. However, the respondents' property also includes the side of the bluff and a portion of a lawn at grade level at the top of the bluff. The respondents' share the lawn with the petitioners, on which the eastern boundary of the respondents' property borders the western boundary of the petitioners' property.
- [5] Most of the lawn is part of the petitioners' property; the respondents' portion of the lawn, comprising the strip west of the property line, ranges from 14.5 feet (4.4 metres) to 36.5 feet (11.12 metres) wide.
- [6] The western edge of the lawn (located on the respondents' property) turns into the bluff, the elevation of which ranges from 52.35 to 54.22 metres Geodetic Datum ("GD")[1]. The initial drop from the edge of the lawn down the bluff ranges from 12 feet (3.7 metres) to over 20 feet (6.1 metres). There is a further drop from there to the bottom of the bluff.
- [7] Given the location of their property at the top of the bluff, the petitioners have enjoyed a panoramic view of the ocean and background mountains, partially obstructed by a grove of trees and a hedge that are also located on the petitioners' property, and by a hedge located to the north-west of the petitioners' property.

B. The Restrictive Covenant

- [8] The petitioners purchased their property in 2003. At the time, the petitioners' property was (and remains) the dominant tenement of a restrictive covenant registered on March 11, 1994 (the "restrictive covenant"); the respondents' property was (and remains) the servient tenement.

[9] Recital C of the restrictive covenant describes its purpose as "preserving the view from the [petitioners' property] over the [respondents' property]".

[10] Article 1.01 of the restrictive covenant provides:

... no building, dwelling or improvement shall be erected, built or constructed on the [respondents' property] having an elevation in excess of 50.43 meters Geodetic Datum

[11] The petitioners made the continued existence of the restrictive covenant a condition of their purchase of their property. They also required that the then-owner of the respondents' property grant another restrictive covenant, also to preserve their view. That additional restrictive covenant (the "2003 restrictive covenant"), registered against what is now the respondents' property, provides:

... the height of any and all shrubs and trees on the [respondents' property] shall be pruned to the extent that the height of such shrubs and trees shall not be higher than the grade level of [the petitioners' property].

[12] There is no dispute that pursuant to Articles 2.01 and 2.02, the terms of the restrictive covenant are binding on the respondents who purchased their property in 2011.

C. The Fence

[13] Until late 2022, there was no fence on the lawn separating the petitioners' property from the respondents' property. Given the location of the lawn at the top of the bluff, from 2003 to the summer of 2022, Mr. Koskoski mowed and maintained both his and the respondents' portion of the lawn. There are also sprinklers on both lawns, which were installed prior to 2003 when the petitioners purchased their property.

[14] In November 2022, the respondents caused a "quality steel fence" to be constructed on their side of the lawn. Connor Embleton, a land surveyor retained by the petitioners, described the placement of the fence as follows:

Concrete was placed in the ground along the easterly property line of [the respondents' property] to support the [f]ence structure. The top of the placed concrete is situated at or about ground level elevation. The [f]ence posts sit within the placed concrete.

[15] The fence also extends further south across the respondents' property line with the petitioner's south neighbour and perpendicularly to the east on the north boundary of the respondents' property (forming an "L"). The north portion of the fence includes a gate that allows the respondents to access their portion of the lawn from the north. Neither extension of the fence borders the petitioners' property.

[16] Mr. Embleton opines that the elevation along the top of the bluff where the fence was installed ranges from 52.35 to 54.22 metres GD, or 1.92 to 3.79 metres GD above the 50.43 metre GD limit set out in the restrictive covenant.

- [17] The height of the fence panels varies between 48 to 50 inches; the post is 63 inches.
- [18] The respondents say that without the fence, trespassers--including the petitioners--have wandered onto their property. Regarding the petitioners, the respondents point to various conduct including Mr. Koskoski's mowing and maintenance of the lawn, his trimming of trees on one occasion on October 14, 2021 (which, although contemplated by the 2003 restrictive covenant, required permission), and the presence of the sprinklers on the lawn. The respondents maintain the fence is required to limit the potential liability created by the hazard of the bluff. In addition, the fence affords them some privacy.
- [19] The petitioners say that the fence obstructs and diminishes the view from their property. They consider the preservation of the view to be important to their use and enjoyment of their property, and to add to its value. They maintain that the fence has reduced that enjoyment.

III. Position of the parties

- [20] On those facts, the petitioners say the matter is straightforward: the restrictive covenant expressly prohibits the respondents from erecting an "improvement" at an elevation of more than 50.43 meters GD. Simply put, they argue that the 48 to 50 inch fence, which was constructed at an elevation of 52.35 to 54.22 metres GD, contravenes that term and obstructs or diminishes the view that that the restrictive covenant was intended to preserve.
- [21] The respondents argue that the issue is not that straightforward. They argue that, as a matter of contract interpretation, the restrictive covenant's height restriction does not apply to the fence for two reasons. First, they say the fence is not a "building, dwelling[,] or improvement", those being the structures to which the height restriction applies.
- [22] Second, they argue that, properly interpreted, the height restriction applies only to limit the height of structures built below the top of the bluff, either on its slope or at its base. Any other interpretation, they say, would deny them of possessory or proprietary rights over their own property and would therefore render the restrictive covenant invalid.
- [23] Finally, the respondents submit that if the restrictive covenant has application, it should be modified to allow the fence to stay in place as is.

