

CANADA / JUDGMENT

Sauer v. 648657 B.C. Ltd.

2019 BCSC 43

COURT

Supreme Court of British Columbia

DECIDED

15 January 2019

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2019 BCSC 43 Sauer v. 648657 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sauer v. 648657 B.C. Ltd.,

2019 BCSC 43

Date: 20190115

Docket: S-182081

Registry: Vancouver

Between:

Robert Sauer, Craig Sheridan, Dr. Steven L. Kirzner Inc.,

Mackoff Management Services (2012) Inc. and Melvin Haber

Petitioners

And:

648657 B.C. Ltd., Interior Savings Credit Union, In Trust for SDRSP Plan 37000853 and SDRSP Plan 37000514, The Canada Trust Company, In Trust for SDRSP Plan 6K-6628S, Kelowna Mountain Development Services Ltd., Kelowna Mountain Limited Partnership, Mark Consiglio, 0768723 B.C. Ltd., RBD Financial Inc., Pamela Chung and Art Trojan

Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Petitioners:

D.B. Hyndman

Counsel for the Respondents, 648657 B.C. Ltd., Interior Savings Credit Union, In Trust for SDRSP Plan 37000853 and SDRSP Plan 3700514, and The Canada Trust Company, In Trust for SDRSP Plan 6K-6628S:

R.H. Sommerey

Place and Dates of Hearing:

Vancouver, B.C.

December 5-6, 2018

Place and Date of Judgment:

Vancouver, B.C.

January 15, 2019

Introduction

- [1] This proceeding raises the issue of whether and to what extent a mortgagee of a landlocked parcel of land that is part of a comprehensive real estate development should be entitled to an access easement.

Background

- [2] There is no material dispute regarding the facts.
- [3] Sometime prior to 2006, the respondent, Mark Consiglio ("Consiglio"), through his alter ego the respondent, 0768723 B.C. Ltd. ("0768723"), determined to acquire and develop three large, contiguous, undeveloped parcels of land outside of but adjacent to the southern boundary of the City of Kelowna, British Columbia. The project eventually became known as "Kelowna Mountain" (the "Project"). Consiglio envisioned that the Project would comprise various tourist and other amenities, including a Welcome Centre, an amphitheatre, suspension bridges, a chairlift, a wine cave, cliff walk, a waterfall and vineyards.
- [4] The three parcels of land in question are known as:
- a) Lot A, covering 160 acres;
 - b) Lot B, covering 160 acres immediately to the east of Lot A; and
 - c) Lot C, covering 320 acres immediately to the south of both Lot A and Lot B.
- (collectively, the "Lots")
- [5] Access to the Lots was via a forest services road. The only practical access to Lots B and C from the forest services road is through Lot A.

- [6] As is the case for most real estate developments, financing was required for the Project.
- [7] In September 2006, the respondents, 648657 B.C. Ltd. ("648657"), Interior Savings Credit Union, and The Canada Trust Company (collectively, the "Lot A First Mortgagees") as well as an entity called "B2B Trust" provided financing in the amount of \$4.5 million, taking as security a mortgage over Lot A (the "Lot A First Mortgage"). The interest rate under the Lot A First Mortgage was 18%. At the time the Lot A First Mortgage was registered, the only encumbrance registered against Lot A was a statutory right of way in favour of Gorman Bros. Lumber Ltd.
- [8] Construction of the amenities forming the Project commenced shortly thereafter. At some point in time, a road (the "Access Road") was constructed through Lot A in order to provide access to the various construction sites on the Lots.
- [9] Astonishingly, construction of the Project amenities occurred without apparent regard for the need to obtain building permits or for the boundaries of the Lots. The suspension bridges are anchored on one lot and span another. The Welcome Center and Amphitheatre encroach over lot boundaries, built partially on Lots A and C. The Lot A First Mortgagees, through their representative Richard Dowding, acquiesced in and indeed encouraged construction of the Project despite the manner in which it was being built.
- [10] In November 2008, the respondents, RDB Financial Inc., Pamela Chung, and Art Trojan (collectively, "RDB"), provided additional financing to 0768723 in the amount of \$300,000. As security for the loan, RDB was granted a second mortgage over Lot A behind that of the Lot A First Mortgagees (the "RDB Mortgage").
- [11] In January 2009, the Lot A First Mortgagees and B2B Trust increased their financing of the Project from \$4.5 million to \$5.2 million. RDB executed a priority agreement granting the Lot A First Mortgagees' modified mortgage priority over the RDB Mortgage.
- [12] Also in January 2008, a statutory right of way was registered against Lot A in favour of the City of Kelowna for a water tower and water system. In June 2009, 0768723 granted an easement over Lot A in favour of a neighbouring property along the western boundary of Lots A and C for the same water system (the "Bishop Easement"). A modified Lot A First Mortgage was registered which stipulated that the two statutory rights of way and the Bishop Easement were permitted encumbrances. As well, an agreement granting the Bishop Easement priority over the RDB Mortgage was registered against title to Lot A.
- [13] In January 2011, Consiglio created the respondents, Kelowna Mountain Development Services Ltd. ("KMDSL") as the general partner, and Kelowna Mountain Limited Partnership ("KMLP") as the limited partner, entities through which the Project would continue to be developed.

