IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Merner v. D'Hollander,*
2011 BCSC 1733

Date: 20111216
Docket: 10-4305
Registry: Victoria

Between:

Darlene Anne Merner

Plaintiff

And:

Rene Francois D'Hollander and
Ruth D'Hollander

Defendants

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Plaintiff:	D. J. Mildenberger
Counsel for the Defendants:	R. S. Margetts, Q.C.
Place and Date of Trial/Hearing:	Victoria, B.C. September 1, 2011
Place and Date of Judgment:	Victoria, B.C. December 16, 2011

[1] In this summary trial application, the plaintiff seeks a declaration that an easement over the defendants' property is valid and that the defendants be ordered to remove a rock wall and concrete patio the defendants have built on a portion of the easement. The plaintiff also seeks damages, including aggravated and punitive damages and costs.

[2] The defendants deny they have done anything to interfere with the plaintiff's right and ability to have full access to and use of the easement. The defendants also say that given the plaintiff's claim for aggravated and/or punitive damages and the existence of material disputed facts, the case is not suitable for summary trial.

Summary Trial

[3] The plaintiff seeks to have this matter proceed as a summary trial even though there is some conflicting evidence. The defendants submit the matter should proceed to a full trial so that the parties can give *viva voce* evidence with a full opportunity to test that evidence by cross-examination.

[4] A summary trial is appropriate if the court is able to make the critical findings of fact necessary for a determination of the issues, provided it would not be unjust to determine the matter by means of a summary trial: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, [1989] B.C.J. No. 1003 (C.A.).

[5] Judges are instructed to be "careful but courageous in assisting the parties to resolve an action without a conventional trial if it can be done without injustice": *Mariotto v. Waterman*, [1996] B.C.J. No. 2711 (C.A.) referred to in *Rowe v. Thomson*, [2011] B.C.J. No. 638 (S.C.).

[6] In this case I conclude that determination of the necessary issues in this case can be determined on a summary trial and that it would not be unjust to proceed by way of summary trial.

Facts

The plaintiff and the defendants own contiguous properties in Esquimalt, British Columbia. The defendants' property is on the waterfront of the Strait of Juan de Fuca and the plaintiff's property lies behind it. The easement in question is about 15 feet wide and lies along the west side of the defendants' property, running from the southern end of the plaintiff's property directly to the waterfront of the Strait of Juan de Fuca. The easement is on terrain that is somewhat steep and rocky.

[7] The easement is registered under No. EL121534 and the two properties are municipally described as 1415A and B Beatty Street, Esquimalt, British Columbia. The defendants own and reside at 1415A Beatty Street. The easement was granted August 14, 1997 and provides as follows:

> 1. THE GRANTOR, as the Registered Owner of Lot A, Suburban Lot 29, Esquimalt District, Plan VIP 64028, the Servient Land, DOES HEREBY GRANT and convey to the Grantee, the Registered Owner of Lot Lot [sic] 1, Suburban Lot 29, Esquimalt District, Plan VIP 63544, the Dominant Land, and their successors in title, the owners and occupiers for the time being of the said Dominant Land or any part thereof, in common with the Grantor, the full free and uninterrupted right and easement at all times and from time to time to enter upon and pass and repass over that part of the Servient Land described as:
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> **All that part of Lot A, Suburban Lot 29, Esquimalt District, Plan VIP 64028, lying westerly of a line and its productions drawn parallel to and 4.572 meters perpendicularly distant from that westerly boundary of the said lot having a bearing of 1 degree 24 minutes 25 seconds and a distance of 29.296 meters**
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> for the purposes of access to the waters of the Strait of Juan de Fuca.
>
> 2. THE PARTIES hereto mutually covenant and agree with the other that the right of way shall at all times be kept free of impediments of every kind and that no structures will be erected on the Servient Tenement which will in any way interfere with the rights hereby granted.
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> 3. THE GRANTEE further covenants with the Grantor that he will not damage or alter the natural state of the Servient Tenement in any way.
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> 4. THE COVENANTS herein contained shall be covenants running with the land and shall be perpetual and the right of way hereby granted shall be perpetual.