IV. Issues

- [24] In light of those positions, the issues to be determined are:
- a) Do the height restrictions of the restrictive covenant apply to the fence, specifically:
 - i. Is the fence an "improvement" within the meaning of the restrictive covenant; and
 - ii. If so, does the height restriction apply to the fence, given its location at the top of the bluff;

- b) If so, is the restrictive covenant inconsistent with the respondents' proprietary and possessory rights over their own property, such that it is invalid;
- c) If applicable to the fence and valid, should the restrictive covenant nonetheless be modified to allow the fence to remain on the respondents' property; and
- d) Finally, if the restrictive covenant is enforceable, what relief is available to the petitioners?

[25] I discuss each of those issues in turn.

IV. Discussion and Analysis

A. Does the restrictive covenant apply to the fence?

1. Does the fence constitute an "improvement"?

[26] The restrictive covenant's building restriction applies to "building[s], dwelling[s] or improvement[s]". There is no issue that the fence is not a "building" or a "dwelling"; the question to be determined is whether the fence is an "improvement".

[27] In that regard, with no direct guidance from the restrictive covenant itself, each of the parties rely on different definitions of "improvement", both drawn from secondary sources. The petitioners refer to Black's Law Dictionary[2], which defines an "improvement" as "an addition to real property, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance".

[28] The respondents cite The Dictionary of Canadian Law[3], which refers not only to what is included as an "improvement", but what is not included. It states:

"IMPROVEMENT, n. I. "... [O]rdinary meaning ... includes buildings, structures and all things which become attached to the land, but does not include buildings, structures or fixtures which merely rested on the land and which could be removed at will without changing the character of the land itself,..." *Beloit Sorel Walmsley Ltd. v. New Brunswick* (1976), 10 L.C.R. 373 at 376, 72 D.L.R. (3d) 240 (N.B. C.A.), the court per Limerick J.A. ..."

[Added emphasis.]

[29] In my view, the fence fits within both definitions of "improvement".

[30] As the fence did not exist prior to November 2022, its appearance on the property in November 2022 comes within the ordinary meaning of the word "addition", that being the defining characteristic of "improvement" in the Black's definition.

- [31] While a structure does not have to be permanent to come within the Black's definition of "improvement", by the reference to the possibility of removal, the concept of permanence (or lack thereof) seems to be implied in The Dictionary of Canadian Law definition. The respondents argue that the remedy sought by the petitioners--that the fence be removed--demonstrates that the fence can "be removed at will", putting it within the exclusion of "improvement" as defined in that source.
- [32] However, the respondents' interpretation ignores the conjunctive requirement that the fence must also "merely [rest] on the land". Having secured the fence in place with posts cemented into the land, the fence is not merely resting on the land nor can it be removed without changing the character of the land. The former puts the fence in the inclusions of "improvement"; the latter means it does not qualify as an exclusion.
- [33] In my view, the fence is an improvement by both definitions referred to by the parties.
- [34] Moreover, to the extent that there is any ambiguity, the principles of contract interpretation favour the conclusion that the fence constitutes an "improvement".
- [35] In *Hofer v. Guitonni*, 2011 BCCA 393, the Court considered the proper approach to the interpretation of restrictive covenants. It held:
- [14] Thus, interpreting a restrictive covenant, whether found in a building scheme or not, involves no special approach. It is a contractual document, and the general principles of contract interpretation apply. The precise words used must be looked at in the context of the factual matrix at the time the document was created, taking into account the background and purpose of the document as guides to interpretation.
- [Added emphasis.]
- [36] In this case, the purpose of the restrictive covenant is set out on its face: to preserve the view from the petitioners' property. In my view, interpreting "improvement" to exclude the fence is contrary to that purpose. The restrictive covenant would have no utility if the owners of the respondents' property could erect a view-obstructing fence of any height.
- [37] Given its express purpose and in the context, I am satisfied that the fence is an "improvement" for the purpose of the restrictive covenant.
2. Does the height restriction apply to structures on top of the bluff?
- [38] With the conclusion that the fence constitutes an "improvement", the respondents argue that, as a matter of contract interpretation, the height restriction applies only to those structures built below the top of the bluff.
- [39] In support of that position, they note that the height restriction imposed by the restrictive covenant (50.43 metres GD) is below the top of the bluff (52.35 to 54.22 metres GD). It follows, they say, that by the petitioners' interpretation, the respondents are precluded from building any sort of structure above grade. The respondents say that outcome is inconsistent

with the principle of contract interpretation that dictates that where there are two plausible meanings that can be given to a restrictive covenant, the ambiguity must be resolved in favour of the free use of the land: *Zhang v. Davies*, 2018 BCCA 99 at para. 34.

