

CANADA / JUDGMENT

## Ruth v. Maple Sunshine Holdings Group Inc.

2020 BCSC 44

COURT

Supreme Court of British Columbia

DECIDED

15 January 2020

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2020 BCSC 44 Ruth v. Maple Sunshine Holdings Group Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ruth v. Maple Sunshine Holdings Group Inc.,

2020 BCSC 44

Date: 20200115

Docket: S1711469

Registry: Vancouver

Between:

Richard Ruth and Pammila Ruth

Petitioners

And

Maple Sunshine Holdings Group Inc. and

The Owners, Strata Plan VAS 2595

Respondents

- and -

Docket: S1910900

Registry: Vancouver

Between:

Maple Sunshine Holdings Ltd.

Petitioner

And

Richard Ruth, Pamilla Ruth and

The Owners, Strata Plan VAS 2595

Respondents

- and -

Docket: S195619

Registry: New Westminster

Between:

Maple Sunshine Holdings Group Inc.

Petitioner

And

Town of Gibsons

Respondent

Before: The Honourable Mr. Justice Dley

Reasons for Judgment

Counsel for Richard Ruth and Pamela Ruth:

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O. Miklos

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I.M. Knapp

No one appeared on behalf of the Town of Gibsons:

Place and Date of Hearing:

Vancouver, B.C.

December 3, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 15, 2020

## Introduction

- [1] This decision arises out of three actions touching upon the same property in Gibsons, British Columbia. The findings of fact are relevant to all three actions. Accordingly, these reasons are to be attached to each action.

## Overview

- [2] Mr. and Ms. Ruth ("Ruths") are owners of Lot 13. Adjacent and parallel to the southern half of Lot 13 is Strata Plan VAS 2595 ("Strata") which comprises a four-unit townhome complex. Running between the properties is a lane used by the Ruths and the Strata to gain access to the back of the respective properties. The Ruths use the lane to access a garage and the Strata uses the lane to access additional parking space. The lane is covered by a registered easement. However, the easement does not cover the entirety of the area on Lot J that is actually used by the Ruths and the Strata.
- [3] Maple Sunshine Holdings Group Inc. ("Maple Sunshine") owns what is now Lot J, north of the Strata. Maple Sunshine is not agreeable to continued access across its property by either of its neighbours. Maple Sunshine intends to use the area on Lot J not covered by the easement, but used by the Ruths and the Strata ("disputed area"), for development of its property.
- [4] The Ruths and the Strata seek a declaration that the disputed area comprises an equitable easement or such other relief that will maintain the status quo and permit them to continue using the land. Maple Sunshine seeks an order that the registered easement be reduced to terminate at the southern boundary of its property.
- [5] In addition, Maple Sunshine needs to secure an extension of time for making an election to proceed with the next phase of the strata development under a "Phased Strata Plan Declaration" as authorized by s. 232 of the Strata Property Act, S.B.C. 1998, c. 43. The Town of Gibsons ("Gibsons") does not oppose that application, but the Ruths and the Strata do.
- [6] As is the case in neighbourly disputes, the respective parties are pitted against each other. The Ruths and the Strata collectively oppose Maple Sunshine's claims for relief and vice versa.

## The Properties

- [7] The properties had all been owned by Mr. and Ms. Wood ("Woods"). In November 1989, they granted an easement over Lot J to Lot 13. It was a 40-metre long strip, running north-south; it was 4.5 metres wide. The easement allowed access to the back of Lot 13.