- [14] In April 2011, KMLP filed with the B.C. Securities Commission an offering memorandum to raise up to \$39 million for the purpose of constructing the Project. KMLP ultimately raised well in excess of \$20 million through that offering.
- [15] In May 2011, 0768723 transferred legal ownership in the Lots to KMDSL without the knowledge of the Lot A First Mortgagees.
- [16] On April 12, 2012, KMDSL, as registered owner of Lot A, granted to itself as registered owner of Lot C, a blanket access easement over Lot A (the "Lot C Access Easement") without notice to or the knowledge of the Lot A First Mortgagees. The Lot C Access Easement provides, in relevant part:

The Grantor for itself and its successors in title, hereby grants unto and for the benefit of the Grantee, its agents, servants, employees, invitees, licensees and its successors in title of the Servient Tenement the full and free right-of-way, right and liberty to pass and repass in common with the Grantor, its servants, employees, agents, invitees and licensees, over and across the Servient Tenement.

The Lot C Access Easement was registered against the title to Lot A on April 23, 2012.

- [17] On June 19, 2012, shortly after the Lot C Access Easement was registered, the Lot A First Mortgagees and B2B Trust executed a document entitled "Lot A Mortgage Extension Agreement" pursuant to which 0768723 agreed to a revised principal and interest payment schedule under the Lot A First Mortgage in consideration for a reduction in the interest rate payable under the Lot A First Mortgage from 18% to 9%. 0768723 failed to make the payments required under the revised payment schedule.
- [18] In August 2012, as a consequence of foreclosure proceedings commenced by B2B Trust under the Lot A First Mortgage, 0768723 purchased B2B Trust's 21% interest in the Lot A First Mortgage.
- [19] In April 2013, KMDSL requested that the Lot A First Mortgagees agree to the Lot C Access Easement being granted priority over the Lot A First Mortgage. The Lot A First Mortgagees refused, advising through counsel that:

Our client will not provide a priority agreement over the Lot A easement. For that, your client will have to refinance and pay out the existing lenders, and put the new mortgage etc. behind the easement.

- [20] Shortly thereafter, on April 17, 2013, 0768723 and the Lot A First Mortgagees entered into a Mortgage Forbearance Agreement pursuant to which the Lot A First Mortgagees agreed not to pursue their demands for payment under the Lot A First Mortgage in consideration for the payment of \$750,000 to them by 0768723.
- [21] Neither the Mortgage Forbearance Agreement nor the earlier Lot A mortgage extension agreement replaced or affected the security in place under the Lot A First Mortgage.

- [22] On June 4, 2013, the petitioners provided additional financing for the Project in the amount of \$3,150,000, taking as security a mortgage over Lot C (the "Petitioners' Mortgage").
- [23] On August 2, 2013, KMDLS, as registered owner of Lot A, granted to itself as registered owner of Lot B and Lot C a blanket utility easement over Lot A in favour of Lot C (collectively with the Lot C Access Easement, the "Lot A/C Easements"). It also granted a blanket access and utility easement over Lot A in favour of Lot B.
- [24] On April 25, 2014, the Lot A First Mortgagees commenced foreclosure proceedings ("Lot A Foreclosure Proceeding"). The relief sought included foreclosure of all of the easements over Lot A that had been registered in favour of Lot B and Lot C (collectively, the "Impugned Lot A Easements"). Although KMDSL and KMLP were named as respondents in the proceeding, the petitioners were not.
- [25] On July 18, 2014, the Lot A First Mortgagees were ordered to amend the foreclosure petition to name 0768723 as a party as a result of the 21% interest it had acquired in the Lot A First Mortgage from B2B Trust.
- [26] The Amended Petition was filed on August 25, 2014. Among other claims, it expressly sought to foreclose on the Impugned Lot A Easements.
- [27] On September 24, 2014, at the request of KMDLS and KMLP and in order to avoid undesired GST assessments, Madam Justice Loo of this Court ordered that the transfers of the Lots from 0768723 to KMDLS that had taken place in May 2011 be rescinded and that title be registered nunc pro tunc in the name of 0768723 subject to all existing charges and priorities (the "Rescission Order"). The transfers ordered by the Rescission Order have not yet been registered.
- [28] On October 16, 2014, Mr. Justice Betton of this Court ordered that there were triable issues raised by the Lot A Foreclosure Proceeding and referred it to the trial list.
- [29] On August 9, 2015, counsel for the Lot A First Mortgagees wrote to the petitioners regarding the Lot A Foreclosure Proceeding stating inter alia that with respect to Lot A:

It's 160 acres and provides the main access to the balance of the KM development lands including the welcome center. The other parcels currently have easements for that access over Lot A but they are registered and ranking after our client's mortgage. These easements will be discharged from title if our clients were to take a final order or on the completion of a sale of Lot A in the context of our client's foreclosure proceeding. We understand Lot A has a few bridge anchors on it, some pathway construction, and the waterfall feature for KM is on Lot A. We don't believe there are any easements for that registered against Lot A.

- [30] Ultimately, the Lot A First Mortgagees decided not to pursue the triable issues that were identified by Betton J. and applied a third time for an order nisi.

- [31] On April 8, 2016, an order nisi with order for sale was granted to the petitioners in separate foreclosure proceedings they had commenced in respect of Lot C.
- [32] On June 8, 2016, an order nisi of foreclosure was granted by this Court in the Lot A Foreclosure Proceeding. The order provided, in relevant part:
8. If the Mortgage and the Lands are not redeemed by December 8, 2016. the plaintiffs shall be at liberty to exercise their rights under the Order for Sale hereinafter ordered, or alternatively apply to this Court for an Order Absolute of Foreclosure. On pronouncement of Order Absolute then the defendants and the heirs, executors, administrators, successors and assigns of the defendants and all persons claiming by, through or under them shall be foreclosed of all right, title, interest, estate and equity of redemption in and to the Lands, and shall immediately deliver to the plaintiffs vacant possession of the Lands.
- [33] As mentioned above, the petitioners were not parties to the Lot A Foreclosure Proceeding and were not represented at the order nisi hearing, although they were aware of it.
- [34] Neither the Lot A First Mortgage nor the Petitioners' Mortgage have been redeemed. Despite exhaustive marketing attempts, neither Lot A nor Lot C has sold pursuant to the respective orders for sale that were granted. No order absolute has been applied for in respect of either Lot A or Lot C.

Issues

- [35] This application before me raises the following issues:
- a) Is the order nisi granted in the Lot A Foreclosure Proceeding binding on the petitioners?
 - b) Are the petitioners entitled to an easement over Lot A under the principle of proprietary estoppel?
 - c) Are the petitioners entitled to an easement of necessity over Lot A?
 - d) Are the petitioners entitled to a remedy under s. 36 of the Property Law Act, R.S.B.C. 1996, c. 377, in respect of the encroachments on Lot C? and
 - e) Are the petitioners entitled to an implied easement over Lot A based on common intent?

Analysis

- a) Is the Order Nisi in respect of Lot A binding on the Petitioners?

[36] The Petitioners' Mortgage secured:

"Lands" means all the Grantor's present and future interest in the mortgaged land described in the Mortgage Form together with improvements, appurtenances and every other thing referred to in Section 10 of the Land Transfer Form Act, Part 3 now or hereafter existing or acquired;

[37] Section 10 the Land Transfer Form Act, R.S.B.C. 1996, c. 252, provides as follows:

Mortgage to include all buildings, reversion and estate

10. Every mortgage under section 9 , includes all buildings, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances to the land comprised in it, belonging or in any way appertaining to it, or demised, held, used, occupied and enjoyed with it, or taken or known as part or parcel of it,

[Emphasis added.]

[38] Accordingly, the Petitioners' Mortgage charged the Lot A/C Easements.

[39] Rule 21-7 of the Supreme Court Civil Rules provides that:

Foreclosure and Cancellation

- (1) A proceeding for foreclosure of the equitable right to redeem mortgaged property or for redemption must be started by petition.
- (2) In a proceeding referred to in subrule (1), all persons whose interest in or claim to the mortgaged property is sought to be extinguished and all persons against whom any relief is sought must be made respondents and, unless the court otherwise orders, it is not necessary to join any other person as a respondent.

[Emphasis added.]

[40] The Lot A/C Easements expressly provide that the dominant tenement was Lot C. The Lot A Foreclosure Proceeding sought to extinguish the rights of the dominant tenement.