- [40] In light of that principle, the respondents argue that the height restriction can be interpreted as limiting the height of only those structures built on the slope below the top of the bluff or at the base of the bluff. They say that interpretation would allow them to freely use all of their property, including their property at the top of the bluff, but would impose a restriction on those structures erected, built, or constructed below grade to preserve the view.
- [41] I reject that argument.
- [42] The restrictive covenant is not ambiguous. It provides a specific elevation (50.43 metres GD) in excess of which the enumerated structures cannot be erected, built, or constructed. Although it is unclear why the height restriction was set at an elevation below grade (as opposed to at grade, for example, as is the height restriction in the 2003 restrictive covenant), that unknown does not create ambiguity.
- [43] There being no ambiguity, there is no need to resort to principles of contract interpretation: *Robb v. Walker*, 2015 BCCA 117 at para. 32.
- [44] Rather, as noted, "[t]he precise words used must be looked at in the context of the factual matrix at the time the document was created, taking into account the background and purpose of the document as guides to interpretation." [Added emphasis]: *Hofer* at para. 14. The respondents' interpretation, which would allow a structure of any height to be erected, built, or constructed at the top of the bluff, is wholly inconsistent with, and fails to give any meaning to, the express purpose of preserving the view. By contrast, the maximum height restriction below grade ensures that no structure will exceed grade. It is consistent with the stated purpose.
- [45] As a second matter of contract interpretation, the respondents argue that the restrictive covenant does not apply to a stand-alone improvement; they say it only applies to an improvement that is built in conjunction with a building or dwelling. Counsel cites, as an example, a fence that is built around a garage.
- [46] The respondents argue that because no building or dwelling can be safely built at the top of the bluff (although they provide no evidence to this effect), it follows that the parties contemplated that construction would occur at the bottom. As I understand their argument, the respondents say it also follows that the parties must have contemplated that an "improvement" would also be built at the bottom, together with the building or dwelling. They seek a conjunctive reading, such that the restrictive covenant only applies to a "building and an improvement" or a "dwelling and an improvement".

[47] I see no logic in that argument. In addition to many other flaws in that reasoning, most simply, the clear and unambiguous provision is disjunctive: the restriction applies to a "building, dwelling or improvement". There is no requirement that the "improvement" be tied or relate to a building or dwelling for the restriction to apply.

[48] There is no merit to either of the respondents' highly contrived and non-sensical interpretations of the restrictive covenant. The terms of the restrictive covenant are unambiguous: the respondents are precluded from erecting, building, or constructing an "improvement", including the fence, above 50.43 metres GD.

[49] The erection of the fence violates the clear and unambiguous provisions of the restrictive covenant.

B. Is the restrictive covenant invalid?

[50] The necessary conditions of covenants which run with the land are set out in *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268 at para. 16 [Westbank]. In brief, they are:

- a) The covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement;
- b) The covenant must be one that touches and concerns the land; i.e., it must be imposed for the benefit or to enhance the value of the benefited land;
- c) The benefited as well as the burdened land must be defined with precision [in] the instrument creating the restrictive covenant....;
- d) The conveyance or agreement should state the covenant is imposed on the covenantor's land for the protection of specified land of the covenantee;
- e) Unless the contrary is authorized by statute, the titles to both the benefited land and the burdened land are required to be registered....; and
- f) Apart from statute the covenantee must be a person other than the covenantor[4].

[51] There is no disagreement that those conditions have not been met.

[52] However, the respondents argue that the restrictive covenant is nonetheless invalid and unenforceable. In particular, relying on the decision in *Robinson v. Pipito*, 2013 BCSC 1670, aff'd 2014 BCCA 200 [Robinson BCCA], they argue its terms are inconsistent with their possessory or proprietary rights over their own property.

[53] Indeed, it is well settled that an easement cannot give exclusive possession or unrestricted use of a parcel of land to a dominant tenement: *Robinson BCCA* at para 22. Citing *Robinson BCCA*, this Court held in *Carmichael v. Pearson*, 2023 BCSC 632:

