CANADA / JUDGMENT

Young v. Beck

2017 BCCA 248

COURT
British Columbia Court of Appeal

DECIDED
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2017 BCCA 248 Young v. Beck

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Young v. Beck,

2017 BCCA 248

Date: 20170629

Docket: CA43607

Between:

Robert Young and Yvonne Young

Respondents

(Petitioners)

And

Carolyn Ann Beck

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Saunders

The Honourable Madam Justice Kirkpatrick

On appeal from: An order of the Supreme Court of British Columbia, dated March 31, 2016 (Young v. Beck, 2016 BCSC 562, Nelson Docket No. 19041).

Counsel for the Appellant:

B. Suffredine, Q.C.

Counsel for the Respondents:

A. Edgar

Place and Date of Hearing:

Vancouver, British Columbia

January 27, 2017

Place and Date of Judgment:

Vancouver, British Columbia

June 29, 2017

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Kirkpatrick

Summary:

The appellant cut off access over her property to a neighbouring lot, thus denying the owners of that lot vehicular access to their home. The access was longstanding and the parties in the past had operated on an understanding of access, but there was no easement confirming a right of access registered in the Land Registry. The trial judge found there was a promissory estoppel in favour of the claimants, and declared an equitable easement as a remedy. The appeal challenged the judge's view of the law of promissory estoppel, certain factual findings, and the judge's conclusion that the doctrine of clean hands did not preclude the remedy ordered. Held: appeal dismissed. The judge made no error in his understanding of promissory estoppel, and the findings of fact challenged on appeal were open to the judge on the evidence. Nor did he err in refusing to apply the doctrine of clean hands.

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Neighbouring property owners in Nelson, British Columbia, fell out over access rights running across one property to the other. Access is of long standing but no easement is registered on title.

[2] Mr. and Mrs. Young, the owners obtaining access by traversing the neighbouring property, successfully petitioned the Supreme Court of British Columbia for a declaration that they have an equitable easement over the neighbouring land. The owner of that land, Ms. Beck, appeals from that order.

[3] As is the case with property disputes, a map and aerial photographs best explain the orientation of the two properties to each other, to other historically related properties, to nearby Kootenay Lake, and to the roadways. Mr. Justice McEwen neatly put the physical relationships of the properties in words that paint the picture:

[1] The "North Shore" lies directly across from Nelson on the West Arm of Kootenay Lake and follows Highway 3A for some distance east, denominated locally in miles, such that one is said to live at "Four Mile" or "Six Mile". In places the highway runs close to the lake, while at others it rises above and off the lake permitting subdivisions several houses deep down to the lake. In many of these places the grade is steep and access roads curve and narrow following the characteristics of the land. Many of these properties are subdivided from once-larger parcels, and access is achieved through a series of reciprocal easements rather than by dedicated roads.

[2] This case concerns a road that curves down from Highway 3A toward Kootenay Lake a short distance from Nelson. The road bisects four properties. There have been changes over the years, and the descriptions and the dimensions of some of the lots have altered, but for present purposes it is sufficient to think of the properties as lots 1–4, along a drive that descends from the highway such that 1 is the highest and closest to the highway and 4 is the furthest down. The petitioners are the owners of lot 3 and the respondent is the owner of lot 2, although her land now has a different description.

[3] In the 1940s the four lots were all owned by a party named Smillie. In 1953, Smillie transferred lot 2 (the respondent's property) to Hughes, a relative.

[4] In 1955 Smillie transferred lot 4 to Askew who took easements over lots 1 and 3 (Smillie) and lot 2 (Hughes) in favour of lot 4. Askew thus had easements all the way to the highway.

[5] In 1958 Askew acquired lot 3 from Smillie, and in 1966 Hughes inherited lot 2 from Smillie. The state of the lots at that time was, then, that Hughes owned 1 and 2, and Askew owned 3 and 4.

