

CANADA / JUDGMENT

Webber v. Worthington

2022 BCSC 1526

COURT

Supreme Court of British Columbia

DECIDED

31 August 2022

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2022 BCSC 1526 Webber v. Worthington

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Webber v. Worthington,

2022 BCSC 1526

Date: 20220831

Docket: S46945

Registry: Penticton

Between:

Robert Bruce Webber and Sandra Jean Webber

Petitioners

And

Dallas John Worthington

Respondent

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Petitioners:

J. Kitsul

Counsel for the Respondent:

K. Hamilton

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 27-30, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 31, 2022

I. Introduction and Overview

- [1] The petitioners reside at and own a property at 210 Windsor Ave., Penticton, BC ("Lot 38"). The respondent is the owner of a property at 226 Windsor Ave., Penticton, BC ("Lot 36").
- [2] The petitioners assert that there is a restrictive covenant registered against title to Lot 36 in favour of Lot 38. They maintain the respondent has constructed additional structures on Lot 36 in contravention of the alleged restrictive covenant.
- [3] The petitioners seek a declaration that the respondent has willfully and intentionally breached the provisions of a restrictive covenant registered against the title to Lot 36. Additionally, they seek an interim order restraining the respondent from engaging in, conducting, or effecting any further work, as was set out in a December 9, 2021, order of Justice B. Brown (the "Brown Order").
- [4] The dispute between the parties arose around May 6, 2021, when the petitioners became aware that the respondent had obtained a permit from the City of Penticton to construct a coach house on Lot 36. The petitioners retained counsel to write a letter to the respondent bringing the alleged restrictive covenant on title to Lot 36 to his attention, and warning that construction of the coach house violated the conditions of the restrictive covenant. A similar letter was also sent to Jenish Home Design Ltd., who was listed on the respondent's development application as the "Coordinating Professional".
- [5] The respondent declined however to halt construction on Lot 36. He maintains that there are no charges, liens, or interests registered against title to Lot 36, other than a water agreement and a number of mortgages.
- [6] The respondent says that the restrictive covenant is noted under title to Lot 36 as an "appurtenant" under the heading "Legal Notations". The respondent submits that this notation only states the restrictive covenant is registered against two other nearby lots--Lots 5 and 6. Accordingly, he says the restrictive covenant is registered against Lots 5 and 6 in favour of Lot 36, amongst other dominant tenements.

II. The Documents

- [7] Title to Lots 36 and 38 each indicate a legal notation registered on the title which states: "For an appurtenant restrictive covenant see DD 39142E".
- [8] DD 39142E is comprised of two documents: The first is entitled "Charge" and is dated August 11 or August 16, 1948 (the written date is unclear). The charge indicates that the application and the deposit numbers are also DD 39142E.
- [9] The second document is an indenture, dated March 14, 1947. The indenture creates a restrictive covenant agreement between David C. Kyle--the grantor--and Arlo Marchant--the grantee. Mr. Marchant is the great-grandfather of the petitioner, Sandra Webber.
- [10] The indenture sets out what the petitioners say is a restrictive covenant on the following terms:

The Grantee in pursuance of the scheme of arrangement of the said Fairview Homes, covenants with the Grantor and with other owners of similar parcels, not to erect on the said parcel any business or buildings other than a single private dwelling and a garage or similar outbuilding of like style and outside finish as the residence, which building shall be fully complete before occupation and which shall be parallel to the street line and back not less than thirty feet therefrom, and shall be a total value or cost of construction of not less than \$4500.00.

The lands to be benefited by this restrictive covenant immediately above set out are Lots 1-4 and 7-8 inclusive, Map 3157, and Lots Nine to thirty-eighth inclusive Map 3284, Penticton B.C.

(the "Restrictive Covenant")

- [11] The relevant parcels are Lots 36 and 38, and thus are contemplated by the wording of the Restrictive Covenant. However, the respondent maintains title to Lot 36 did not reflect the Restrictive Covenant and thus resists the present petition.

III. Issues

- [12] The questions at issue in the present petition are as follows:

- a) Should the Court grant the orders sought?
- b) If so, what is the proper interpretation of the Restrictive Covenant?
- c) Did the respondent deliberately breach the Restrictive Covenant?
- a) Should the Court grant the orders sought?

- [13] As a threshold issue, the Court must determine whether it should grant the orders sought by the parties. This in part requires consideration of a threshold issue as to whether a petition under s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377 [PLA], is necessary prior to the relief sought being granted. In my view, the Court cannot properly dispose of all issues on this petition until notice is given to the potentially interested parties. Resolution of the

issues raised by the parties will almost certainly have some bearing on the rights and obligations of other property owners subject to the same Restrictive Covenant, and thus its interpretation should not be undertaken without their knowledge and opportunity to make submissions.