- [39] An easement which confers a right to possession or control inconsistent with the possessory rights of the servient owner is not legally valid, and is subject to being set aside by the courts
- [54] In this case, the respondents' purpose for erecting the fence is to keep trespassers off the respondents' property, both for privacy and to avoid the potential liability given the hazard of the bluff. They argue that the petitioners' interpretation of the restrictive covenant, which "preclude[s] [the] construction of any sort of structure forever on top of the bluff", precludes them from using their portion of the lawn for that purpose or, indeed, for any purpose above grade. In that way, they say that the restrictive covenant negates their proprietary rights to protect and preserve their property. Relying on the decision in Robinson BCCA, they argue that negation of those rights makes the restrictive covenant invalid.
- [55] I do not accept that argument. In my view, Robinson, and the other cases relied on by the respondents, are legally and factually distinguishable. They provide little to no support for the respondent's position.
- [56] First, the decisions in Robinson, Carmichael, and 1057600 B.C. Ltd. v. 1249645 B.C. Ltd., 2023 BCCA 365 involve the validity of an easement, not a restrictive covenant. While easements and restrictive covenants are both contractual in nature and affect the use of property, the two are "conceptually distinct creations of the law": U.S. Steel Canada Inc. (Re), 2023 ONSC 6419 at para. 49. Referring to a restrictive covenant as an "negative easement", the Court explains:
- [58] An easement is a "right of usage over a property". Positive easements grant the owner of the dominant tenement the right to use the servient tenement in a particular way. Negative easements grant the owner of the dominant tenement a right to prevent the owner of the servient tenement from using their land in a particular way
- [57] Nothing in either of the Robinson decisions suggests that its principle applies equally to restrictive covenants. Nor was I directed to any case that did. With no authority having considered the issue, it is not clear to me if or how the principle in Robinson BCCA may apply to restrictive covenants. However, for the reasons that follow, I do not have to decide that point.
- [58] More notably, assuming the principle applies, as Robinson BCCA provides, the mere restriction of a servient tenement's use of its property is not determinative of validity. Rather, it is the degree of the restriction that will guide the assessment.
- [59] As the Court notes in Robinson BCCA (regarding easements):
- [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.

[60] Like an easement, a restrictive covenant restricts the use a servient tenement can make of their property. By definition, it is a necessary condition that "[t]he covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement": Westbank at para. 16. The question is whether the degree of that restriction, as contemplated by the document itself, amounts to the "complete derogation" of possessory or proprietary rights.

[61] In the present case, I am not satisfied that the height restriction imposed by the restrictive covenant does.

[62] In Robinson BCCA, the easement provided the dominant tenement a "free and uninterrupted Easement for farm and recreational uses": at para. 16. For that purpose, the grantor agreed "not to erect or maintain any buildings or structures on the easement that would obstruct farm and recreational uses or access to and from the property". The easement also provided the grantee with "full rights" to all timber and all gravel in the easement area.

[63] The chambers judge described the effect of that grant as follows:

[54] The plaintiffs have taken full possession of the easement area and excluded the defendant as Servient Tenement owner of any right to enter the property for any purpose whatsoever.

[Added emphasis.]

[64] And further:

[56] In my opinion this is a complete derogation of any rights to the proprietorship or possession of this area by the defendant as Servient Tenement owner.

[Added emphasis.]

[65] The easement was declared to be invalid. The Court of Appeal agreed. It held:

[45] By granting to the dominant tenant the right to use all of the easement area for farming and recreational use, and by barring the servient tenant from making any inconsistent use of the property, the Easement Agreement permits the owners of the dominant tenement in the case at bar to plant crops over the entire easement area. It thereby grants them exclusive use of all of the easement area.

[Added emphasis.]

[66] The Court of Appeal came to the same conclusion in respect of the grant allowing the dominant tenement to remove all timber and gravel from the easement area without restriction. In those circumstances, the Court of Appeal upheld the chambers judge's declaration that the easement was invalid and unenforceable.

[67] By contrast, in other decisions referred to in Robinson BCCA, the dominant tenement's right to use property did not amount a "complete derogation" of the servient tenement's right to use their own property. For example, in *Grant v. MacDonald*, 68 B.C.L.R. (2d) 332, 1992 CanLII 5969 (B.C.C.A.), the trial judge cancelled an easement that allowed the dominant tenement to construct and exclusively use a swimming pool in the easement area on the basis it was inconsistent with the servient tenement's proprietary rights. The Court of Appeal overturned that decision.

[68] In Robinson BCCA, the Court describes the Grant decision as follows:

[35] It was critical to this Court's decision that the swimming pool would occupy only a portion of the easement area. Not only would the owner of the servient tenement have some right to possess and use the balance of the easement area, but the owner of the dominant tenement would have no right to occupy the substantial portions of the easement area not used for the construction of a swimming pool

[Added emphasis.]

[69] In this case, the respondents argue that the petitioners have used their portion of the lawn as if it was their own. In support of that position, they point to various conduct including Mr. Koskoski's mowing and maintenance of the lawn, his trimming of trees without permission on one occasion in October 2021, and the presence of the sprinklers on the lawn.

[70] However, none of that conduct is contemplated or permitted by the restrictive covenant. Unlike the easements considered in Robinson and Grant (and generally), the restrictive covenant does not confer on the petitioners any right to use any of the respondent's property, including the lawn, for any purpose.

