COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Shaw Cablesystems Limited v. Concord Pacific Group Inc.,*** 2008 BCCA 234

Date: 20080605
Docket: CA035383

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Between:

Shaw Cablesystems Limited

Appellant
(Plaintiff)

And

Concord Pacific Group Inc. and Novus Entertainment Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

J. L. Carpick — Counsel for the Appellant

B. C. Cramer — Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
19 March 2008

Place and Date of Judgment: Vancouver, British Columbia
5 June 2008

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This appeal is about the interpretation of a statutory easement provided to a strata lot owner by section 69(1)(b) of the ***Strata Property Act***, S.B.C. 1998, c. 43 (the "***Act***"). The chambers judge determined, in answer to two questions of law, that, first, the easement did not oblige a strata corporation to permit the installation of telecommunications infrastructure in the common property of a strata development, and, second, the easement did not oblige a strata corporation to permit the use of existing telecommunications infrastructure. His reasons are indexed as 2007 BCSC 1711, 288 D.L.R. (4th) 252.

[2] For the reasons that follow, I agree with the chambers judge that the two questions of law must be answered in the negative, and I would dismiss the appeal. The extent of the easement under section 69(1)(b) of the ***Act*** cannot be determined in the abstract without any evidence of the manner in which that easement would be enforced and without the dominant and servient tenements before the Court.

Facts

[3] The appellant, Shaw Cablesystems Limited ("Shaw"), and the respondent, Novus Entertainment Inc. ("Novus"), are telecommunications providers. The respondent, Concord Pacific Group Inc. ("Concord"), develops strata properties. In its capacity as owner-developer, it acts as the directing mind of a strata corporation until the first annual general meeting of members subject to its responsibilities under section 6(1) of the ***Act***. That provision requires the owner-developer to "act honestly and in good faith with a view to the best interests of the strata corporation, and

exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances." In the exercise of its power, Concord contracts with Novus to provide telecommunication access to most buildings it constructs "as long as Concord as owner developer controls the strata corporations."

[4] Because the respondents deny the use of that access to Shaw's customers and potential customers, and refuse to permit Shaw to install its cable system in those buildings, Shaw instituted an action for damages for unlawful interference with its economic interests.

[5] An allegation essential to its tort claim is that the respondents have breached section 69(1)(b) of the ***Act*** which provides:

> Implied easements
>
> 69(1) There exists an easement in favour of each strata lot in the strata plan and the owner of each strata lot
>
> > (b) for the passage or provision of water, sewage, drainage, gas, oil, electricity, garbage, heating and cooling systems and other services, including telephone, radio and television, through or by means of any pipes, wires, cables, chutes, ducts or other facilities existing in the common property or another strata lot to the extent those systems or services are capable of being, and intended to be, used in connection with the enjoyment of the strata lot, ...

[6] In its amended statement of claim, Shaw claims that the section 69(1)(b) easement gives a strata lot owner or occupant the right to invite a telecommunications service provider to install infrastructure on the common property of the strata corporation or to access the infrastructure installed by others, and

requires the strata corporation to permit the installation or access. Shaw's statement of claim provides:

> 21. An owner or occupant of a strata lot is entitled to invite a telecommunications service provider to install infrastructure on the common property of the strata corporation, or to access the infrastructure installed by others, and the strata corporation must permit that.
>
> ...
>
> 26. Strata corporations have a duty under the Act to allow Shaw to install its telecommunications infrastructure on their common property, and to allow Shaw to access the infrastructure installed by others.

[7] On the application of the respondents, Leask J. ordered that Shaw's interpretation of the section 69(1)(b) easement be set down for hearing as two points of law under Rule 34 of the ***Rules of Court***; the two questions of law were set out as follows:

> 1. Is the meaning of s. 69(1)(b) of the *Strata Property Act*, S.B.C. chp. 43 ("the *SPA*") that each owner or occupant of a strata lot is entitled to invite a telecommunications service provider ("the TSP") to install, on the common property of the strata corporation, ducts, wires, cables, optical equipment or such further or other equipment as may be required by the TSP for the delivery of its telecommunication services to the strata lot, and the strata corporation must permit this?
>
> 2. Does the easement created by section 69(1)(b) of the *SPA* impose on a strata corporation or the common property the obligation to permit the passage or provision of telecommunication services through or by means of the existing facilities in the common property at the request of the owner or occupant of a strata lot?

[8] The first question addressed whether the strata corporation must permit the installation of infrastructure; the second question addressed the strata corporation's obligation to permit the use of existing infrastructure.