[6] The historical root of the problem lies in an anomaly. While Askew had obtained easements over lots 1 and 3 from Smillie, and over lot 2 from Hughes all for the benefit of lot 4, when Askew acquired lot 3, no easement had been registered over lots 1 and 2 for the benefit of 3. This obviously did not matter while one person held title to lots 3 and 4. In 1972 when a party named Brown acquired lots 3 and 4 from Askew both lots were noted on the same Certificate of Title, along with the lot 4 easement over lots 1 and 2.

[7] In 1976 Brown transferred lot 4 to Kilpatrick. It carried with it the easement for the benefit of lot 4 over lots 1 and 2. When new Certificates of Title were issued, however, the notation of this easement remained on the lot 3 title. It was not until April 28, 2015, that a solicitor engaged by the respondent queried the presence of the easement on lot 3. He wrote to the Examiner of Titles:

Lot 3 (008-644-161) has an easement #44839D registered against it as a legal notation. Based on our review of the document, it references only lots 2 & 4; we can't find any reference to Lot 3, so it would appear that it should not be registered as a legal notation for the benefit of Lot 3. The owner of Lot B [lot 2] is trying to clarify that the owner of Lot 3 does not have the entitlement under #44839D to cross her property - which is confusing given it appears as a legal notation on Lot 3. We would like the title to Lot 3 amended to delete the reference to 44839D as a legal notation - if I am correct in my interpretation. Feel free to call me at 250-352-3125 if you have any questions.

[8] The title was corrected by the Examiner of Title without notice to the petitioners.

[9] I have outlined the history of the titles only down to the alienation of lot 4 by Brown to Kilpatrick. Since that time the titles have passed through several subsequent owners.

[4] Ms. Beck owns Lot 2 over which the disputed access runs. The Youngs own Lot 3.

[5] The petition was heard on affidavit evidence. On the basis of the evidence the judge found that there was a "long standing practice" permitting access to all four lots by the driveway in issue, and observed that so long as both Lots 3 and 4 were owned by the same person, Lot 3 (without an easement of Lot 2) had effective access over Lot 2 by virtue of Lot 4's easement over it. He found that over time it was assumed that the benefit of Lot 4's easement over Lot 2 also benefitted Lot 3. With these findings, the judge concluded that Ms. Beck purchased Lot 2 in the belief it was "impressed with an obligation to afford access" to Lot 3 and that she continued to hold that belief until the falling out.

[6] This appeal concerns the obligation of the owner of Lot 2 to allow passage to Lot 3 by the driveway habitually used for that purpose, and does not engage any claim of the Youngs' that may arise by virtue of the mistaken notation of an easement corrected in 2015 without notice to them, referred to by the judge.

[7] In addressing the claim of equitable easement the judge referred to Dykes v. Nagel, 2011 BCSC 1549 in which Mr. Justice Harris, said:

[58] The legal principles governing the recognition of equitable easements have been extensively canvassed in the recent decision of Sherbinin v. Jackson, 2011 BCSC 74. It would serve no useful purpose to repeat the thorough analysis undertaken by Madam Justice Fitzpatrick in that case.

[59] It is clear that recognition of an equitable easement is rooted in the principles of proprietary estoppel. In recent years, the courts have taken a broader and more flexible approach to proprietary estoppel. The courts will give effect to proprietary estoppel in circumstances where parties have conducted themselves on an assumption about their rights and where it would be unfair or unjust to allow a party to go back on that assumption. So for example, where there has been an implied promise by conduct and acquiescence, coupled with detriment, it may be inequitable to allow a party to assert rights inconsistent with that implied promise.

[60] Fitzpatrick J. summarized the current law in the following way at para. 47:

[47] The judgment of Scarman L.J. in Crabb at 192-199 provides that in assessing any claim for proprietary estoppel, the Court must ask itself three questions:

(a) Is there an equity established? By this, there must be a belief by the plaintiff in the existence of a right created or encouraged by the words or the actions of the defendant such that it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim of the plaintiff;

(b) What is the extent of the equity? The Court must provide for the "minimum equity to do justice to the plaintiff as a right either as an easement or a license upon terms to be agreed"; and

(c) What is the relief appropriate to satisfy the equity?