[71] Similar circumstances arose in *Wong v. Rashidi*, 2011 BCCA 489. There, the Court held:

[37] the validity of an easement must be determined by the legal rights flowing from the document purporting to create it, and cannot be governed by the choice of the owner of the servient tenement not to exercise his or her legal entitlement to access the easement area. In this case, the Easement did not give exclusive possessory rights over the easement area to the owners of the Benefitted Lands. As found by the trial judge (at para. 56), there is nothing to stop the plaintiffs from using the easement area, and he gave the examples of walking on the easement area and putting a ladder to access the windows and gutters at the back of their house. At the hearing of the appeal, my colleagues and counsel for the third parties gave several other examples of how the plaintiffs could put the easement area to use without interfering with the rights given under the Easement to the owners of the Benefitted Lands (including driving their own vehicle on the driveway and parking it at the top of the driveway).

[Added emphasis.]

[72] The Court came to the same conclusion in Robinson BCCA:

[20] 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.

[Added emphasis.]

[73] In this case, while the petitioners' attendance to the whole of the lawn may constitute their "use" the respondents' property (and I do not decide the point), that use, which is not permitted by the restrictive covenant, is not determinative of its validity. The validity is to be determined by the terms of the restrictive covenant itself.

[74] Those terms contain a single restriction: the respondents are precluded from erecting, building, or constructing a structure on the property that exceeds 50.43 metres GD. They do not preclude the respondents from otherwise using any portion of their property for any other purpose. For example, there is nothing to prevent the respondents from using their portion of the lawn for a garden or to set up lawn chairs for sunbathing or simply to enjoy the view. Nor are the respondents precluded from mowing their portion of the lawn, or even from letting it grow wild, if that is their preference. Given those other potential uses, in my view, the effect of the restriction contained in the restrictive covenant is more like the restriction in Grant than in Robinson. To the extent that the restrictive covenant does limit the respondents' ability to erect the fence, that limitation does not amount to a "complete derogation" of their right to use their own property.

[75] The restrictive covenant is valid.

[76] I now turn to the respondents' final argument that the restrictive covenant should be modified.

C. Should the restrictive covenant be modified?

[77] Section 35 of the Property Law Act, R.S.B.C. 1996, c. 377 is a comprehensive code that permits modification or cancellation of registered charges against land. Subsection 35(1)(e) expressly allows for the modification of "a restrictive or other covenant burdening the land or the owner".

[78] The authority of the court to cancel or modify a charge is constrained by the specific grounds set out in s. 35(2): *Vandenberg v. Olson*, 2010 BCCA 204 at para. 23. The relevant provisions of that subsection provide:

- (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
- (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, [or]

(d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest

[79] To obtain an order to modify a charge, an applicant need only prove one of the enumerated grounds under s. 35(2). However, the order is discretionary: *Olenczuk v. Mooney*, 2014 BCSC 825 at para. 36; *Vandenburg* at para. 25.

[80] As described above, the fence is not restricted to the property line between the respondents' property and the petitioners' property (the "Property Line Fence"). The fence also extends: (a) south across the respondents' property line with the petitioner's south neighbour (the "South Fence"), and (b) perpendicularly to the west, on the north boundary of the respondent's property (the "North Boundary Fence").

[81] Both the South Fence and the North Boundary Fence are on the respondents' property, however neither border the petitioner's property. Together, the North Boundary Fence, the Property Line Fence, and the South Fence create one continuous L-shaped fence.

[82] The respondents argue that both ss. 35(2)(b) and (d) apply such that the restrictive covenant should be modified as it effects not only the Property Line Fence, but also the North Boundary Fence. The propose that the restrictive covenant be modified by adding:

a) "Recital D" as follows:

"AND WHEREAS the Grantors desire to preserve the integrity and stability of the Grantors' Lands and to protect against any access over or onto the Grantors' Lands without their express permission"; and

b) At the end of Article 1.01:

"PROVIDED THAT the Grantors may erect, install and maintain both a fence and gate and underground drainage system with water sensors/wells on the Grantors' Lands bordering to the North on Graham Drive and to the East on the Boundary of the Grantees' Lands, such fence not to exceed the height of 54 inches and such gate not to exceed the height of 72 inches (6 feet)."

[83] I will consider those proposed modifications under each of the relevant subsections in turn.

1. Section 35(2)(b) - Will the reasonable use of the land be impeded without practical benefit to others?

[84] Despite the two components embedded in s. 35(2)(b) (the impediment on the reasonable use of land and the practical benefit of the charge to others), the analysis under this section should not be approached as a balancing exercise. Rather, the applicant must show the reasonable use of the land will be impeded without practical benefit--"in other words, that the continuation of the covenant or other charge provides no practical benefit": *Wallster v. Erschbamer*, 2011 BCCA 27 at para. 19 [*Wallster BCCA*]. As the Court confirms, "[i]f this burden is not met, the petition should not be granted": *Wallster BCCA* at para. 19.