[41] Counsel for the Lot A First Mortgagees argued strenuously that naming 0768723, KMDSL, and KMLP was sufficient for the purpose of compliance with R. 21-7(2) of the Supreme Court Civil Rules and that it would have been unprecedented to have had to look behind those entities and also name parties with whom they may have done business. However counsel conceded during his submissions that KMDSL was required to be named because it had an interest in the Lot A/C Easements. In my view, so too did the petitioners have an interest in the Lot A/C Easements and the rights and remedies that flowed from that interest. Those rights and remedies arose by virtue of both s. 10 of the Land Transfer Form Act (which was incorporated in the petitioners' mortgage) and s. 231(2) of the Land Title Act, R.S.B.C. 1996, c. 250, which provides:

- (2) Whether or not a mortgage referred to in section 225 contains words of transfer or charge subject to a proviso for redemption, the mortgagor and mortgagee are entitled to all the legal and equitable rights and remedies that would be available to them if the mortgagor had transferred the mortgagor's interest in the land to the mortgagee,

[Emphasis added.]

- [42] In my view, R. 21-7(2) required that the petitioners be made respondents in the Lot A Foreclosure Proceeding. They were not.
- [43] The question is whether the petitioners have a remedy at this late stage of the proceedings.
- [44] Counsel for the petitioners submits that the Lot A First Mortgagees' purported foreclosure of the Lot A/C Easements is a nullity because it was not demonstrated that the easement was invalid, unenforceable or had expired. The petitioners rely on s. 35 of the Property Law Act which provides, in relevant part:

Court may modify or cancel charges

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

- (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
- (e) the registered charge is invalid, unenforceable or has expired, and its registration should be cancelled.

- [45] The petitioners submit that s. 35 is a complete code for the removal of easements from title to land and that such a remedy cannot be achieved by way of ancillary relief in a foreclosure. In other words, they say that the only basis upon which an easement can be discharged is an order under s. 35(2). They rely on the following passage from our Court of Appeal in *Vandenberg v. Olson*, 2010 BCCA 204, a case in which the appellant sought an order cancelling an easement:
- [23] The respondents argue, correctly in my view, that the court's authority is no more and no less than that conferred by s. 35(2) of the Property Law Act. I also agree with the respondents that s. 35(2) is a comprehensive code (as that phrase is described by Sullivan) which displaces the common law. The authority of the court to cancel an easement is constrained by the specific grounds set out in s. 35(2). In my view, the language of the opening words of s. 35(2) must be interpreted to mean that the Legislature intended to comprehensively describe all the grounds on which an order under s. 35(1)(a) may be made. Consequently, I am of the view that the appellant must bring himself within the s. 35(2) grounds if he is to obtain any relief.
- [46] In my view, the petitioners are attempting to take the comments of the Court of Appeal in *Vandenberg* too far. Section 35 merely provides a mechanism by which a party interested in land may apply for an order cancelling a charge. Nothing in s. 35 of the Property Law Act deals with the question of the priority of charges registered on title to land. The Property Law Act does not supersede the provisions of the Land Title Act in that regard. Because the Lot A/C Easements were registered against title to Lot A after the Lot A First Mortgage was

registered, the British Columbia Torrens Land Title System precludes the argument advanced by the petitioners that the rights under the Lot A First Mortgage are subject to the Lot A/C Easements. The registration of the Lot A First Mortgage was deemed to be notice to the world at large of not only the existence of the charge but its priority. Pursuant to ss. 26-29 of the Land Title Act, that charge is unaffected by any unregistered interest that may affect the land (subject to fraud, which does not exist here).

- [47] Regardless, counsel for the Lot A First Mortgagees submits that, since the order nisi has been entered and was not appealed, this court is *functus officio* and has no jurisdiction to interfere with it. He points first to R. 22-7(1), which provides that a failure to comply with the Supreme Court Civil Rules must be treated as an irregularity and does not nullify a step taken in a proceeding. Rather, the court has the discretion set out in R. 22-7(2), including the discretion to make any order it considers will further the object of the Rules. R. 22-7(4) provides that an application under subsection (2) must be made within a reasonable time. No explanation has been provided by the petitioners for why they waited two-and-a-half years to raise this issue.
- [48] It is noteworthy that the petitioners are not seeking to take any step in the Lot A Foreclosure Proceeding in respect of which they say they ought to have been named as respondents. They could easily have done so. Furthermore, the Lot A/C Easements remain in place as interests against title to Lot A precisely as they were at the time the petitioners obtained their mortgage over Lot C.
- [49] I agree with counsel for the Lot A First Mortgagees that, in the absence of a 'slip' in drawing up the order, or where a matter should have been but was not adjudicated upon or there was an error in expressing the manifest intention of the court, this court is *functus officio* with respect to the order nisi obtained by the Lot A First Mortgagee: *Harrison v. Harrison*, 2007 BCCA 120 at para. 29; *Ba-Oose Inc. v. HSBC Bank Canada*, 2011 BCCA 511 at paras. 21-23. In doing so, I have considered the decision in *Cariboo Disposal Services (90) Ltd. v. Slater Iron & Salvage Co. Ltd.*, 2004 BCCA 246 where, at para. 2 the Court of Appeal stated:
- [2] The Supreme Court has jurisdiction to reopen a final order of foreclosure, where the equities permit it

However, that case was decided in the context of a final order of foreclosure having been granted without notice to the appellant who was the beneficiary of a conditional contract of purchase and sale with respect to the property and without disclosure to the Master who made the order of all the circumstances of that contract. It was an example of there having been an error in expressing the manifest intention of the court.