[8] The issue in this case turns on the interpretation to be given to paras. 2 and 3 of the easement. The plaintiff says that before the defendants purchased the

property, the former owners had constructed a patio that extended into the easement for a distance of about three or four feet. The precise measurements of that alleged encroachment are in dispute. The plaintiff says the encroachment was not significant and as the patio was only a few inches above the ground, she chose to do nothing about the encroachment in the interest of maintaining the good relations she had enjoyed with the previous owners. However, she maintains the encroachment of the patio onto the easement did not have her consent and she made her former neighbours aware of that fact.

[9] The defendants purchased the waterfront property in 2003. They were aware of the easement, but had some uncertainty about the exact location of its boundaries, as the survey pin could not be found at the southwest corner of their property. When they purchased the property, the defendants were aware the existing patio encroached on the easement and that the plaintiff had made no objection about it to the previous owners.

[10] The defendants say the existing patio had been constructed so that it created a drop of some two or three feet from the level of the patio to the ground on the downhill side. The defendants made some unsuccessful attempts to correct the problem by blocking the area with planters and they wanted to reconfigure the patio to remove the potential danger of the unprotected drop.

[11] In December 2009, the defendants decided to make changes to the patio to eliminate the problem. They approached the plaintiff to discuss their plans. The plaintiff was opposed to the proposed changes as she was concerned the defendants' plans to modify the patio would create a further encroachment of the patio onto the easement. She was also concerned that the size and shape of the new patio would partially obstruct her views and would move the patio closer to her residence and might reduce her privacy.

[12] After the plaintiff made it clear she would not agree to the proposed changes to the patio, the defendants sought legal advice. They wanted to know if they could build the proposed patio without contravening the terms of the easement. They

received advice and the opinion letter from their lawyer is in evidence. It is fair to say the advice they received was equivocal; they were not told they could build the planned extension of their existing patio, nor were they told it would definitely contravene the terms of the easement if it were built. The defendants decided to go ahead and build the patio notwithstanding the plaintiff's objections.

[13] After the patio was completed the plaintiff retained a land surveyor to determine the precise location of the boundaries of the easement area. The surveyor created a site plan and it showed the existing patio encroached upon the easement to the extent of about one-half of its 15-foot width.

[14] The defendants arranged for their own survey. Their surveyor, Powell & Associates, prepared a more detailed site plan, showing the location of the proposed new patio. According to the defendants' site plan, the patio would extend about 2.9 metres (9 1/2 feet) into the easement at its point of furthest encroachment. The defendants say most of that distance is the existing patio the plaintiff had not complained about previously.

[15] However, the patio is now larger and extends down the easement towards the water for what appears to be a distance of almost 10 feet. The photographs of the new deck show rock walls extending to a height of approximately 7 or 8 feet above ground level.

[16] It appears from the photographs in evidence that the terrain of the easement between the plaintiff's property and the water is rocky and steep. Mr. Rene D'Hollander says in his affidavit that he has never seen the plaintiff use the easement for access to the water. He says the easement is not blocked or obstructed in any way that could prevent her from walking over the easement to access the waterfront from her property. It appears there is still ample room to walk around the patio and rock walls to get to the waterfront.

[17] The plaintiff asserts that she has used the easement in the past and expects to do so again in the future. She denied the route is excessively steep and rough

and says in her affidavit that the easement has a gradual slope from her property to the water. She says the portion of the easement available to go around the patio is more difficult to walk on.

[18] Even if the plaintiff has not used the easement, she and her successors in title have the right to do so whether or not they actually choose to exercise their rights.