- [85] As the starting point, the respondents argue that both the erection of the fence (to prevent trespassers) and the installation of water sensors and wells (as a safety measure) on the lawn are reasonable uses of their land. They say the restrictive covenant impedes that use.
- [86] Since the filing of these cross-applications, the petitioners have abandoned their objection to the installation of the water sensors / wells (referred to in the petition as the "water sensors"). In other words, the petitioners are not relying on the restrictive covenant to impede the respondents' ability to use their portion of the lawn for the water sensors / wells. Accordingly, I will limit my consideration to the proposed modification regarding the fence.
- [87] In that regard, the petitioners do not dispute that, but for the restrictive covenant, the installation of the fence is a reasonable use of the respondents' property. I accept that to be the case. The analysis under this section is whether the restrictive covenant provides "no practical benefit" to the petitioners. In determining that issue:
- a) One must look to the object of the restrictive covenant at the time of its creation to determine the practical benefits that are protected: *Tri-X Timber Corporation v. Rutherford*, 2012 BCCA 71 at para. 26 [Tri-X]; and
 - b) Both subjective factors, such as neighbour aesthetics and views, and objective factors can be taken into account: *Wallster BCCA* at paras. 10, 19; *Zhang v. Davies*, 2017 BCSC 1180 at para. 79 [Zhang BCSC].
- [88] The respondents argue that the "practical benefit" of the restrictive covenant (that is, preserving the petitioners' view), if any, is minimal. They argue that given the elevation of the petitioners' home on their property, the fence at 48 to 50 inches, does not obstruct the view. In any event, referring to photographs of the ocean and mountain view from the petitioners' backyard, they say the view is partially obscured by objects other than the fence, including a grove of trees and a hedge that borders significant portions of the petitioners' property.
- [89] The respondents argue that the North Boundary Fence does not impact the view at all given that a taller hedge has been planted behind it on property owned by a third party.
- [90] With respect to the hedges, Mrs. Russell deposes:
- The fence panel appears to be no more than about 21 inches above the hedge at the highest level near the north end and about 11 inches higher near the south end. It appears to me that [the petitioners'] view of our property may be impacted but not so much the view over the property. The hedge along the north boundary is higher than the fence and gate
- [91] Simply put, the respondents argue that, given the other obstructions, the obstruction of the view caused by the fence is minimal.
- [92] Similar arguments have been considered and rejected by the courts of this province. For example, in *Wallster v. Erschbamer*, 2009 BCSC 1619 [Wallster BCSC], aff'd *Wallster BCCA*, a servient tenement designed a home which exceeded the height restriction of the subject

restrictive covenant by 16 inches. Partway through construction, she sought an order to modify the restrictive covenant. Relying on s. 35(2)(b), she argued that the home's height would obscure the respondent's view "only a minimal amount more" than if she complied with the restrictive covenant and, accordingly, there was no practical benefit to maintaining the height restriction set out in the restrictive covenant.

[93] The chambers judge disagreed. He noted:

[16] The evidence adduced by the respondents establishes that there is a practical benefit both in terms of the view from the Reference window and real estate value.

[17] It is apparent that the height restriction in the RC was put in place to preserve views from the respondents' property.

[18] The property was purchased by the respondents for the views afforded from the house.

[20] The argument that there are better views from other places in the respondents' home does not add to the petitioner's position. The focus is on the Reference window specified in the RC and the practical benefits derived at that location. Further, I find no merit in the argument that the sought after roof height would only impede slightly the view from a roof built to the height permitted in the RC, given that a practical benefit exists.

[Added emphasis.]

[94] That decision was upheld by the Court of Appeal.

[95] In my view, while not identical, the circumstances of the case at bar closely mirror the circumstances in Wallster. In both cases, the intention and purpose of the height restriction contained in the restrictive covenant was, specifically, to preserve the view.

[96] Also like the situation in Wallster, it is uncontroverted that the preservation of the view was an important factor in the petitioners' decision to purchase their property. That they negotiated an additional covenant (the 2003 restrictive covenant) to ensure that the shrubs and trees on the respondents' property would be kept below grade evidences the importance of the view to them.

[97] I accept that the fence does not completely obscure the view from the petitioners' property. Indeed, as the respondents argue, the restrictive covenant does not provide for an "unobstructed view". However, having reviewed the photographs of the view both prior and subsequent to the installation of the fence, I am satisfied that the fence as a whole does detract from the view in not an insignificant way. Not only is the expansive view impaired, unlike the greenery of the hedge and the trees the petitioners have chosen to keep on their property, the fence is a jarring juxtaposition to the natural environment comprising the view.