- [8] In February 1990, the Woods subdivided Lot J by way of a phased strata plan. The first phase was the southern half of Lot J and what is now the Strata. The second phase of the strata plan comprised the northern half of Lot J. The easement encroached 0.525 metres onto the northern half of Lot J, now owned by Maple Sunshine.
- [9] Phase one was completed in 1992 with the construction of the four-townhouse development.
- [10] Lot J was encumbered by the phased plan of development with a "Form E" (now Form P of the Strata Property Regulation, B.C. Reg. 43/2000, under the Strata Property Act) lodged against the title.
- [11] The Woods' son, Richard, bought Lot 13 and, in 1993, he built a garage at the rear of the home. The garage faced the Strata property and the only access to it was along the easement and further into Lot J. The Woods' continued to own Lot J. The Strata owners used a portion of Lot J to park vehicles.
- [12] Lot J has never been developed. It has been owned by five owners since the Woods.
- [13] The Ruths bought Lot 13 from Richard in 1999. By then, the garage had been converted into a dwelling. The registered easement and the area north of it on Lot J have been used continually for access to the garage/dwelling on Lot 13 and for Strata parking. Until Maple Sunshine purchased Lot J in May 2016, there had been no issue with access.
- [14] Gibsons will require a development permit and, presumptively, development on Lot J would need to be in keeping with the first phase.
- [15] Maple Sunshine needs a court order (s. 232(3) of the Strata Property Act) to extend the time to elect to proceed under the filed Form E. Gibsons is not opposed to the order.

## The Filed Documents

- [16] The registered easement states that Lot J, as the servient lands, has agreed to grant the easement for the benefit of the dominant lands, being Lot 13. The easement includes the following clause:

This easement is granted to allow the full, free and uninterrupted access and egress at all times to and from the dominant lands in common with others entitled thereto for persons and motor vehicles through and over the servient lands; but it does not allow the parking of motor vehicles on the easement area herein defined. And it is agreed between the parties that both parties shall have the mutual use of the easement area for access and egress.

- [17] The Woods filed a declaration of their intention to develop Lot J through a two-phase strata plan. The declaration, filed as a Form E, stated that the Woods would elect as to whether or not the Woods were to proceed with each phase. The election for the second phase was to be done by March 10, 1990. That date was postponed to January 2, 1996, by an amended Form E. Phase two was to be a mirror of the first phase. No election was made.

## Legislation

- [18] Section 35(1) of the Property Law Act, R.S.B.C. 1996, c. 377, permits the court to modify or cancel an easement.
- [19] Section 232(3) of the Strata Property Act allows the court to order an approving officer to extend the time for an owner developer to elect to proceed with the next phase of the proposed strata plan. Section 233(5) permits a strata corporation to apply to the court for a determination as to whether an election not to proceed with the next phase is unfair to the strata corporation.

## No. S1711469 - Extension of Easement

- [20] The Ruths have a plan to develop the northern part of Lot 13. Access to such a development would require passage through Lot J in the area of the present garage/dwelling.
- [21] The Ruths also seek to preserve the access for their tenants who live in the now converted garage.
- [22] The Strata supports the Ruths because it uses some of the area adjacent to the lane on Lot J for parking.
- [23] Maple Sunshine resists the application to extend the registered easement by about 18 metres onto its land. Maple Sunshine argues that the Ruths are not seeking to correct a historical wrong, but rather are trying to improve their property at its expense.
- [24] There is no evidence from the Woods or their son as to the circumstances surrounding the granting of the easement and why an easement did not cover the land now in issue.
- [25] The easement permitted access for the Woods to enter their attached garage located on the north side of the home on Lot 13.
- [26] Photographs and aerial views show that at times, the garage/dwelling has been completely enclosed by fencing so that parking would not be available adjacent to that structure. There is additional parking at the front of the Ruths' home.
- [27] The Ruths have referred to authorities that touch upon the question of interpreting easements. The wording of the easement governs the interpretation of its use unless there is ambiguity or the surrounding circumstances show that both parties to the agreement could not have intended a particular use of the easement as authorized by the document's wording: *Grandfield v. Cowichan Valley (Regional District)* (1996), 16 B.C.L.R. (3d) 382 at paras. 20-21 (C.A.).
- [28] There is no ambiguity in the easement; it is clear as to what is permitted within the confines of the stipulated area. It cannot be read to extend its boundaries. Similarly, the surrounding circumstances cannot be relied upon to alter the plain language, meaning and intent of the document.