[19] It seems clear from both survey plans that the patio as it is currently constructed encroaches on the easement. The plans and photos indicate that there is room between the patio and the western boundary of the property for someone walk around the deck or patio. The plaintiff says the space remaining between the new patio and the boundary of the easement is not suitable for walking and says the terrain is now somewhat more difficult. The defendants disagree and assert there is ample room for passage and the terrain is no worse than the other portions of the easement.

[20] It is clear from the plain wording of the easement, it must be kept free of "impediments of every kind" and that no structures will be erected on the easement that will in any way interfere with the rights granted by the easement. The provisions of para. 3 clearly provide that the owner of the servient property, that is, the defendants, "… will not damage or alter the natural state of the servient tenement in any way."

[21] The defendants say that even though they did construct a structure on the easement, it does not interfere with or act as an impediment to, the rights granted by the easement. They argue that the provisions of the easement must be interpreted against the matrix of facts surrounding the granting of the easement and the purpose for which the easement was created. The defendants submit that the right granted by the easement is a right of passage over the easement from the plaintiff's property to the waterfront and that right can still be easily exercised.

Law

[22] According to case law, if the words of the easement are clear, they must be given their plain meaning: *Strata Plan No. VIS 3215 v. Viewbank Holding Ltd.*, [2006] B.C.J. No. 1673 (S.C.); *Carter v. Sigmund*, [1996] B.C.J. No. 813 (C.A.). The nature and extent of an easement is to be determined by the wording of the instrument that created the easement: *Livingston v. Millham*, [2005] B.C.J. No. 1988 (S.C.); *Fallowfield v. Bourgault*, [2003] O.J. No. 5206 (Ont. C.A.). In *Livingston*, the plaintiff sought to restrain the defendant from constructing gates to slow or restrict access by persons coming to and going from the plaintiff's resort. The court granted a permanent injunction preventing interference with the rights granted by the easement.

[23] The court in *Livingston* relied upon *Fallowfield v. Bourgault*, where the court stated at para. 10:

> **10** Where an easement is created by express grant, the nature and extent of the easement are to be determined by the wording of the instrument creating the easement, considered in the context of the circumstances that existed when the easement was created. This principle is set out in Halsbury's Laws of England, vol. 14, 4th ed. (London: Butterworths, 1980) at p. 26, para. 54:
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>> The nature and extent of an easement created by express grant primarily depend upon the wording of the instrument. In construing a grant of an easement regard must be had to the circumstances existing at the time of its execution; for the extent of the easement is ascertainable by the circumstances existing at the time of the grant and known to the parties or within the reasonable contemplation of the parties at the time of the grant, and is limited to those circumstances.

[24] In *Fallowfield*, the court dealt with a mutual easement over a space between two houses in a subdivision. The developer of the sub-division created the easement to allow access for the maintenance and repair of the homes. One of the owners erected a fence on his property outside of the easement that interfered with the other's access to the easement. The plaintiff asserted he had an ancillary right to cross the defendant's property to access the easement and the fence interfered with that right.

[25] The majority of the court concluded that the first step in the analysis was to interpret the wording of the easement in the context of the circumstances existing at the time and then to decide if there were any ancillary rights that were not specifically included in the wording of the easement, but which were reasonably necessary for the use of the easement. The court held that it was only after the extent of the easement had been determined that the court could determine whether the alleged interference constituted a substantial interference with the intended use and enjoyment of the easement (para. 41).

[26] The majority of the court held that the wording of the easement was clear and unambiguous and defined the easement with precise dimensions and further determined there was no basis in the wording of the easement to apply any extension of the defined boundaries or any ancillary rights in addition to the specific terms of the easement. The court allowed an appeal from the trial decision that ordered the removal of the fence on the ground that the fence did not interfere with the rights granted by the easement.