[8] In Dykes v. Nagel the parties had assumed access was provided by way of an easement and the respondents claiming the easement had acted to their detriment by spending money on their property premised on access over the easement. The court held that the parties appear to have assumed there was an easement, and went on to hold it would be unconscionable and unjust to say there was no entitlement to access.

[9] Applying the approach of Dykes v. Nagel, the judge here reached the same conclusion. He said:

[34] Realigning their property to create access from above would be a similar hardship to the petitioners.

[35] I think it would be unconscionable now to permit the respondent to assert this legal oversight against the petitioners' proprietary interest in access through the established road.

[10] The judge then rejected the submission the Youngs showed a lack of clean hands, saying any behavioural taint was not in relation to the subject matter of the dispute. In the result, the judge granted the relief sought.

Grounds of Appeal

[11] Ms. Beck raises nine grounds of appeal. For convenience, they may be gathered into four subjects:

1. the judge erred in his application of the law of proprietary estoppel;
2. the judge erred (in several ways) in his appreciation of the facts;
3. the judge erred in failing to apply the doctrine of clean hands to defeat the petition; and
4. the judge erred in awarding costs to the Youngs.

Discussion

[12] This appeal raises issues of law and principle, as to which our task is to determine whether the judge was correct, and of fact, as to which we may only interfere if we consider the judge made a palpable (obvious) and overriding (material) error in his appreciation of the evidence. In the matter of the exercise of discretion, we will interfere only where the judge acted on a wrong principle or failed to give sufficient weight to all relevant considerations: Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3; Harelkin v. University of Regina, [1979] 2 S.C.R. 561; and MiningWatch Canada v. Canada (Fisheries and Oceans), 2010 SCC 2.

1. Promissory Estoppel

[13] The claim for a right to access can only succeed if an equitable easement is established because the doctrine of prescription formerly employed to establish a legal right was abolished in 1971 (subject to a five-year window to assert a claim) (s. 8 of the Land Registry Amendment Act, S.B.C. 1971, c. 30, a provision continued in s. 24 of the Land Title Act, R.S.B.C. 1996, c. 250).

[14] The law in this area is as the judge described by Mr. Justice Harris in Dykes v. Nagel, replicated above. In Trethewey-Edge Dyking District v. Coniagas Ranches Ltd., 2003 BCCA 197 Madam Justice Newbury revisited the rather strict approach to proprietary estoppel taken in earlier jurisprudence, confirming the traditional five probanda but recognizing that the law is broader and less literal than established in Willmott v. Barber, (1880) 15 Ch. D. 96. She cited with approval this statement in Halsbury's (4th ed., vol 16):

The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. The belief on which the person seeking protection from equity relies need not relate to an existing right nor to a particular property. It

may be easier to establish acquiescence where the right in question is equitable only. Where, on the hypothesis that liability has been established, the question is whether equitable relief should be withheld in the case of a continuing legal wrong, the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories.

[15] Mr. Justice Chiasson found to like effect in Erickson v. Jones, 2008 BCCA 379, as did Madam Justice Smith in Cowper-Smith v. Morgan, 2016 BCCA 200. Madam Justice Smith referred also to the comments of Madam Justice Newbury in Idle-O Apartments Inc. v. Charlyn Investments Ltd., 2014 BCCA 451, and said:

[49] From the foregoing I infer that although proprietary estoppel is, like most equitable remedies, flexible and aimed at doing justice, and although the basic elements of the doctrine are not to be technically confined, those elements must still be made out and an equity established. I reproduce again the encapsulation of the doctrine provided recently in Sabey:

1. Is an equity established? An equity will be established where:

a. There was an assurance or representation, attributable to the owner, that the claimant has or will have some right to the property, and

b. The claimant relied on this assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance.