- [50] Here, there is no suggestion that the order nisi granted in the Lot A Foreclosure Proceeding was in error or failed to express the manifest intention of the court. No argument has been advanced that the order would have been any different had the petitioners been named as respondents. Counsel for the petitioners, nevertheless, submits that the failure to add the petitioners as respondents resulted in the court failing to adjudicate a matter that should

have been adjudicated, namely the petitioners' rights under the Lot A/C Easements. To the extent that is so, it is a matter that must be raised in the Lot A Foreclosure Proceeding, not in a separate proceeding.

[51] Rather than challenging the priority of the Lot A First Mortgage over the A/C Easements in the Lot A Foreclosure Proceeding as they ought to have done, the petitioners instead filed this separate proceeding seeking declaratory relief. In my view, the petitioners' attempt to set aside or vary that order in this manner constitutes an improper collateral attack on that order by way of an impermissible route in a different proceeding: *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599-600; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35, 37, 43, 46-47.

[52] The petitioners' application for a declaration that the Lot A/C Easements are valid and enforceable is dismissed.

b) Proprietary Estoppel

[53] In the alternative, the petitioners seek an easement over Lot A for access to Lot C under the doctrine of proprietary estoppel.

[54] Proprietary estoppel is a remedy available for the acquisition of an interest in land where its owner knowingly stands by while another person incurs detriment under the belief that he is entitled to an interest in the land. The courts have endorsed a broad, flexible approach to the doctrine: *Bland v. Bland*, 2017 BCSC 1712 at paras. 44-45; *The Owners Strata Plan NES33 v. Westshore Developments Limited*, 2015 BCSC 1280 at paras. 66-69 [Westshore].

[55] Proprietary estoppel can do what other estoppels cannot--it can found a cause of action: *Cowper-Smith v. Morgan*, 2017 SCC 61 at para. 17.

[56] The test for proprietary estoppel is whether, on the facts of the particular case, it would be dishonest or unconscionable for a person seeking to enforce a legal right to do so where he has done something beyond mere delay to encourage another to believe that he does not intend to rely on his strict rights and that other person has acted to his prejudice in that belief: *Erickson v. Jones*, 2008 BCCA 379 at paras. 52-57, citing *Tretheway-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003 BCCA 197 at para. 64.

[57] Propriety estoppel, like most equitable remedies, is aimed at doing justice. The elements of the doctrine must, nevertheless, be made out and an equity established. An equity is established where (1) there was an assurance or representation attributable to the owner that the claimant has or will have some right to property; and (2) the claimant relied on the assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance: *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451 at para. 49; *Fraser Valley Credit Union v. Siba*, 2001 BCSC 744 at paras. 22-25.

[58] As mentioned above, The Lot A First Mortgagees never expressed any objection or concern as to the unusual, indeed bizarre, manner in which the Project was being constructed.