- [29] The garage, which was later converted to a dwelling, was not built until after (four years later) the easement was registered. Therefore, it has not been demonstrated that the parties to the agreement had actually agreed or intended the easement to cover a greater area than set out. The easement document cannot be used to secure greater rights than those agreed upon.
- [30] The Ruths place great emphasis on the notion that, in the absence of an implied easement, the garage/dwelling is rendered worthless as a garage. However, that argument ignores the reality of the use that the building has been put to. It is no longer a garage - it has been converted to a residence.
- [31] Historical use of the lane does not confer on the Ruths a proprietary right to the land. The Ruths and Strata argue that they have had the benefit of a portion of Lot J for almost 30 years and, therefore, the status quo should continue. That would be akin to invoking the doctrine of prescription - a doctrine that no longer has any effect: *Young v. Beck*, 2017 BCCA 248 at para. 13.
- [32] The Ruths must then rely on a claim for an equitable easement based on the doctrine of estoppel. As an equitable remedy, the ultimate issue is based on the question of unconscionability: *Young* at para. 17.
- [33] The modern approach to proprietary estoppel was summarized in *Cowper-Smith v. Morgan*, 2016 BCCA 200 at para. 73:

Thus, the elements of the modern doctrine of proprietary estoppel require: (i) an assurance or representation by the defendant that leads the claimant to form a mistaken assumption or misapprehension that he or she has an interest in the property at issue; (ii) a causative connection between the assurance or representation and the claimant's reliance on the assumption such that the claimant changes his or her course of conduct; (iii) a detriment suffered by the claimant that flows from his or her reliance on the assumption, which causes the unfairness and underpins the proprietary estoppel; and (iv) a sufficient property right held by the defendant that could be transferred to satisfy the right claimed by the claimant.

- [34] The elements of proprietary estoppel do not exist in these circumstances. There is no convincing evidence of any assurances or representations that lead the Ruths to misapprehend the presence of an easement beyond what was registered on title. There is no detriment to the Ruths causing unfairness. There is an inconvenience if the Ruths are forced to construct other access to the garage/dwelling from the easement to the back of Lot 13. However, an inconvenience in these circumstances does not equate to unfairness that gives rise to proprietary estoppel.

- [35] There is no evidence to show that the garage/dwelling was built on the assurance that access would be granted from Lot J. If the Woods had intended to grant an easement beyond what was registered, it was open to them to have done so. It is apparent that they were careful in setting out the terms of the easement. As an example, they were clear and unequivocal that parking was not permitted within the easement.
- [36] The Woods continued to own Lot J after the garage/dwelling was built. I can infer that they raised no issue with the building being accessed across their land. However, there is no evidence that they took any steps to formalize access through Lot J; nor did any subsequent owner.
- [37] There is access to the rear of the Ruths' property. The easement extends beyond the attached garage so that the rest of the land can be accessed without encroaching onto Lot J.
- [38] Mr. Ruth has deposed that he intends to develop the rear of Lot 13 by constructing row housing. His preference would be to have an easement extend further along the boundary line with Lot J. That would presumably add value to his development. However, that would also detract from the value of Lot J by depleting its size. In essence, the result would be an expropriation; equity is not a remedy to invoke such an unjust result.
- [39] The Strata argues that its parking spots have been in use for decades and, therefore, the owners of Lot J have acquiesced. It is apparent that Lot J has been vacant land without any development. It would not be unusual for a neighbour in these circumstances to allow vehicles to park on its vacant land, but that does not give the Strata rights over the property. The Strata expected that upon completion of the second phase, there would be additional parking, but that was predicated on the second phase proceeding. It is unknown as to whether the second phase will proceed until an election has been made.
- [40] It is also clear that the Woods excluded parking from the easement that they granted. In these circumstances, I draw the inference that absent a clear intention to the contrary, the Woods would not have permitted parking in the easement now being sought by the Ruths and supported by the Strata.
- [41] The Strata has no basis upon which to claim a propriety interest in the remainder of Lot J.
- [42] I, therefore, conclude that there is no equitable easement.
- [43] The Ruths rely on the provisions of s. 35 of the Property Law Act to modify the easement. The Property Law Act is a comprehensive code that governs any modification or cancellation of a registered charge: *Vandenberg v. Olson*, 2010 BCCA 204 at para. 23.
- [44] The relevant portions of s. 35(1) and (2) of the Property Law Act state:
- 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;
- (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.
- [45] An assessment under s. 35(2)(b) is not to be approached as a balancing exercise: *Wallster v. Erschbamer*, 2011 BCCA 27 at para. 19.
- [46] The modification of the registered easement urged by the Ruths results in the creation of an easement that was not contemplated by the signatories to the agreement. There is no indication that the Woods intended to develop their property as now envisaged by the Ruths. The easement allowed the Woods access to their attached garage and to the back of their property. It was not intended to grant access to the garage/dwelling, or a further residential development, since it was not built until years later.
- [47] In *Banville v. White*, 2002 BCCA 239 at paras. 24-25, the Court endorsed the comments in *Sidhu v. Chandra*, [1997] B.C.J. No. 88(S.C.):
- [26] I agree with the Respondent's argument s. 31 applies to the servient party bearing the burden of a charge against the land and does not provide a remedy to the dominant party who enjoys the benefit.
- [27] I agree with the Respondent's statement that s. 31 "is not intended to provide a chargeholder with the means to expand the scope of his/her interest in the land." If expansion were contemplated by s. 31, it would give a power similar to expropriation of a right in the land.
- [28] S. 31(4)(b) requires notice to "the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled." From that requirement it appears the holder of the servient tenement, not the charge holder, must be the applicant. The "land" referred to in the section is the title holder's land, not the charge holder's.