2. If an equity is established, the court must determine the extent of the equity and the remedy appropriate to satisfy the equity.

[16] Madam Justice Smith then summarized the current state of the law:

[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. See Professor Bruce MacDougall's Estoppel (Markham, ON: LexisNexis Canada Inc., 2012) at pp. 446, 462-3, 479, and 486.

[17] The enquiry, in the end, considering these elements, reduces to the ultimate issue of unconscionability.

[18] Ms. Beck says the judge erred by finding proprietary estoppel by reaching back to events before she purchased Lot 2 and that because there was no assurance or representation by her to the Youngs on which they could form a mistaken assumption that they had a right to use the driveway for access, the claim must fail.

[19] The judge addressed the issue of assurance or representation by referring comprehensively to the history of the properties, rather than looking to an assurance or representation by Ms. Beck, the current owner of Lot 2, who on the record purchased the property after the Youngs and so could not have made any representation that touched on the Youngs' reliance when purchasing the property:

[30] The difficulty with applying such a test to the present situation is that there is some artificiality to the focus on the immediate parties. The petitioners' right to access is not precisely or solely "created or encouraged by the words or the actions of the respondent". Each of the parties is a successor in title to property subject to a longstanding assumption that the owners of lot 3 had a right to cross lot 2 to access their property. The location of the house and garage on lot 3, are premised on the location of the access road.

[20] He referred to this as a mistake:

[31] For her part, the respondent obviously purchased the property and paid a price that reflected the existence of the access road and its use by the owner of lot 3. I think the appropriate characterization of the situation is that the parties, and several predecessors in title were, until April 2015, mistaken as to the legal status of a road that has been used for six decades.

[21] The record shows that an easement over Lot 2 in favour of Lot 3 was registered (in error) at the time the Youngs purchased Lot 3 and when Ms. Beck purchased Lot 2. The Youngs were told by the previous owners access to Lot 3 was by way of Lot 2, and Ms. Beck in turn was told by the Youngs they accessed their property by the driveway. Indeed this cooperative use of the driveway was consistent with Ms. Beck traversing a portion of Lot 1 to access her property (which, as related above, is over a registered easement). It is plain on the record that the right of Lot 3 owners to traverse the driveway was, as the judge described, long assumed.

[22] The previous owner of Lot 3 confirms that assumption and explains that he organized the paving of the driveway, with all the users sharing the cost of paving. It seems to me the acquiescence of the previous owner of Lot 2 to others sharing in the paving of the driveway is implicit assurance that those paying for the paving would have use of it. Adapting the words from Halsbury's approved by Madam Justice Newbury in Trethewey-Edge Dyking, this supports a view that the owner of Lot 2 at the time of paving did something to encourage the view that the participants to the paving would be able to use the driveway.

[23] The appellant urges us to look only to Ms. Beck to establish the required assurance or representation. This is a variation of the proposition that any equity which may have arisen before the current parties purchased their homes is not relevant because it had not yet been recognized by a judicial determination. I do not hold to that narrow view of proprietary estoppel in circumstances in which successor parties are inevitable. In his essay "How Proprietary is Proprietary Estoppel?" found in Consensus Ad Idem, Essays on the Law of Contract in Honour of Guenter Treitel, (London: Sweet & Maxwell, 1996) Roger Smith says:

A good place to start is [Lord] Coke, who is quite clear that estoppels ("an excellent and curious kinde of learning") bind privies in estate (that is, successors) to O. There are many cases in the nineteenth century and earlier applying this principle.

[24] Trethewey-Edge Dyking is such a case in which the parties before the courts were not the initial parties to the assurance, but were bound by proprietary estoppel.

[25] I would not bar the door to proprietary estoppel on the basis that the understanding of access precedes the parties' purchases of Lots 2 and 3. That is a matter, however, for consideration in reviewing reliance, detriment, and unconscionability.

[26] I see no error in principle in the reasons for judgment in the judge's consideration of the law of proprietary estoppel.