Reasons for Judgment

[9] Leask J. answered both questions in the negative. He preferred a more democratic approach to the use of the common property than that proposed by Shaw; he wrote:

> [10] In answering the two questions posed on this Rule 34 application, I am persuaded that the defendant's position is correct. Owning a strata lot and sharing ownership of the common property in a condominium development is a new system of owning property and has required the development of new mechanisms and procedures. Living in a strata development, as the Nova Scotia Court of Appeal stated [in *2475813 Nova Scotia Ltd. v. Rodgers,* 2001 NSCA 12 at para. 5], combines many previously developed legal relationships. It is also something new. It may resemble living in a small community in earlier times. The council meeting of a strata corporation, while similar in some respects to a corporate annual general meeting, also resembles the town hall meeting of a small community. Stratas are small communities, with all the benefits and the potential problems that go with living in close collaboration with former strangers. In the circumstances, I believe the court should be slow to find absolute rights in individual owners that cannot be modified by the considered view of the majority of owners, controlled by judicial supervision where appropriate.
>
> [11] These principles lead me to a negative answer to both questions posed in this application.

[10] The chambers judge gave an alternative, narrower, reason for answering the first question in the negative. He held that the phrase "facilities existing" in section 69(1)(b) of the ***Act*** restricted the easement to existing infrastructure; he wrote:

> [11] ... I would also answer the first question in the negative for a narrower reason - the reference in s. 69(1)(b) to the language "facilities existing," and I emphasize existing, "in the common property," which I interpret to mean that the individual owner does not have a right to have someone "install" new facilities. I reach this conclusion bearing in mind the provision of s. 69(3)(e).

Positions of the Parties on Appeal

[11] On appeal, Shaw submits the chambers judge erred in substituting "a concern about public policy for ... an exercise in statutory construction." Shaw maintains that under the ***Act***, as under its predecessors, the easement is designed to give the strata lot owner or occupier a right over the common property that is not subject to the approval of the strata corporation, as it states in its factum:

> 66. ... The creation of the easements must have been intended to guarantee rights of unit owners that were intended to be inalienable. They do not represent a compromise of those rights, but an exclusion from the compromises each condominium unit owner must make in order to live together in a MDU [multi-dwelling unit] building.
>
> ...
>
> 78. There is no language in the statute that suggests, never mind says, that the easement is somehow limited to whatever the strata corporation decides to permit.
>
> ...
>
> 80. Put simply, if I own a strata lot and want Shaw cable instead of Novus, section 69(1)(b) means the strata corporation must allow me whatever access to the common property is reasonably required in order to make the connection to Shaw from my strata lot.

[12] However, recognizing that a dominant tenement cannot exercise its rights under an easement to an extent that would unduly burden the servient tenement, Shaw also submits that a strata corporation would be entitled to refuse to allow the strata lot owner or occupier to exercise its easement if the strata council had a reasonable concern that the easement would "unduly burden" the common property. In its factum, it explains:

> 86. ... if a strata council has reasonable concern that a strata lot owner's proposed use of the section 69(1)(b) easement would unduly burden the common property, the strata corporation would be entitled to refuse to allow the use proposed by the owner – or, if the matter went to court, the court would declare (as it has done in other easement cases in other contexts) whether the proposed use of the easement was forbidden for excess user [*sic*].
>
> ...
>
> 89. Interpreting the Act as Shaw proposes in no way circumscribes a strata council's ability to protect the legitimate interests of the strata corporation, including by balancing the interests of the corporation as a whole against the interests of individual strata lot owners (the council can prohibit use of the easement that is likely to adversely affect the strata corporation).

[13] Shaw then admits that the installation of telecommunications infrastructure "might result in overcrowding" of the common property such as the ducts in the walls, but argues that this concern goes only to the first question decided by the chambers judge. As for the second question, Shaw argues "it is inconceivable that there could be any adverse impact on the strata corporation" by allowing Shaw to use the already existing telecommunications infrastructure. Shaw then concludes that since none of the pleadings allege any evidence to show that the installation or use of telecommunications infrastructure would unduly burden the common property, therefore, the respondents "should be taken as admitting there are no facts that would support the chambers judge's interpretation of section 69."

[14] In addition, Shaw submits that the chambers judge erred in misconstruing the phrase "facilities existing" in section 69(1)(b) of the ***Act*** when he relied upon that phrase to narrow the scope of the easement to those facilities already existing in the common property.