Section 35 of the Property Law Act is equivalent to s. 31 addressed in *Sidhu* as the Court was dealing with the Property Law Act, R.S.B.C. 1979, c. 340.

[48] The Ruths do not fall within s. 35(2)(b). Their application is more properly regarded as an expropriation of property; that is not a matter that is covered by any of the grounds enumerated in s. 35(2).

[49] I, therefore, conclude that there is no relief available to the Ruths under s. 35(2).

### **Injunctive Relief**

[50] The Ruths argue that they are entitled to injunctive relief because, if the status quo is not maintained, they will lose vehicle access to half their property. They further argue that if an injunction is not granted, then Maple Sunshine will be empowered to block the Ruths from developing their property because vehicles or equipment will not be able to bypass the garage/dwelling. Their concern is focussed on the development of their property.

[51] Injunctive relief may be granted if:

- a) There is a serious question to be tried;
- b) The applicant will suffer irreparable harm if the injunction is not granted; and
- c) The balance of convenience favours granting the injunction.

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at 347-49.

[52] Injunctive relief should not be regarded as a dumping ground to seek solace when there is no substantive basis on which to ground an action.

[53] The threshold for determining whether there is a serious question to be tried is a low one, but it is still a threshold. I am not satisfied that there is a serious question to be tried in this case.

[54] The easement is clear; there is no ambiguity. It is not the existing easement that is the issue. Instead, it is the concern that Maple Sunshine may not complete phase two of the strata plan. The meaning of the easement can be readily gleaned from reading the agreement.

[55] The Ruths will not suffer irreparable harm if the injunction is not granted. They have access to the rear of their property. It may not be as convenient as if they were permitted to drive past the garage/dwelling on Lot J before entering Lot 13. However, there is access along their attached garage. If there are expenses associated with that access, those can be easily quantifiable.

[56] The balance of convenience does not favour granting the injunction. The Ruths will still have access to their property without an injunction. To issue an injunction would unnecessarily restrict Maple Sunshine in its development of Lot J. In essence, the injunction would force Maple Sunshine to proceed with the strata plan from almost 30 years ago or do nothing. The harm to Maple Sunshine far outweighs the benefit to the Ruths.

[57] I, therefore, conclude that the application for an injunction is dismissed.