- [59] Their reason is evident. The evidence demonstrates that the Lot A First Mortgagees, through Mr. Dowding, knew from the outset of their financial involvement in the Project that Lot A was but one component of a three-lot land assembly to be used to create an integrated development, with all access through Lot A. The Lot A First Mortgagees knew that the Access Road was being used for both construction of the amenities on Lot C and for public access to those amenities after they were constructed. They encouraged, or at the very least acquiesced in, that use because it would facilitate future revenues and hence an increased prospect of being repaid. The importance of the Access Road to the Project, including Lot C, was obvious.
- [60] Counsel for the petitioners argues that, by their conduct of acquiescence, the Lot A First Mortgagees led all involved in the Project, including the petitioners, to believe that the Access Road was and would in the future be a secure means of access to Lot C. He points to the uncontroverted evidence of the petitioners that they relied on the existence of the Access Road as fundamental to their decision to advance financing for the Project and that they would not have done so otherwise.
- [61] The difficulty with this argument is that there is no evidence that the petitioners relied upon anything said or done by the Lot A First Mortgagees that led them provide the financing they did. There was no history of dealings between the parties such as there were in *Erickson v. Jones* 2008 BCCA 379, and in *McCarthy v. Johnson's Landing Community Association*, 2010 BCSC 986. There is also no evidence the Lot A First Mortgagees were aware that the petitioners intended to make the loan they did. Rather, the evidence shows that the petitioners relied on their own observations, assumptions and dealings with Consiglio, KMDSL, KMLP and 0768723. In this case, the petitioners simply failed to engage in sufficient due diligence of the Project before providing the funding they did. They could easily have performed a search of the title to Lot A. Had they done so (and perhaps they did), they would have seen the registration of the Lot A First Mortgage ahead of the Lot A/C Easements. That would or at least should have led them on a train of enquiry regarding the security of the Lot A/C Easements. Whether or not they did so, they are the authors of their own misfortune.
- [62] In the circumstances, the petitioners have failed to demonstrate entitlement to an access easement across Lot A on the basis of a proprietary estoppel.
- c) Implied Easement of Necessity / *Wheeldon v. Burrows*
- [63] The law regarding and the test for establishing an implied easement of necessity was reviewed in *Roop v. Hofmeyr*, 2016 BCCA 310 at paras. 33-39:
- [33] The test for establishing an implied grant of easement was summarized in *Anger & Honsberger* ["Law of Real Property, Third Edition" (Toronto: Thomson Reuters Canada Limited, 2014)] at 17-9 to 17-10:

When land owned by one person is divided and part of the land conveyed to another, even if there are no words in the instrument expressly creating an easement, a court will imply that the new owner was granted easements of necessity and any continuous and apparent easements which existed as quasi-easements during unity of ownership. Thus the implied grant will render the retained lands servient and the newly acquired portion dominant.

The test for necessity is fairly stringent. In order to make a successful claim for an easement of necessity, it would have to be shown that it would be impossible to enjoy the dominant land otherwise. A common example is a right-of-way which would provide the only possible access to a piece of land.

In order for a quasi-easement which was exercised during unity of ownership to become an easement by implication of law, the right claimed must meet certain criteria:

- a) it must be necessary to the reasonable enjoyment of the part granted;
- b) it must have been used by the owner of the entirety for the benefit of the part granted up to and at the time of the grant; and
- c) it must have been apparent at the time the land for which the easement is claimed was acquired.

For an easement to be apparent, its previous use must have been indicated by some visible, audible or other apparent evidence on either the quasi-dominant or the quasi-servient tenement which could be seen, heard or smelled by a reasonable inspection.

[Footnotes omitted.]

[34] The authorities confirm that an easement by way of implied grant and an easement of apparent accommodation are simply alternative ways of expressing a *Wheeldon v. Burrows* easement (see BCLI Report at 2; Anger & Honsberger at 17-10; *Hardy v. Herr* (1964), 47 D.L.R. (2d) 13 (Ont. H.C.J.), aff'd 52 D.L.R. (2d) 193 (C.A.); *Babine*; *Ellis*; 3021386 Nova Scotia Ltd. v. Barrington (Municipality), 2014 NSSC 1 [Barrington], aff'd 2015 NSCA 30).

The rule in *Wheeldon v. Burrows*

[35] The rule in *Wheeldon v. Burrows* was expressed in the judgment of The *siger* L.J. as follows:

[O]n the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not

dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

[36] Only the first proposition is relevant to the circumstances of this case.

[37] The BCLI Report explained the *Wheeldon v. Burrows* rule in this fashion (at ix):

The rule in *Wheeldon v. Burrows* applies when part of a tract of land is disposed of and part is retained, or when land is disposed of simultaneously in different parts. The transferee is considered to acquire easements over the parcel retained by the transferor, or over other parcels disposed of at the same time, that are "continuous and apparent" and necessary for the reasonable enjoyment of the parcel of land granted away, provided that they were exercised (as incidents of ownership of the entire tract) by the transferor at the time of the transfer for the benefit of the parcel granted. The rule also applies to leases and dispositions of land by will. In being related to "reasonable enjoyment," a *Wheeldon v. Burrows* easement differs from an easement of necessity which is also an easement implied by law but depends on different principles.

[38] As noted in this passage, an implied easement of necessity is to be distinguished from an implied easement necessary for the reasonable enjoyment of a property. The former arises when there is no access to the grantee's property (e.g., it is land-locked) and necessity requires an implied easement for any enjoyment of the property. The latter arises when there is derogation of part of a parcel of land (by a grantor) to another party (the grantee) and reasonable enjoyment of the derogated land requires an implied easement. See *Halsbury's Laws of England*, vol. 14, 4th ed. (London, UK: Butterworths, 1980) at 31, para. 61.