[15] In the respondent's view, the chambers judge was correct to answer both questions in the negative because the "easement" in section 69(1)(b) only ensures that all strata lots benefit from the services and facilities already existing in the strata development. The respondent relies on the phrase "facilities existing" in section 69(1)(b) in support of its position.

Discussion

[16] Because the easements implied by section 69 of the ***Act*** are first and foremost statutory provisions, the interpretive task is governed by section 8 of the ***Interpretation Act,*** R.S.B.C. 1996, c. 238, and the edict of the Supreme Court of Canada in ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42, [2002] 2 S.C.R. 559. The former provides:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[17] In the latter, the Court approved (at para. 26) Elmer Driedger's formulation of the proper approach to the construction of a statute:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[18] For convenience of reference, section 69 of the ***Act*** reads in full:

> Implied easements
>
> 69 (1) There exists an easement in favour of each strata lot in the strata plan and the owner of each strata lot

(a) for the strata lot's vertical and sideways support by the common property and by every other strata lot capable of providing support,

(b) for the passage or provision of water, sewage, drainage, gas, oil, electricity, garbage, heating and cooling systems and other services, including telephone, radio and television, through or by means of any pipes, wires, cables, chutes, ducts or other facilities existing in the common property or another strata lot to the extent those systems or services are capable of being, and intended to be, used in connection with the enjoyment of the strata lot, and

(c) for shelter of the strata lot by every part of a building that is shown on the strata plan as part of the common property or another strata lot and that is capable of providing shelter.

(2) There exists an easement in favour of the common property and the owners of the common property

(a) for the common property's vertical and sideways support by every strata lot capable of providing support,

(b) for the passage or provision of the services and facilities described in subsection (1) (b) existing in a strata lot to the extent those systems or services are capable of being, and intended to be, used in connection with the enjoyment of the common property, and

(c) for shelter of the common property by every part of a building that is shown on the strata plan as part of a strata lot and that is capable of providing shelter.

(3) The easements referred to in subsections (1) and (2)

(a) exist without registration in a land title office,

(b) charge and burden that part of the common property capable of providing support or shelter to a strata lot,

(c) charge and burden each strata lot capable of providing support or shelter to another strata lot or to the common property,

(d) charge and burden each strata lot and that part of the common property in which any part of the services and facilities described in subsections (1) (b) and (2) (b) are located, and

> (e) include all of the rights and obligations needed to give effect to and enforce them, including a right of entry to inspect, maintain, repair and replace the shelter, support, services and facilities described in subsections (1) and (2).
>
> (4) The easements referred to in subsections (1) and (2) may be enforced by the strata corporation on its own behalf or on behalf of one or more owners to the same extent as if the strata corporation were the owner of a strata lot or the common property that benefits from the easement.
>
> (5) The easements referred to in subsections (1) (c) and (2) (c) do not apply to strata lots in a bare land strata plan.

[19] The Legislature did not define the term "easement" in the ***Act***. There is little in the legislative history or jurisprudence to assist in the interpretive task.

[20] Counsel agree that essentially the same easement provision has been a part of strata property legislation since the enactment of the ***Strata Titles Act***, S.B.C. 1966, c. 46. While the 1966 ***Strata Titles Act*** was succeeded by the ***Strata Titles Act***, S.B.C. 1974, c. 89, then the ***Condominium Act***, R.S.B.C. 1979, c. 61, later consolidated as R.S.B.C. 1996, c. 64, and finally, in response to the first Barrett Commission report, (British Columbia, Commission of Inquiry into the Quality of Condominium Construction in British Columbia, *The Renewal of Trust in Residential Construction* (Victoria, June 1998)), by the longer and more complex ***Act***, there has been surprisingly little, and no substantive, change to the implied easements over the 42 years since their enactment.

[21] Appellant's counsel has not been able to access the journals in which the Legislature's debates about the original enactment would have been recorded before the advent of Hansard. There may have been little, if any, debate. In 1980,

A. D. Marks noted in *Understanding Condominiums & Cooperatives* (Vancouver: The Landsdowne Row Co., 1980) that the literature indicates all condominium acts in Canada and the United States were introduced by government bills. He then remarked at 17:

> Undoubtedly at the time these condominium bills were introduced into their respective legislatures, none of the legislators knew much about the concept. Perhaps this is the reason they passed final reading without much debate!