2. The Judge's View of the Facts

[27] Ms. Beck contends the judge was mistaken in his understanding of the history of access to Lot 3 and she says that there is no reliance by the Youngs to their detriment that would cause an unfairness and underpin a proprietary estoppel so as to create an equitable easement.

[28] On the history of access, Ms. Beck says the judge failed to reflect the timing of the granted easement and the establishment of Highway 3A with an access road, Short Frontage Road, running to the west of Lot 3. This led, she says, to the judge failing to give effect to the potential to construct an access road from Lot 3 to Short Frontage Road as was likely contemplated in 1956.

[29] The task of finding facts is particularly within the purview of the trial judge, and we approach the findings from a deferential stance.

[30] The theory advanced by Ms. Beck to the judge and this court that the coincidence of the granted easements and establishment of Highway 3A contradicts the existence of a proprietary estoppel, although not compelled, was available to the judge on the evidence. Yet I consider that the inferences drawn by the judge from the evidence, and his view of the circumstances, were available to him on the evidence. While I understand the theory advanced by Ms. Beck, the notion that the original owner intended that Lot 2, transferred to a relative, would provide the access to the lower portions of the acreage, is an inference consistent with the apparent continuous access to Lot 3 via Lot 2. This, coupled with the evidence of paving referred to by the judge in which the cost was shared by all, is capable of

being seen as an affirmation of an understanding amounting to an assurance.

[31] I conclude the position presented to us by Ms. Beck on this issue was one she was required to win at trial. Were we to accept her view of the evidence on this issue, we would be stepping into the role of a trial judge, which we cannot do.

[32] Nor am I persuaded the judge erred in principle in reviewing the issue of detriment to the claimant. The judge referred to the Youngs' purchase of the property in reliance of access over the roadway. That evidence, coupled with the practice of the then owner of Lot 2, is a sufficient basis for the judge's conclusion that the criterion of detrimental reliance was met.

[33] I cannot say the judge committed an error as would allow us to interfere with his findings of fact.

3. The Doctrine of Clean Hands

[34] Ms. Beck complained to the judge of behaviour of the Youngs in relation to the use of the driveway, and said any equitable remedy should be denied because the Youngs did not come to court with clean hands. She advances the same submission to us.

[35] The judge said:

[36] There is a significant body of evidence in the materials respecting the behaviour of the parties, which has led to a criminal complaint by the respondent against the petitioner, Robert Young. The allegation has not been proved, and could not possibly be determined on the affidavit evidence before this court. The respondent cites it, however, as evidence in support of a submission that the petitioners have not come before the court with "clean hands".

[37] The concept of "clean hands" is qualified in that it must be "in relation to the subject matter of the dispute." (See: Silcox v. Field, 2010 BCSC 1373 para. 76). The sort of ongoing irritation at the root of this kind of dispute is common, but does not, in the circumstances, have any useful bearing on the proprietary issue that is the subject matter of this proceeding.

[36] In my view, the comments of the judge are apt. There is no basis, in my view, to interfere with that conclusion.

4. Costs

[37] Ms. Beck also appeals from the award of costs against her. She says this order should not have been made because she simply relied upon her legal rights as she was entitled to do.

[38] In litigation the successful party usually is entitled to costs, absent an offer to settle that may trigger a different response. I see no basis on which to depart from the usual rule. I would not interfere with the costs order.

5. Terms of Easement

[39] Ms. Beck complains that the easement declared by the court is vague, and does not adequately define the access that is allowed. For example, she complains that the Youngs have conducted business from their home although it is in a residential area, that people back up the driveway, and that visitors to the Youngs turn around on her property. On her understanding of the order, she cannot complain of these matters to the trial court, and she asks us to amend the order to allow her to do so.

[40] The order of the judge allows for further application to the court to define the easement that gives the Youngs "free and uninterrupted access". I consider the nature of that access falls within the terms of the order. With that understanding, I would dismiss the appeal in its entirety.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

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