Positions of the Parties

[14] As noted above, the petitioners seek the following orders:

- a) a declaration that the respondent has willfully and intentionally breached the provisions of a restrictive covenant registered against title to Lot 36; and
- b) an interim order restraining the respondent from engaging in, conducting, or effecting any further work, as was set out in the Brown Order.

[15] Conversely, the respondent seeks a declaration that the Restrictive Covenant does not constitute a registered charge or building scheme against title to Lot 36. If the Court found that the Restrictive Covenant constitutes a charge against Lot 36, the respondent had previously sought an order that it be cancelled pursuant to s. 35 of the PLA. However, this alternative ground was later abandoned.

[16] The petitioners say that the Court should not grant the order sought by the respondent. The petitioners submit that, if the Court were to find that the Restrictive Covenant did not apply to Lot 36, this would be tantamount to cancelling it. They say such an order would be inappropriate, as the respondent has not filed a formal petition under s. 35 of the PLA. Rather, the respondent has simply raised the applicability of the Restrictive Covenant as a defence to the petitioners' own arguments on this petition.

[17] The petitioners therefore argue that the respondent has failed to follow the formal requirements of the provision--importantly, providing notice to parties affected by a possible cancellation of the Restrictive Covenant. In support, the petitioners rely on *Rideout v. Fliss*, 1998 CanLII 2922, [1998] B.C.J. No 714 (B.C.S.C.), where the Court declined to hear a petition under s. 35 of the PLA where proper notice had not been given to the interested parties: paras. 21-23.

[18] The respondent takes the position that no covenant is in effect on Lot 36. The petitioners respond that the respondent's arguments on this petition essentially attack the validity of the alleged Restrictive Covenant itself, and thus indirectly seeks to cancel it without following the formal procedure set out in s. 35 of the PLA.

[19] The petitioners also argue that, in any event, if the respondent were to file a proper petition under s. 35 of the PLA, it would not be successful on the merits. The petitioners say that the terms of the Restrictive Covenant establish a building scheme as between Lot 36 and the other adjacent lots upon which the appurtenance is listed.

- [20] In response, the respondent maintains that there are no charges, liens, or interest registered against title to Lot 36 other than a water agreement and a number of mortgages. In particular, the respondent says that unlike the title to Lot 38, there is no note under "Legal Notations" on title to Lot 36 indicating it is subject to a building scheme. Rather, the only relevant notation under the section on title is notice of an "appurtenant" restrictive covenant. The respondent says the correct reading of the notation on the title to Lot 36 is simply that Lot 36 has the benefit of the restrictions that encumber Lots 5 and 6. The respondent maintains that nowhere on title or the document referenced in the legal notations on title is there an indication that Lot 36 is encumbered with any restrictions whatsoever.
- [21] Alternatively, if the notation on title establishes a charge against the Lot 36, the respondent says that nothing appended to title or any other initial transfer documents contain the language required to create a building scheme, and thus the alleged Restrictive Covenant is unenforceable.
- [22] The petitioners say that the Restrictive Covenant constitutes a building scheme encompassing Lot 36, and is thus a valid and subsisting instrument. The petitioners say that title to Lot 36 contains a legal notation which directs that an appurtenant restrictive covenant is referred to in "DD 39142 E". DD 39142 E includes the Restrictive Covenant. The Restrictive Covenant specifically states that Lot 36 is benefitted by its terms.
- [23] The respondent says that the Restrictive Covenant is not a registered charge on title to Lot 36, and thus does not constitute a valid building scheme. The respondent says that the Restrictive Covenant instead benefits Lot 36, with Lots 5 and 6 acting as the servient tenements. That is, the respondent says the Restrictive Covenant establishes a covenant in favour of Lot 36, among other lots, as the dominant tenement, and encumbers Lots 5 and 6 as servient tenements.
- [24] In *Gubbels v. Anderson* (1994), 91 B.C.L.R. (2d) 379 (S.C.), *aff'd*, 8 B.C.L.R. (3d) 193 (C.A.), the Court differentiated between traditional restrictive covenants and building schemes as follows:
- [18] A restrictive covenant involves a relationship where one property is subject to restrictions for the benefit of another property. This relationship, by its nature, interferes with the free use of land and is the reason why such agreements are strictly interpreted.
- [19] A building scheme, however, involves a community of interests. Under a building scheme all landowners share similar burdens and enjoy similar benefits relating to these limitations on property use. Purchasers of property within areas covered by building schemes do so with knowledge of the restrictions and often because they seek the specific benefits provided by the building scheme. The terms imposed are known to each owner and are entered into by the successors in title.

[25] The necessary conditions for a valid building scheme were described in *Anderson v. Michaels*, 2017 BCSC 238 at para. 23:

- (i) There was a common vendor under whom the various owners derived title;
- (ii) Before the land was sold there was a scheme relating to a defined area which the vendor intended to sell in lots, containing restrictions which were to be imposed on all the lots, and which though varying in details as to particular lots was consistent only with some general development;
- (iii) The restrictions were intended by the vendor to be and were for the benefit of all the lots; and,
- (iv) The parties and their predecessors in title purchased their lots from the common vendor on the footing that the restrictions imposed on the land purchased by them were to enure for the benefit of the other lots included in the general scheme.