[22] This is not surprising in view of the speed with which condominium legislation was introduced to North America in the 1960s. Alberta introduced the first condominium legislation to Canada in 1966. A few weeks later, British Columbia enacted the ***Strata Titles Act***, S.B.C. 1966, c. 46. By the mid-1970s, governments in every U.S. state and Canadian province (except Prince Edward Island) had enacted similar legislation. One of the factors driving the need for these new complex codes, Mr. Marks suggests, was the inclusion in modern building structures of central utility services. In recognition that such legislation would not be the product of a master-mind, he foresaw the need for constant statutory changes to deal with unforeseeable problems and the need for a spirit of cooperation among members of the strata corporation.

[23] The concept of an easement (or servitude) came to the common law from Roman rules and is known to the civil law as a right to use common property freely. It may be that helpful authority might be found in the jurisprudence on these and comparable provisions in civil law countries or the United States, but none was provided to the chambers judge nor to this Court. Nor did counsel provide any

authority interpreting statutory easements, as opposed to easements at common law, whether agreed or implied from necessity or convenience.

[24] As is apparent from the scheme of the ***Act***, its purpose is to create condominiums and to enact a total body of law to permit this new arrangement and application of property rights. To permit more concentrated and efficient use of land resources, this new type of property ownership met the need for a means of providing fee ownership to people wishing to own their own home, as land became less available and more expensive with increased post-war urbanization.

[25] As J.C. Cowan (later Cowan J.) noted in a lecture he gave shortly after the introduction of the new strata title concept to British Columbia (since published as "Strata Titles" in K.C. Woodsworth, ed., *British Columbia Annual Law Lectures, 1968* (Vancouver, B.C.: Continuing Legal Education)), the condominium or strata title concept permits us to "legally build and own 'castles in the air'." One of the important objects of the ***Act,*** like its predecessors, is to provide a framework of rules for group living in those castles, most often in one building. The primary feature of those rules is that no one person possesses or can possess exclusive control of the building and that, generally speaking, the majority rules. No owner has complete freedom of action within their own unit or within the common property.

[26] There is no doubt the Legislature intended to establish an easement taking guidance from the common law, otherwise it would not have used that term for the right it was creating. In the only relevant authority counsel have located on this issue, ***2475813 Nova Scotia Ltd. v. Rodgers,*** 2001 NSCA 12, 189 N.S.R. (2d) 363,

41 R.P.R. (3d) 129, the Nova Scotia Court of Appeal remarked on the role of the common law in interpreting modern condominium legislation:

> [5] From a more purely legal perspective, a modern condominium is created pursuant to detailed legislative provisions such as, in Nova Scotia, the Condominium Act, R.S.N.S. 1989, c. 85 (the "Act"). The condominium is, therefore, a creature of statute. But condominium legislation reflects the combination of several legal concepts and relies on, and to a degree incorporates by reference, principles drawn from several different areas of law. ... The law relating to easements and covenants is relevant because the unit owners have rights to compliance by the others with the provisions governing the condominium and certain easements are, by statute, appurtenant to each unit: see s. 30(2) and 29. ... While the Condominium Act enables and, to a degree, regulates the legal aspects of condominium ownership, it does so against a vast background of general legal principles which will frequently be relevant to the interpretation and application of the Act.

[27] In ***Re Ellenborough Park***, [1955] 3 All E.R. 667, [1956] Ch. 131, [1955] 3 W.L.R. 892 (cited to All E.R.), the English Court of Appeal reviewed the historical evolution of the category of incorporeal rights known as easements or servitudes in English real estate law to determine whether a privately owned park could be used by successors in title to the original recipient of that right. The Court, at p. 673, adopted as correct the four characteristics of a common law easement formulated in Dr. Cheshire's ***Modern Real Property***, 7th ed., pp. 456 *et seq.*:

> (i) There must be a dominant and a servient tenement;
>
> (ii) an easement must accommodate the dominant tenement;
>
> (iii) dominant and servient owners must be different persons; and
>
> (iv) a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.

[28] There is no dispute that the first three conditions are fulfilled. The legislative grant in section 69 overcomes any doubt that the third condition is fulfilled even though the dominant owner is also one of the servient owners as is the case in strata corporations.

[29] It is the last condition that is relevant in this case: an easement must be "capable of forming the subject-matter of a grant". In ***Ellenborough Park*** the Court explained that an easement is only capable of forming the subject matter of a grant if, among other things, the rights exercised under the easement do not amount to joint occupation or substantially deprive the park owners of proprietorship or legal possession. The Court wrote at 674:

> The exact significance of this fourth and last condition is, at first sight perhaps, not entirely clear. As between the original parties to the "grant" it is not in doubt that rights of this kind would be capable of taking effect by way of contract or license. But for the purposes of the present case, as the arguments made clear, the cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms of too wide and vague a character; whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the owners of the park of proprietorship or legal possession; whether, if and so far as effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot qualify as easements.
>
> [Emphasis added.]