[39] In short, the three elements from *Wheeldon v. Burrows* that must be proved on a balance of probabilities include: (1) continuous and apparent use of the grantor's land for the benefit of the grantee's land; (2) that was necessary for the reasonable enjoyment of the grantee's land; and (3) that was exercised by the grantor at the time of the original derogation of land to the grantee.

[64] There is mixed jurisprudence on the principles underlying the easement of necessity. In the United Kingdom, the Court of Appeal has described the easement of necessity as simply being a manner in which courts construct a grant of land in order to give effect to the intention of the parties: *Adealon International Proprietary Ltd v. Merton LBC*, [2007] E.W.C.A. Civ. 362; *Nickerson v. Barraclough*, [1981] Ch. 426 (C.A.). The Court of Appeal explicitly rejected any public policy aspect of the doctrine.

[65] By contrast, in *Hirtle v. Ernst* (1991), 110 N.S.R. (2d) 216 (S.C. - Trial Div.), the Nova Scotia Supreme Court held that the easement of necessity reflects the public policy objective of ensuring that land is used and not rendered useless. This comment in *Hirtle* was quoted (without approval or disapproval) by the Nova Scotia Court of Appeal in *Shea v. Bowser*, 2013 NSCA 18 at para. 43.

[66] However, the Ontario Court of Appeal, in *Toronto-Dominion Bank v. Wise*, 2016 ONCA 629, rejected the public policy approach from *Hirtle* in favour of the English approach. In so doing, it quoted the following passage from *Nickerson* at para. 34:

[34]

[T]he law relating to ways of necessity rests not upon a basis of public policy but upon the implication to be drawn from the fact that unless some way is implied, a parcel of land will be inaccessible. From that fact the implication arises that the parties must have intended that some way giving access to the land should have been granted. Public policy may inhibit the parties from carrying their intention into effect, but I cannot see how public policy can have a bearing upon what their intention was. In my judgment, that must be ascertained in accordance with the ordinary principles of construction, the language used and relevant admissible evidence of surrounding circumstances.

[67] In my view, the weight of authority in Canada is against any public policy aspect to the easement of necessity.

[68] While the petitioners have established that, without the ability to utilize the Access Road, Lot C will effectively be landlocked, the law in British Columbia is such that the application of the doctrine of implied easement of necessity is limited to the original parties to a grant of subdivided land: *Roop* at paras. 47-50. Because the Lots were already subdivided when they were purchased by 0768723, an implied easement of necessity is not available. The subsequent use of an access road through Lot A by subsequent purchasers of Lots A and C (*Consiglio* and/or 0768723) is irrelevant to the issue: *Roop*, at para. 52.

[69] The petitioners' application for a declaration that they are entitled to an implied easement of necessity through Lot A is dismissed.

d) Section 36 of the Property Law Act

[70] The petitioners claim that they are entitled to a remedy under s. 36 of the Property Law Act which provides as follows:

Encroachment on adjoining land

36 (1) For the purposes of this section, "owner" includes a person with an interest in, or right to possession of land.

(2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application

(a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,

- (b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or
 - (c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.
- [71] The purpose of s. 36 is to provide a basis, on equitable grounds, for resolving disputes over encroachments. In broad terms, its purpose is to allow the court to declare a statutory easement, or vest title to an encroaching structure, in circumstances where it would be equitable to do so. This is achieved through an assessment of the balance of convenience: Westshore at para. 88, citing Taylor v. Hoskin, 2006 BCCA 39 at para. 52; Bland at paras. 49-50.
- [72] The "encroachment" in this case is the Access Road used by Lot C for ingress and egress.
- [73] The word "building" in s. 36(2) has been interpreted liberally by the courts to include a roadway necessary to provide reasonable access to a building or buildings: Westshore at paras. 87-91; Epp v. Gartside, 2011 BCSC 1687 at para. 21.
- [74] The predominant considerations to be applied in determining the balance of convenience were summarized in Bland at para. 60 (citing Vineberg v. Rerick, (1995), 59 A.C.W.S. (3d) 787 (B.C.S.C.) at para. 20) as follows:
- [60]
1. The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are three degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.
 2. The nature of the encroachment: Was the encroachment a lasting improvement? What is the effort and cost involved in moving the improvement? Was its effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more these considerations will be weighed in favour of the petitioner.
 3. The size of the encroachment: How does the encroachment effect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.
- [75] Although the second and third of the above considerations clearly favour the petitioners, the first does not. There is no evidence that the petitioners had an honest belief that the Access Road was part of Lot C. Rather, the evidence demonstrates they knew it was on Lot A. They simply assumed that it was available to provide access to Lot C. As counsel for the Lot A First Mortgagees points out, the petitioners' assumption in this regard was correct - the Access Road does provide access to Lot C. However, that access is subject to the pre-existing rights under the Lot A First Mortgage.