Discussion

[26] As stated in *Vandenberg v. Olson*, 2010 BCCA 204, s. 35(2) of the PLA is a comprehensive code for modification or cancellation of any instrument:

[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 with the s. 35(2) grounds if he is to obtain any relief.

[27] Based on the parties' submissions, it is clear the issues raised involve the interests of others who were not given notice of the present petition. Indeed, many parties who would have been entitled to notice under s. 35 of the PLA were not parties to the present proceeding.

[28] While the respondent argues this case is about the indefeasibility of title and only concerns the interpretation of a notation on title to Lot 36 and the documents referred to therein, his submissions fail to address a fundamental problem: if the Court accepts the respondent's interpretation of the Restrictive Covenant and concludes there is no building scheme, the rights and burdens of adjacent lots will be profoundly affected without the Court hearing any evidence or argument from them.

- [29] Such an outcome is precisely the situation the codification of s. 35 of the PLA was meant to prevent. This is reflected in the Court of Appeal's finding that s. 35 constitutes a complete code: Vandenberg at para. 23. Accordingly, s. 35 is the appropriate vehicle to resolve the issues raised in the present proceeding. While the respondent says a s. 35 petition is unnecessary--as no building scheme exists--that conclusion is premature without the benefit of evidence and submissions from any interested and affected party.
- [30] I note the petitioners' submission must be reconciled with the Court of Appeal's decision in Vandenberg. I conclude this situation can be distinguished. In Vandenberg, the plaintiff sought to enforce an easement over land held by the defendant. In response to the plaintiff's claim, the defendant raised s. 35 PLA as a defence and sought cancellation of the easement. The plaintiff did not contest the defendant's reliance on s. 35 at trial, but did so on appeal. In finding that it could consider the defendant's cancellation argument, the Court in Vandenberg stated as follows:
- [39] The respondents also argue, for the first time at this appeal, that the appellant's challenge to the continued existence of the easement should have been properly brought pursuant to s. 35 and could not be advanced by way of a defence and counter-claim to their injunction application. Rather, the respondents say that the appellant ought to have commenced a separate petition proceeding for cancellation of the easement and in doing so joined all affected parties, including the owners of Lots 78 - 82. I note however that the respondents themselves sought declaratory relief as to the validity of the easement in their statement of claim in the following manner.

The Plaintiff claims:

- (a) A declaration that the Plaintiff is entitled to the Easement of Lot 20 on such terms as the court may order
- [40] I do not think that as between these parties there is any prejudice to the appellants in having this question determined in an action. While the preferable procedure for the cancellation or modification of an easement is by petition, it would not be in the interests of justice to require these parties to re-litigate this question. Moreover, strictly speaking it was not necessary for the respondents to have sought a declaration in the first place. The injunctive relief would follow from a finding that the respondents are the owners of Lot 19 and the easement is a valid easement.
- [31] The Court then concluded that in view of the manner in which the matter had been litigated, the result would not affect the rights of parties who were not before the Court--that is, the remedies sought were narrow in scope. Moreover, no objection was raised to the manner of the defence until after the trial had already occurred. However, in this case, the petitioners specifically object to the respondent's failure to file a s. 35 petition. Given the early juncture at which this objection has been raised, as well as the broader impact cancellation of the alleged Restrictive Covenant would have, I find that Vandenberg is distinguishable. I am further bolstered in this conclusion by Vandenberg itself, where the Court of Appeal notes

the preferable procedure to the cancellation or modification of an easement is by petition brought under s. 35: para. 40

[32] While the respondent argues that the Restrictive Covenant does not extend to Lot 36, and therefore a s. 35 application is not necessary, such an approach would fail to do justice between the parties. Both parties require the Court to consider their respective interpretations. This is more appropriately done through a s. 35 petition.

[33] In closing, the petitioners sought two alternative remedies:

- a) the Court grant the petition and order the demolition coach house, such that it conforms with the petitioners' interpretation of the alleged Restrictive Covenant; or
- b) the Court grant the Petition, continue the interim injunction set out in Brown Order, and allow the respondent to file a proper s. 35 petition, with notice to the interested parties.

[34] I am inclined to grant the latter remedy. I grant the petition, order the continuation of the interim injunction, and if the respondent wishes to pursue this matter further, he is at liberty to file a petition under s. 35 of the PLA, with notice to the affected parties.

IV. Conclusion

[35] In view of my conclusion in this matter, it is not necessary to determine the remaining issues.

[36] If the parties are unable to agree on costs, they are at liberty to apply to have that matter determined, if done within 45 days of the date of this judgment.

[37] I thank the parties for their thorough and thoughtful submissions in this matter and note that I am not seized of this matter.

"Burke, J."

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