- [198] In my opinion, the erection of a steel fence does not preserve the view which, at the time the restrictive covenant was made, did not include the fence. Nor does the fence allow for the preservation of the natural environment comprising the view.
- [199] Having said that, I accept that the impact of the North Boundary Fence is less significant than the impact of Property Line Fence. The fact that that a taller hedge has been planted behind the former means that the petitioners' ocean and mountain views to the northwest would be impaired in any event. However, like the Property Line Fence and the South Fence, the North Boundary Fence does impact the natural environment comprising the view that existed at the time the restrictive covenant was entered into.
- [100] To succeed under s. 35(2)(b), the respondents must show that the continuation of the restrictive covenant provides no practical benefit. Even with the hedge behind the North Boundary Fence and the hedges and trees on the petitioners' property, I cannot conclude that is the case. I do not accept the respondents' argument regarding the "minimal" impact of the fence.
- [101] In addition, according to expert opinion evidence obtained by the petitioners, the current value of the petitioners' property would increase by \$100,000 if the fence is removed. While the respondents' expert disagrees with the methodology used reach that conclusion, they offer no evidence that the petitioners have not suffered any financial impairment as the result of the fence. In oral submission, the respondents appear to concede that some impairment may exist, but that the impairment is a fraction of \$100,000.
- [102] While I accept that the financial impact of the fence may be less than \$100,000, I am satisfied that its existence has some negative financial impact which represents the loss of a practical benefit: Zhang BCSC at para. 80.
- [103] In any event, the view the restrictive covenant is intended to preserve, in and of itself, is of a "practical benefit" to the petitioners.
- [104] The respondents have failed to establish that there is no "practical benefit" of the restrictive covenant in preserving the petitioners' view. The application under s. 35(2)(b) must fail.
2. Section 35(2)(d) - Will the modification or cancellation injure the person entitled to the benefit of the registered charge?
- [105] The analysis under subsection 35(2)(d) mirrors the analysis under subsection 35(2)(b) because the potential injury under subsection (d) will often be the removal of practical benefits protected by subsection (b): Tri-X at para. 29, citing 676604 B.C. Ltd. v. Nanaimo (City), 2011 BCCA 447 at para. 10.
- [106] That is the situation in this case. For the same reasons set out in relation to s. 35(2)(b), I find that the proposed modification to allow the fence will "injure" the petitioners.
3. Conclusion on the respondents' application under s. 35

[107] Having failed to prove either of the grounds under s. 35(2)(b) or (d), the respondents' application to modify the restrictive covenant is dismissed.

D. What relief is available to the petitioners?

[108] Having concluded that the restrictive covenant is valid and applies to the fence, the issue to be determined is the form of order that flows from those conclusions. Specifically, are the petitioners entitled to the mandatory injunction compelling the respondents to remove the fence and, if so, on what terms?

1. Are the petitioners entitled to the mandatory injunction sought?

[109] The case law has held that the usual remedy for a breach of a building scheme is a mandatory injunction to effectively enforce its terms, but it is a discretionary order governed by the following factors:

- a) the character of the interest to be protected;
- b) the relative adequacy of injunctive relief in comparison with other remedies;
- c) delay, if any, in bringing the action;
- d) misconduct, if any, of the parties;
- e) relative hardship likely to result if the injunction is granted or denied;
- f) interests of third parties and/or the public; and
- g) the practicality of framing and enforcing the order,

Schriemer v. Harris, 2021 BCSC 1490 at para. 50, citing Suncourt Homes Ltd. v. Cloutier, 2019 BCSC 2258 at para. 55 and 417489 B.C. Ltd. v. Scana Holdings Ltd., [1998] B.C.J. No. 140, 1998 CanLII 6770 (B.C.S.C.) at para. 8.

[110] I see no principled basis on which that authority should not also apply to a restrictive covenant.

[111] While they did not expressly reference the factors set in Schriemer, in oral submissions, the respondents referred to the "clean hands doctrine" as a basis on which to deprive to the petitioners of the injunction they seek. I take that argument to invoke factor (d) --the alleged misconduct of the petitioners. In either case, the determination of the issue invokes the discretion of the Court.

[112] In essence, the respondents say that, given the petitioners' unauthorized use of the respondents' lawn, it would be inappropriate to grant the equitable relief sought in the form of a mandatory injunction. As described above, that conduct includes Mr. Koskoski's mowing and maintenance of the lawn, Mr. Koskoski's unannounced attendance on the respondents' property on one occasion to trim trees, and the presence of the sprinklers on the lawn. They say that conduct, in part, necessitates the installation of the fence.