- [58] The Ruths argue that Maple Sunshine should be restricted to completing the development of Lot J in accordance with the phased plan as set out in the filed Form E. They say that a court order is the only way of resolving the differences between them, the Strata and Maple Sunshine. In effect, they ask this court to impose terms on Maple Sunshine that will force it to negotiate with its neighbours. They say that relief must be granted so as to "quell the inequitable and heavy-handed approach of [Maple Sunshine]".
- [59] Undoubtedly, there may have been more diplomatic and perhaps cooperative overtures by Maple Sunshine to try to resolve this matter with its neighbours. Putting up "no trespassing" signs and filing complaints with the police do little to foster goodwill in the neighbourhood. However, it cannot be said that Maple Sunshine's conduct rises to the level where this court must intervene in a private dispute and rebuke a party for failing to act in good faith as has been suggested. Maple Sunshine is entitled to protect and enforce its proprietary rights.
- [60] There is no legal basis upon which to order the status quo. To do so would simply be shifting the leverage in bargaining power. The Ruths and the Strata may still involve themselves in the development of Lot J by making representations to Gibsons. It is not for this court to interject itself into that process.
- [61] I conclude that there is no basis upon which the easement can be extended further into Lot J. Accordingly, the relief sought by the petitioner is dismissed.

### **No. S1910900 - Reduction of Registered Easement**

- [62] Maple Sunshine seeks a modification of the registered easement so as to reduce its length by 0.525 metres which is the measurement by which it encroaches into Lot J north of the Strata. The Ruths and the Strata argue that the modification is not necessary and in any event that the application should be dismissed because the encroachment is de minimus.
- [63] Section 35 of the Property Law Act governs this application. Maple Sunshine relies on ss. (b) and (d) which allow for modification where its reasonable use of the land is being impeded with no practical benefit to others or that the modification will not harm others.
- [64] The easement is an impediment to the remainder of Lot J; it is reduced in size by a half metre to the width of the easement (4.5 metres). The Ruths do not lose access to Lot 13.
- [65] There is no injury to the Ruths. The loss of the half metre does not reduce or eliminate the effectiveness of the easement. The Ruths will still be able to access their attached garage and the back of their property.

- [66] There is no reason to deny Maple Sunshine use of its property. Carving off bits and pieces of property and justifying retention on the basis that the taking falls within the de minimus maxim is not appropriate. There may be occasions where a nominal encroachment can be justified. For example, where the encroachment is with respect to a large structure, the removal of which is impractical, the de minimus argument may be persuasive. The circumstances here cannot justify the encroachment.
- [67] I, therefore, conclude that the easement be reduced in length and terminate at the southern boundary of Lot J, which is the northern boundary of the Strata.

### **No. S195619 - Declaration to Extent Time**

- [68] Maple Sunshine had applied for and obtained an order granting an extension on the time to elect to proceed under the filed Form E. That order was subsequently set aside because notice had not been given to the Ruths and the Strata.
- [69] Maple Sunshine has indicated that the original plan to proceed with the second phase of the townhome development on Lot J is no longer feasible. Maple Sunshine has contemplated a larger development incorporating other property which it has acquired.
- [70] The Ruths maintain that they need the easement to service their property. The Strata argues that the second phase, as documented in the filed Form E, would provide additional parking spaces. Therefore, they both argue that an extension of time should not be permitted because Maple Sunshine will elect not to proceed as per the Form E.
- [71] The Strata concedes that the primary focus of s. 235 of the Strata Property Act governing unfairness is to provide compensation for the loss of a "common facility".
- [72] The Strata argues that if Maple Sunshine chooses not to proceed with the second phase of the Form E development, it may fundamentally alter the neighbourhood.
- [73] The reality is that neighbourhoods change. The neighbourhood would change if the Ruths constructed their townhouse development. As long as a property owner abides by local government requirements, it should be free to develop its lands.
- [74] Gibsons takes no issue with the extension of time being granted.
- [75] The provisions of s. 235 of the Strata Property Act state:

### **Election not to proceed**

235(1) An owner developer who elects not to proceed with the next phase must, before the time set in the Phased Strata Plan Declaration for the election to proceed,