[30] In ***Ellenborough Park*** at 676-7, the Court found nothing repugnant to proprietorship or possession in an easement which granted to the dominant tenement the right to enjoy the owner's ornamental garden as long as that right did

not include the right to "trample at will all over the park, to cut or pluck the flowers or shrubs, or to interfere in the laying out or upkeep of the park."

[31] In contrast, in ***Copeland v. Greenhalf***, [1952] Ch. 488, [1952] 1 All E.R. 809, a right-of-way easement over a strip of land did not give the dominant tenement the right to deposit vehicles to be repaired on the land. Such a use was virtually a claim to possession as a joint user of the land.

[32] Similarly, in ***MacDonald v. Grant*** (1993), 85 B.C.L.R. (2d) 180, 35 R.P.R. (2d) 50 (S.C.), an easement over a strip of land for the purpose of building a swimming pool for the exclusive use of the dominant tenement, did not give the dominant tenement the right to exercise that easement by developing 90-95% of the land so as to "virtually evict the owners of the servient tenement from their own land" (para.19).

[33] I accept that an easement is an interest in land comprising the privilege of imposing a burden on the servient tenement for the benefit of the dominant tenement. The effective legislative prohibition on the modification or destruction of the section 69 implied easements by the strata corporation makes clear their fundamental nature. But the ***Act*** provides little guidance as to their nature and scope and does not specify a means for enforcing them.

Application to this Case

[34] In its factum Shaw admits that the strata corporation would be entitled to refuse to allow a proposed exercise of the section 69(1)(b) easement if the strata

council had a reasonable concern that the use would unduly burden the common property. This alone would be sufficient to dismiss the appeal. The questions of law put before the chambers judge were phrased in absolute terms. The first question asked whether the strata corporation "must permit" the installation of infrastructure, and the second question asked whether the strata corporation had the "obligation to permit" the use of existing infrastructure. The appellant effectively concedes that the chambers judge was correct to answer the questions in the negative.

[35] Despite its concession, Shaw argues that since the pleadings do not allege any facts in support of the conclusion that the installation or use of infrastructure would unduly burden the common property, therefore, the respondents should be taken as admitting that the proposed use would not unduly burden the common property.

[36] Shaw's submissions demonstrate the difficulty with enforcing an easement abstractly without any factual context and without the dominant and servient tenements before the Court. Shaw itself admits that the installation of infrastructure "might result in overcrowding" of the common property facilities designed for telecommunication equipment. Nor is it "inconceivable" that there could be an adverse impact on the strata corporation by permitting Shaw to use the existing telecommunications infrastructure. For example, a positive answer to the second question would oblige a strata corporation who had entered a valid and enforceable exclusive contract with a service provider in good faith by the appropriate approving vote, to breach that contract.

[37] The s. 69(1)(b) easement does not provide a right that is the equivalent to trampling at will in a park. It does not provide joint ownership or occupation of the services and facilities. Nor does it give any of the proprietorship or possession rights of an owner. The unit owner enjoys those rights in common property through its co-tenancy and membership in the strata corporation and its ability to elect and direct the strata council. The strata corporation exercises those rights in accordance with the ***Act***, and may install such facilities and services as it deems desirable on the common property. The unit owner is entitled to the enjoyment of those services and facilities that are reasonably necessary to his enjoyment of his unit. The individual unit owner has no absolute right to install services or facilities in the common property any more than he has the right to plant a tree in a common garden or pluck its fruit.

[38] Any owner may enforce its rights to the reasonable use of the common property by application for approval by the strata council of whatever service it wishes, and this owner would have precisely the right to expect what the appellant suggests – a fair hearing that balances his interests with those of his co-tenants of the common property – and all the other rights he has under the ***Act*** and bylaws by way of process, including an action. For the purposes of this appeal I need say no more.

[39] Given the above findings, I need not address the chambers judge's alternative ground for giving a negative answer to the first question of law -- whether

the phrase "facilities existing" in section 69(1)(b) of the ***Act*** limits the exercise of the easement to those services already existing in the common property.

[40] I would dismiss the appeal with costs.

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Mr. Justice Low"