[76] The petitioners have failed to demonstrate an entitlement to relief under s. 36 of the Property Law Act.

e) Implied Easement based on Common Intent

[77] In circumstances where two neighboring landowners have participated in a joint enterprise with the implied intention that both properties will benefit, the law of equity can intervene to provide a remedy. The benefit must be both an obvious and necessary inference from the circumstances: *Barton v. Raine* (1980), 114 D.L.R. (3d) 702 (Ont. C.A.) at 711.

[78] The lower court in *Barton* (1979), 10 R.P.R. 1 (Ont. Co. Ct - Middlesex Co.) held that the requisite intent can be determined by the following "officious bystander" test:

[46]

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying: so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh, of course!'

[79] Examples of circumstances where the courts have found an implied easement based upon the common intentions of the parties include *Canada Lands Co. CLC Ltd. v. Trizechahn Office Properties Ltd.*, 2000 ABQB 166, where a waste system was built on one lot and the compactor and dumpsters for the waste system were built on the adjoining lot; *Bruce v. Dixon*, [1957] O.J. No. 540 (C.A.) where neighbors undertook the drillings of a well for their common use; and *Spur Valley v. Csokonay et al*, 2000 BCSC 1356, where a water system for a campground had been built to service 80 lots.

[80] The evidence in this case demonstrates that, at all times throughout their respective involvement in the Project, it was the common intent of the parties that Lot A would be used as the means of access to construct and utilize the Project for the purposes for which it was built.

[81] Each of the petitioners and the Lot A First Mortgagees participated and cooperated directly or through their authorized representative in the overall Project undertaking by way of their financing of it. They did so with a view to receiving a handsome return on their investment. When it appeared that their investment was in jeopardy, the Lot A First Mortgagees took steps to safeguard it, first by increasing their investment from \$4.5 million to \$5.2 million, and then by agreeing to a mortgage extension agreement and later a forbearance agreement. The petitioners' contribution was the provision of mortgage financing after the Project was well underway for the same common purpose.

- [82] Throughout, the Lot A First Mortgagees acquiesced in and encouraged the use of the Access Road by those involved in construction of the works on Lot C, including the petitioners, for the common purpose and with the common intent of completing the Project and enabling revenues to be derived from it. If, during the course of the Project, an officious bystander had asked whether Lot C had the benefit of access by way of the Access Road, all involved, including the Lot A First Mortgagees would have emphatically responded: "Of course".
- [83] In my view, the shared use of the Access Road from the outset for ingress to and egress from the Project's amenities was such that equity should intervene to grant an implied road access easement over Lot A consistent with the intentions of all of the parties, including Consiglio/0768723 (the owner of Lot A and Lot C) as well as the Lot A First Mortgagees and the petitioners (who took security in Lot A and Lot C, respectively).
- [84] Counsel for the Lot A First Mortgagees submits that the petitioners should not be entitled to any equitable relief by virtue of the doctrine of laches and acquiescence. He argues that the petitioners' delay in bringing their application is inexcusable and that the petitioners' conduct might fairly be regarded as equivalent to a waiver, making the prosecution of this proceeding now unreasonable: *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at paras. 107-111.
- [85] Although the petitioners were aware of the Lot A Foreclosure Proceeding and delayed in bringing this proceeding, I do not find that their delay was inexcusable. There has been no change in the status quo which would make the prosecution of this matter unreasonable. Since obtaining the order nisi in their respective foreclosure proceedings, both the petitioners and the Lot A First Mortgagees took exhaustive steps to sell the foreclosed lots, all to no avail. The evidence indicates that the uncertainties regarding access and the various encroachments of the Project's amenities over the Lots are prime impediments to any sale. As I stated to counsel during the hearing, if there is to be any reasonable prospect of a sale, it only makes sense that the owners of the Lots work together to market the Lots as a package.
- [86] Nor do I find that the delay of the petitioners indicative of a waiver of their equitable rights with respect to an easement over Lot A. The Lot A/C Easements remain in place. In my view, it should not be inferred that the petitioners' failure to assert an equitable right constituted a waiver in circumstances where the right in question--use of the Access Road--had not been violated.

Conclusion

- [87] The petitioners are entitled to a declaration that Lot C has the benefit of an implied easement over Lot A in the form of the Access Road, as defined in the survey plan prepared by Neil Denby attached as Exhibit "A" to the second affidavit of Richard Dowding sworn November 26, 2018.

[88] The remaining orders sought in the Petition are dismissed.

[89] As success has been divided, there will be no order as to costs.

"G.C. Weatherill J."

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