

CANADA / JUDGMENT

Singer v. Willows

2022 BCSC 241

COURT

Supreme Court of British Columbia

DECIDED

15 February 2022

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2022 BCSC 241 Singer v. Willows

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Singer v. Willows,

2022 BCSC 241

Date: 20220215

Docket: S30592

Registry: Cranbrook

Between:

Iain Gordon Singer and Sally Margaret Singer

Petitioners

And

Lesley Ann Willows

Respondent

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

Reasons for Judgment

Counsel for the Petitioners:

J.L. Martin

Counsel for the Respondent:

C. Harvey, Q.C.

Place and Date of Trial/Hearing:

Vernon, B.C.

January 11-13, 2022

Place and Date of Judgment:

Vernon, B.C.

February 15, 2022

Introduction

- [1] The petitioners and the respondent are adjacent property owners of two lots overlooking Windermere Lake ("Lake"), near Invermere, British Columbia. The petitioners, who reside in Calgary, Alberta, purchased Lot 5, District Lot 4347 Kootenay District Plan 2886 ("Lot 5"), on December 1, 2020, with the intention of building a residence on it. Prior to purchasing Lot 5, the petitioners were aware that portions of two cabins (referred to by the parties as "Cabin 1" and "Cabin 2") constructed on the adjacent lot to the south, Lot 4 District Lot 4347 Kootenay District Plan 2886 ("Lot 4"), owned by the respondent, encroached on Lot 5.
- [2] The petitioners apply pursuant to s. 36(2)(c) of the Property Law Act, R.S.B.C. 1996, c. 377 [Act], for an order that the encroachments be removed.
- [3] In response, the respondent seeks an order pursuant to ss. 36(2)(a) and (b) of the Act for a vesting order or easement over Lot 5 on paying just and equitable compensation to the petitioners.

Background

- [4] Lot 4 and Lot 5 are part of a 116-lot subdivision plan along the east shores of the Lake that was filed in the Land Title Office in December 1956, under Plan No. 2886 ("Subdivision"). Many of the lots comprising the Subdivision are lakeshore lots, the others, including Lot 4 and Lot 5 are lakeview lots.
- [5] Lot 4 and Lot 5 are long, steep and narrow, with dimensions of roughly 70 feet x 770 feet. Between the Lake and these lots is Lakeview Road that provides access to the Subdivision.
- [6] The respondent's parents purchased Lot 4 in 1963 when the respondent was 13 years old. Cabin 1 and Cabin 2 were already in existence at the time. Her family has continued to enjoy Lot 4 ever since as mostly a summer-time retreat. Cabin 1 can be described as a 34 feet x 14 feet summer cottage and contains a kitchen, bedrooms and other rudimentary amenities. Cabin 2 is much smaller and can be described as a small guest cottage/bunk-house. The evidence suggests that neither Cabin 1 nor Cabin 2 have basements, are winterized nor are regularly used. Both, and in particular Cabin 2, appear to be in a poor state of repair.