[27] The court considered the English case of *Goodhart v. Hyett* (1884), 25 Ch.D. 182, 53 L.J. Ch. 219 (Ch.D.). In that case, the plaintiff enjoyed an easement over the defendant’s land for the purposes of running water pipes from a deep spring on the defendant’s property to his own property. The defendant wanted to build a house on his property directly over the easement. The existence of the house would have made a portion of the easement inaccessible. The court stated the test in this way:

> … the fact the Plaintiffs would continue to have the right to do it [i.e. use the easement] is not enough. They must have the opportunity and the means of doing it; and the question is whether anything which the Defendant is doing will practically and really in any way obstruct the doing of what the Plaintiffs are entitled to do …
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> [as quoted in *Fallowfield* at para. 78]

[28] The plaintiff also referred to *Wallster v. Erschbamer*, 2011 BCCA 27. In that case, the petitioner sought an order to rescind, vary or cancel a restrictive covenant and an easement registered in favour of the respondents.

[29] The petitioner lived next to the respondents' property and wanted to build a new house on their property. The restrictive covenant limited the height of their proposed new home based upon a reference point set at the level of a windowsill of the respondents' house. The petitioner wanted to build to a height above that reference point by approximately 16 inches.

[30] The provisions of the easement provided for a "free and uninterrupted right and easement, for persons, animals and vehicles, through, along and over" the respondents' property and the right "to pass and re-pass over the said right and easement for the purposes of ingress and egress to and from the said right and easement".

[31] As the petitioner was seeking the cancellation or variance of the easement under s. 35 of the *Property Law Act*, R.S.B.C. c. 377, it fell to her to prove there was no practical benefit to the respondents in maintaining the height restriction as provided in the restrictive covenant or the restrictions provided by the terms of the easement.

[32] The trial court found the dispute to be secondary to the height restriction issue contained in the restrictive covenant and held there was a practical benefit to the respondents with respect to both the easement and the restrictive covenant. The height restriction in particular provided ancillary benefits of light and air and was clearly intended to preserve the view of the respondents from their home.

[33] The Court of Appeal upheld the trial judge's conclusion that there was some practical benefit to the respondents' property and thus, concluded the petitioner had failed to satisfy the requirements of s. 35(2)(b) of the *Property Law Act*. The case turns on whether the petitioner was able to show the proposed use of her land would be impeded by the easement and restrictive covenant without providing any practical benefit to others. That is not the issue here as this case deals with the interpretation of the easement, not whether it should be varied or cancelled on the ground that it provides no practical benefit to the plaintiff.

[34] In *Vandenberg v. Olson*, 2009 BCSC 1302, the court dealt with a dispute between the owners of two adjacent properties. For several years, the plaintiffs used a 20-foot easement over the defendant's land. The defendant installed some landscaping and planters and a garden shed on the easement that interfered and impeded the use of the easement. The plaintiffs sought an injunction compelling the defendant to remove the obstruction and the defendant brought a counterclaim to cancel the easement or have it declared invalid.

[35] The court referred to *Gale on Easements* for the principle that an easement must provide a benefit to the dominant tenement and concluded the easement was still valid as even though the plaintiffs did not own the property on the other side of the defendant's land to which the easement allowed access, they had obtained permission to cross it. The counterclaim to cancel the easement was dismissed as there was still a practical benefit to the plaintiffs. Once again, while the principles considered are useful in the determination of this case, the issue in *Vandenberg* was whether the easement provided any practical benefit to the plaintiff. The court found that it did.

[36] Thus, the principles to be applied are that the court must first consider the words of the easement to determine the meaning and extent of the grant. Second, if the words are clear and unambiguous no extrinsic evidence can be admitted to create an ambiguity or to show the easement does not mean precisely what it says. Finally, it is only after the meaning of the words of the easement has been determined that the court may consider if the alleged encroachment constitutes an actionable violation of the easement.