- [113] In my view, that conduct is an insufficient basis on which to invoke the "clean hands" doctrine.
- [114] In coming to that conclusion, I do not intend to condone the petitioners' unauthorized entry onto the respondents' portion of the lawn. However, the context is important. As noted, Mr. Koskoski had maintained the lawn since the petitioners purchased the property in 2003, and continued to do without complaint for 11 years after the respondents purchased their property. I cannot conclude he did so for any nefarious or untoward purpose - he was looking after the lawn, conduct other neighbours might welcome.
- [115] In addition to Mr. Koskoski's maintenance of the lawn, the respondents' also refer to the one-time unauthorized tree trimming and the installation of sprinklers by someone other than the petitioners as the petitioners' improper conduct. I easily conclude that the respondents' complaint of this innocuous activity (the latter of which is not even attributable to the petitioners) is another disingenuous attempt to resile from their obligations under the restrictive covenant.
- [116] I do not accept that the "clean hands" doctrine applies to deny the petitioners the relief they seek.
- [117] Ultimately, the petition was brought so that the petitioners could preserve their view. In my opinion, although the petitioners have offered expert evidence regarding the effect of the fence on the monetary value of their property, monetary compensation does nothing to provide the petitioners with the preserved view they negotiated (both by the continued existence of the restrictive covenant and the 2003 restrictive covenant), of which the respondents were aware. A monetary award would be inadequate.
- [118] Finally, there being no delay in the commencement of these petition proceedings, the "usual remedy", being a mandatory injunction to enforce the terms of the restrictive covenant, is appropriate. The final issue to be determined are the specific terms of that order.
2. On what terms should the injunction be granted?
- [119] As described above, the fence borders more than just the petitioners' property line. In addition to the portion comprising the Property Line Fence, it also includes the South Fence and the Northern Boundary Fence.
- [120] The petitioners argue that the injunction should require the respondents remove all three portions of the fence, all of which, they say, disrupt the view the restrictive covenant was meant to preserve. They say an order on those terms would reflect the terms and the purpose of the restrictive covenant.

- [121] However, the order sought in the petition is less comprehensive. In the petition, the fence, for which the declaratory and injunctive relief is sought, is defined as the fence "constructed along the eastern boundary of the [r]espondents' [p]roperty"; while that includes the Property Line Fence and the South Fence, it does not include the North Boundary Fence (on the northern boundary of the respondents' property).
- [122] The respondents argue that the removal order should be confined to Property Line Fence. Referring to the limited order sought in the petition, the respondents argue that an injunction to remove the fence should not include the North Boundary Fence. Arguing that the restrictive covenant was not made to benefit the petitioners' south neighbour, they argue that no order should be made to remove the South Fence.
- [123] I do not accept the respondents' argument with respect to the South Fence.
- [124] First, as I have described, the view from the petitioners' property is not limited to the 90° directly in front of their property but, rather, includes a panoramic view of the ocean and mountains. The South Fence obstructs that panoramic view. I accept, as the respondents argue, that that petitioners' south neighbours will also benefit from an order to remove the South Fence. However, any such collateral benefit is irrelevant on this analysis. What is relevant is the fact that the South Fence, erected on the respondents' property in excess of 50.43 metres GD, contravenes the restrictive covenant and obstructs the view the restrictive covenant was meant to preserve.
- [125] Second, the restrictive covenant precludes the erection, building, or construction of the enumerated structures on the respondents' property. Nothing in its terms directly or indirectly suggests those restrictions are confined to the portion of the respondents' property that borders the petitioners' property.
- [126] I am satisfied that that, in addition to the Property Line Fence, an order to remove the fence must include the South Fence, which borders the eastern boundary of the respondents' property.
- [127] I cannot come to the same conclusion with respect to the North Boundary Fence.
- [128] Having defined the fence in the circumscribed manner they did (along the eastern boundary of the respondents' property), the petitioners set out the scope of the order sought in this petition. At no time since the petition was filed in August 2023 or even after the matter was first scheduled to be heard in February 2024 did they apply to amend the petition to seek a more comprehensive order to include the North Boundary Fence. That remained the case even after hearing the respondents' position regarding the limited scope of the order sought in the petition.
- [129] As the petitioners have not sought an order to remove the North Boundary Fence, in my view, it would unfair to the respondents to make that order now. I decline to do so.

[130] The respondents are ordered to remove the fence constructed along the eastern boundary of the respondents' property within 30 days of the date of this order.

[131] To be clear, however, nothing in declining to order the removal of the North Boundary Fence is intended to preclude the petitioners from making a further application in that regard. I will be seized of any such application.

[132] The parties are at liberty to apply for further directions as may be required to give effect to the declarations and the order made, for which I shall also be seized.

IV. Costs

[133] Each of the parties have asked to make submissions on costs on the delivery of these reasons. If either party still wishes to do so:

- a) The party wishing to make submissions may do so by filing and serving written submissions, not exceeding three pages, within 30 days of these reasons;
- b) The responding party will have two weeks after receipt of the costs submissions to file a written response, also not to exceed three pages; and
- c) Further written reply, not to exceed two pages, must be filed within a further two weeks.

[134] If no costs submissions are filed within 30 days, costs of the proceeding are awarded to the petitioners at Scale B.

"Ahmad J."

[1] "Geodetic Datum" is the unit of measurement used in the subject restrictive covenant. It references to a specific known elevation in Delta.

[2] Bryan A. Garner, Black's Law Dictionary, 11th ed (Thomson Reuters, 2019) at 907.

[3] Daphne A. Dukelow, The Dictionary of Canadian Law, 4th ed (Carswell, 2011) at 618.

[4] In British Columbia, s. 18(5) of the Property Law Act, R.S.B.C. 1996, c. 377 permits the covenantee and covenantor to be the same person.

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