- [7] Lot 5 was originally purchased in the 1950's by friends of the respondent's parents, the Carltons, ("Carlton(s)") and remained in the Carlton family until the petitioners purchased it in December 2020.
- [8] Throughout the history of owning Lot 4, the respondent's family believed Cabin 1 and Cabin 2 were located within Lot 4's property boundaries. In 1976, the Carltons granted Lot 4 a six-foot easement over Lot 5's southern property line for the purpose of allowing person and vehicle access. That easement was registered as a charge against Lot 5 in favor of Lot 4 ("1976 Easement"). Cabin 1 and Cabin 2 are located on the 1976 Easement and portions of them encroach further onto Lot 5 than the 1976 Easement.
- [9] The petitioners owned recreational property on the west side of the Lake for about 14 years. In 2020 they began looking for an alternative property and, in August 2020, were introduced to Lot 5 which was listed for \$624,900. Their realtor provided them with a property disclosure statement prepared by the Carltons dated September 17, 2020, disclosing the existence of encroachments and an easement ("Encroachments").
- [10] Further investigation disclosed that portions of Cabin 1 and Cabin 2 encroached on Lot 5. Nevertheless, on September 30, 2020, the petitioners made an offer to purchase Lot 5 for \$524,500 subject to approving the title and charges that may affect its value. The Carltons' counter-offer of \$562,500 was accepted by the petitioners.
- [11] In early October 2020, the petitioners commissioned Mr. Adam Brash, a licenced BC Land Surveyor, with Global Raymac Land Surveying Ltd., to determine the nature and the extent of the Encroachments.
- [12] Also, in early October 2020, the petitioners commissioned Ms. Cheryl Willard, a home designer, to assist them with the design of a home on Lot 5. She prepared a preliminary floor-plan design. Further design has been put on hold pending the outcome of this case. Ms. Willard suggests that the best building site is on a relatively flat area near the west end of Lot 5 and that the Encroachments hinder the ability to build what the petitioners would like.
- [13] Because of the Encroachments, the petitioners negotiated a reduction in Lot 5's purchase price from \$562,500 to \$510,000 and the purchase was completed on December 1, 2020.
- [14] Following some unsuccessful efforts by the petitioners to persuade the respondent to remove the Encroachments, they engaged counsel who, in early January 2021, formally demanded they be removed. When the respondent failed to comply, this petition was filed on April 16, 2021.
- [15] During the hearing of the petition, the parties became aware that the local Regional District and/or fire code requires a 4.8 metre distance between buildings. Additionally, there is a five-foot side yard set-back required by the Regional District (together, the "Set-Backs").

The Brash Surveys

- [16] In early October 2020, Mr. Brash prepared a survey of Lot 4 and Lot 5 to locate Cabin 1 and Cabin 2 and plot the Encroachments. He completed and signed the survey on October 28, 2020 ("First Brash Survey"). He subsequently prepared other surveys during the course of which he found discrepancies in the original Subdivision survey.
- [17] Relying to a large extent on a prior 1975 survey plan, Mr. Brash re-established the property boundaries and filed a corrected plan in the Land Title Office under No. EPP110130. This new plan had the effect of changing Lot 5's legal description to Lot A, District Lot 4347 Kootenay District Plan EPP110130. "Lot 5" and "Lot A" will be used interchangeably in these reasons as referring to the same property.
- [18] The First Brash Survey disclosed the following encroachments onto Lot 5:
- a) Cabin 1:
 - i. The steps encroach entirely onto Lot 5 by 5.47 metres;
 - ii. The deck encroaches onto Lot 5 by 0.96 metres;
 - iii. Cabin 1 encroaches onto Lot 5 by 3.26 metres;
 - iv. Cabin 1's porch encroaches entirely onto Lot 5 by 4.61 metres; and
 - v. Cabin 1's septic tank encroaches entirely onto Lot 5, ("Cabin 1 Encroachment");
 - b) Cabin 2:
 - i. The deck encroaches onto Lot 5 by 2.20 metres; and
 - ii. Cabin 2 encroaches onto Lot 5 by 2.75 metres, ("Cabin 2 Encroachment").
- [19] The First Brash Survey is attached as Schedule 1 to these reasons.
- [20] Mr. Brash also prepared two sketch plans showing the effect of proposed easements being granted to accommodate the Cabin 1 Encroachment. The first sketch plan shows an easement accommodating Cabin 1 and its deck, but without including Cabin 1's porch, stairs, septic tank and Cabin 2. The second sketch plan shows an easement area completely around Cabin 1, its deck, septic tank, porch and stairs, but without including Cabin 2 ("Second Brash Sketch Plan"). The Second Brash Sketch Plan is attached as Schedule 2 to these reasons.

Discussion

[21] Section 36 of the Act grants the court broad discretion to do justice in the case of an encroachment. The court is to take a broad, equitable approach and weigh the equities between the parties to determine the balance of convenience. Relief under the section is entirely discretionary: *Taylor v. Hoskin*, 2006 BCCA 39 at paras. 52 - 53 [Taylor].

[22] Section 36 states:

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.

[23] In *Vineberg v. Rerick*, [1995] B.C.J. No. 2506 (S.C.) at para. 20 [Vineberg], Mr. Justice Leggatt set out three considerations to assist in determining the equities and the balance of convenience between parties, which I will summarize as follows:

- [20] . . . 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? [What] is 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.