- (a) give written notice of the election not to proceed to the strata corporation and the approving officer, and

- (b) file with the registrar a notice of the election not to proceed, together with a reference plan, in accordance with section 100 (1) (a) of the Land Title Act, of the remainder parcel.
- (2) On receipt of the notice of the election not to proceed, the registrar must remove the Phased Strata Plan Declaration notation from the title to the strata lots and from the title to the remainder parcel.
- (3) Unless otherwise agreed between the owner developer and the strata corporation, if an owner developer elects not to proceed, the Supreme Court may order, on application of the owner developer or the strata corporation made within 2 years of the receipt of notice under subsection (1) (a), that the owner developer
  - (a) contribute to the expenses of the strata corporation that are attributable to the common facilities as if the owner developer had elected to proceed, and
  - (b) pay money, post a bond, provide a letter of credit or provide other security for the owner developer's share of the expenses of the strata corporation under paragraph (a).
- (4) Subsection (3) applies only if
  - (a) common facilities have been constructed in the existing phases, or
  - (b) the strata corporation has become contractually obligated to contribute toward the operating costs of common facilities on a separate parcel.
- (5) On application by the strata corporation, the Supreme Court may determine whether the owner developer's election not to proceed is unfair to the strata corporation.
- (6) If the court determines that the election is unfair, the court may make one or both of the following orders:
  - (a) that the owner developer complete whatever common facilities the court considers equitable;
  - (b) that some or all of the security provided for the common facilities be paid as provided by the court.
- (7) An agreement referred to in subsection (3) must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, and for the purposes of that 3/4 vote, the owner developer is not an eligible voter.
- [76] In these circumstances, the process must proceed in the manner outlined in the statute:
  - a) First, there must be an election that the owner developer will not be proceeding with the next phase;
  - b) Second, the owner developer must notify the strata corporation and the approving officer of its election;

- c) Third, if there are common facilities constructed, the court may order compensation from the owner developer to contribute to the expenses of the strata corporation regarding those common facilities (the compensation order only arises if there are common facilities);
  - d) Fourth, the strata corporation may apply to the court for a declaration that the election not to proceed is unfair to the corporation; and
  - e) Fifth, if the court determines that the election is unfair, it may order the owner developer to complete common facilities or pay compensation.
- [77] Maple Sunshine has not made an election that it will not proceed - its application is to extend the time for making such an election. If it chooses not to proceed, the strata corporation may apply for a declaration that such an election is unfair as outlined above. The determination of that question will be decided within the framework of the statutory provisions.
- [78] Gibsons may have a role in deciding what development, if any, will be approved on Lot J if Maple Sunshine elects not to proceed with the second phase.
- [79] To deny Maple Sunshine the extension of time to elect would in essence be leveraging the Ruths and Strata positions regarding the extension of the easement. These provisions of the Strata Property Act are not to be used to extract concessions and reap expropriation without compensation from property owners.
- [80] Maple Sunshine's application seeks an extension of time to elect until March 10, 2019. This Petition was filed on October 19, 2017. At the time of its filing and, assuming the matter was heard within a reasonable time, the March 10 date was appropriate. Maple Sunshine should not be denied an extension simply because it has taken longer than anticipated to have the matter heard.
- [81] I, therefore, conclude that there is no reason to deny Maple Sunshine an extension of time to elect pursuant to s. 232 of the Strata Property Act. The election must be made no later than March 10, 2020.
- [82] The result is that the approving officer is ordered, under s. 232(3) of the Strata Property Act, to extend the time to March 10, 2020, for Maple Sunshine to make its election as to whether it will proceed with the second phase of the strata plan.

## Costs

- [83] Although there have been three actions commenced, the parties have been reasonable in having them heard at the same time. Maple Sunshine has been successful and is entitled to costs. Whether that means costs to the full extent in each action was not addressed at the hearing.

[84] The parties are at liberty to set the matter down for a further hearing as to the question of costs.

"S.D. Dley J."

DLEY J.

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