[24] Although these considerations have been adopted and applied in many cases, they are not intended to be tests to be rigorously applied in every case: *Taylor*, at para. 51.

The Equities and Balance of Convenience

- [25] I make the following findings regarding the Encroachments and note how each weigh in the balance of convenience between the parties in this case:
- a) Cabin 1 and Cabin 2 have been in existence and encroaching on Lot 5 for roughly 60 years. There is no evidence that either the respondent's family or the Carltons knew of the Encroachments or that the Encroachments were ever an issue between them. This factor weighs in favour of the respondent;
 - b) Given the lack of evidence on the point and Mr. Brash's evidence respecting the surveys he prepared, I conclude that when Cabin 1 and Cabin 2 were constructed, their encroachment onto Lot 5 was probably an honest mistake. Again, this factor weighs in favour of the respondent;
 - c) The petitioners bought Lot 5 knowing the precise location of the Encroachments. They used the Encroachments to obtain a reduction in the purchase price, from \$562,500 to \$510,000. They were able to do so because of the time and expense they would have to incur to have the Encroachments removed. In other words, they purchased Lot 5 assuming the risk that the Encroachments would remain and that the location and preferred design of their proposed residence might change. In effect, they received compensation for the Encroachments in advance by way of a reduced purchase price. Although this is a factor to consider, it is not a determinative factor: *Robertson v. Naramata Resorts Ltd.*, 2005 BCSC 467. Again, this factor weighs in favour of the respondent;
 - d) The combination of the Encroachments, the Set-Backs and the fact that Lot 5 is steep and narrow restricts the type, size and design of the home the petitioners will be able to build on Lot 5. They will be unable to build what they desire on the building site of their choice. This factor weighs in favour of the petitioners;
 - e) The evidence suggests that Cabin 1's septic tank is located within the area of the Encroachments and would need to be relocated if the Encroachments are ordered removed. This factor weighs in favour of the respondent;
 - f) In 2015, the respondent did some research into the title for Lot 4 and noted the 1976 Easement. At the time, there were survey stakes on the northern property line of Lot 4 and she measured 69 feet from that line towards Lot 4. This measurement suggested the Lot 4/ Lot 5 property line went through the middle of Cabin 1's kitchen. The respondent concluded that her measurements were erroneous. In 2017, she looked into a renovation of Cabin 1 to extend it to the south and to add a bedroom and a second entrance. Based on information from a contractor, she concluded that such a renovation would compromise Cabin 1's integrity and the plan was abandoned. Also in 2017, the respondent replaced the steps leading to Cabin 1. Prior to doing so, she made no inquiries to ensure the steps did not encroach onto Lot 5. This factor weighs in favour of the petitioners;

- g) There is no persuasive evidence that the petitioners could not build a suitable home further east and up the hill from the Encroachments, nor is there any evidence of the increased cost, if any, of doing so. Ms. Willard's evidence was that if the Encroachments remained she would work with what she had and design a residence using a different approach. She stated that although an alternative location would not be ideal, it was certainly possible. At this juncture, she has not been asked to design a home to work around the Encroachments. This factor weighs in favour of the respondent;
- h) It has not been suggested by either party that Cabin 1 or Cabin 2 could be moved entirely onto Lot 4 at a reasonable cost. There is no evidence either way on the point and this option is not part of either parties' case. The proposition was not pleaded nor put to the respondent on cross-examination. The only evidence before the Court are photographs of Cabin 1 and Cabin 2; that they were built over 60 years ago; Mr. Singer's evidence that neither cabins have basements, that neither is winterized nor regularly used; and Cabin 1's porch is in a poor state of repair. Both Cabins are clearly old and somewhat dilapidated. There is also no evidence on whether Cabin 1 and/or Cabin 2 sit on a foundation or on blocks of some kind. It is therefore not possible to determine on the evidence what would be involved in moving Cabin 1 and/or Cabin 2 completely onto Lot 4, if indeed, it would be possible at all. Therefore, this factor is neutral; and
- i) Removing the Cabin 1 Encroachment and Cabin 2 Encroachment would effectively make them unusable and would only minimally benefit Lot 5. This factor weighs in favour of the respondent.
- [26] The petitioners' primary argument that the balance of convenience favours an order that the Encroachments be removed is based on the combination of the Set-Backs and Lot 5 being narrow and steep, and that if the Encroachments are not removed they will be severely limited in building the home they would like on what they consider to be the prime building location. Other than obtaining a preliminary floor plan design, the petitioners have taken no steps to further the design of their home. Given the uncertainty of whether the Encroachments would be ordered removed, they did not want to spend the money on a house design until the results of this case were known.
- [27] The respondent's primary argument that the balance of convenience favours the granting of an easement is based on Cabin 1 and Cabin 2 being innocently constructed partially on Lot 5 over 60 years ago and there was no issue with them until the petitioners purchased Lot 5 in December 2020, with full knowledge of the Encroachments. Further, the respondent also asserts that the petitioners could easily build their home on Lot 5 further uphill and to the east of the Encroachment area.

Disposition

- [28] Section 36 of the Act allows the court to do justice where equitable principles favour recognition of a property right. The task is to look broadly at the equities and do justice between the parties.
- [29] Firstly, there is no debate that the petitioners have proven that Cabin 1 and Cabin 2 encroach onto Lot 5. The First Brash Survey is unchallenged and the respondent accepts it as accurate.
- [30] Secondly, given its state of disrepair and disuse, the respondent does not strenuously oppose the petitioners' position that the Cabin 2 Encroachment should be removed. During submissions she stated that she was prepared to do so.
- [31] Respecting Cabin 1, in my view, equitable principles favour the respondent and the granting of equitable relief in the nature of an easement to accommodate the Cabin 1 Encroachment on fair compensation to the petitioners. Respecting Cabin 2, equitable principles favour the petitioners and an order that the Cabin 2 Encroachment be removed.
- [32] The petitioners purchased Lot 5 with knowledge of the Encroachments, and as a result, negotiated a significant reduction in its purchase price. They knew there was a risk that the Encroachments would remain.
- [33] Although not their first choice of building site, there is no persuasive evidence, geotechnical or otherwise, that the petitioners could not construct a home further east and uphill on Lot 5. Ms. Willard's design sketch showing the Encroachments as a problem was, I conclude, made for the purpose of assisting the petitioners with this litigation. She was not asked to prepare a house design elsewhere on Lot 5 that would work-around the Encroachments. During her testimony, she agreed that alternative designs were possible. Clearly, the petitioners have halted their house design pending the outcome of this case. I conclude that reasonable alternative designs that would not significantly harm the petitioners' building plans are possible.
- [34] Accordingly, there will be a declaration and orders that:
- a) Two buildings (Cabin 1 and Cabin 2) built upon the land situated at 766 Lakeview Road, Invermere, BC, and having a PID: 008-122-962 and legally described as Lot 4 District Lot 4347 Kootenay District Plan 2886 ("Lot 4") encroach on the adjoining land situated at 762 Lakeview Road, Windermere, BC, having a PID: 031-355-587 and legally described as Lot A District Lot 4347 Kootenay District Plan EPP110130 ("Lot A");
 - b) The petitioners shall grant the respondent an easement to accommodate the Cabin 1 Encroachment in the area defined and in accordance with the Second Brash Sketch Plan, attached to these reasons as Schedule 2;

- c) As compensation for the Cabin 1 Encroachment and the easement I have ordered, the respondent will exchange the portion of the 1976 Easement to the east of Cabin 1 for an easement that accommodates the portion of Cabin 1 and stairway that encroach onto Lot 5, as is set out on the Second Brash Sketch Plan; and
 - d) Within 90 days of this order, the respondent remove the Cabin 2 Encroachment so that it does not encroach on any part of Lot A.
- [35] Should further directions or orders be required to implement this decision, the parties are at liberty to apply.

Costs

- [36] Costs were not spoken to. If the parties wish, within 30 days of the date of these reasons, they may make the appropriate arrangements with Supreme Court Scheduling. If no arrangements are made, each party will bear their own costs.

"G.P. Weatherill J."

Schedule 1

Schedule 2

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