Discussion and Analysis

[37] In this case, the provisions of the easement agreement must be considered in the context of the matrix of facts surrounding the granting of the easement and the purpose of the easement. Clearly, the purpose of the easement was to allow access from the plaintiff's property to the waterfront on the Strait of Juan de Fuca. The geography of the easement makes it so that the easement is only suitable for

pedestrian traffic. While I do not consider it relevant to the issue before me, there is evidence that the plaintiff rarely, if ever, used the easement. Nevertheless, the easement is not just for the benefit of the plaintiff, but for future owners of her property as well.

[38] On a purely contextual analysis of para. 2 of the easement agreement, it is my view that changes to the patio do not interfere with either the purpose of the easement or the plaintiff's use of the easement. I do not agree that the plaintiff can use the easement to protect her privacy or preserve her views. Support for that principle is referred to in *Gale on Easements* relying on the case of *Browne v. Flower*, [1910 B. 1310] (Ch.), [1911] 1 Ch. 219, where the court stated, in a somewhat different context:

> … Inasmuch as our law does not recognize any easement of prospect or privacy, and (as I have already held) the plaintiffs' lights are not interfered with, it is difficult to find any easement which can have been interfered with by the erection of the staircase in question.

[39] The difficulty in this case turns on the interpretation to be given to para. 3 of the easement. By the terms of the agreement, it is clearly stipulated that the owner of the servient tenement, that is, the defendants, will not alter the natural state of the servient tenement in any way. That covenant runs with the land and is binding on the defendants. On the authority of *Strata Plan VIS 3215 v. Viewbank Holdings Ltd.*, above, as the words of para. 3 are in my view plain and unambiguous, effect must be given to them.

[40] It appears from the survey plans in evidence that the encroachment of the patio into the area of the easement extends to more than one-half the width of the easement over about an 8 or 9 foot length. The photographs that are in evidence clearly show that the natural state of the servient tenement has been altered. Arguably, it has also been damaged, but leaving that aside, clearly there has been a change to the natural state of the easement.

[41] The defendants submit that para. 3 can be effectively read down by adding to the end of that paragraph that the servient tenement shall not be altered in a manner "that will in any way interfere with the rights hereby granted".

[42] The problem in implying any words into para. 3 of the easement agreement is that in *Strata Plan VIS 3215 v. Viewbank Holdings Ltd.* at para. 23, the court stated:

> … if the words used are plain and unambiguous, extrinsic evidence is not admissible to create an ambiguity or to show that the document does not, or was not intended to, create the easement in the exact terms of the primary meaning which the words bear.

[43] Here, the words of para. 3 of the easement agreement are clear and in my view, unambiguous. It is clearly stipulated that the owners of the servient tenement, such as the defendants, must not damage or alter the natural state of the servient tenement in any way. Clearly, the construction of the extended patio and rock wall has altered the natural state of the servient tenement.

[44] The defendants submit that courts have held that not every interference with the right to enjoyment of an easement is actionable. They argue there must first be some "substantial interference" with the enjoyment of the rights granted by the easement to give rise to a cause of action. The defendants say the test is whether the easement could be practically and substantially exercised as conveniently after as before the interference: *Chester v. Roch and Roch* (1975), 27 A.P.R. 536 (N.S.S.C. Tr. Div.).

[45] Similarly, in a case where the easement required the owner of the servient tenement to "clear the easement and keep it clear of all or any part of any trees, obstructions or interfering growth, now or hereafter" the court held that the rights under the easement did not take precedence over the owner's right to use the land for a particular purpose. Such interference must be a substantial interference: *Gardiner v. Robinson*, 2006 BCSC 1014.

[46] However, applying the test in *Strata Plan VIS 3215*, if the wording of an easement instrument is clear the easement cannot be interpreted in a manner to

establish the document does not, or was not intended to, create an easement in the exact terms of the primary meaning which the words bear (at para. 23).

[47] Similarly, in *Miller v. MacLean* (1972), 7 N.S.R. (2d) 371 (S.C. Tr. Div.) as referred to in *Grenier v. Elliott*, 2007 BCSC 598, it was stated that:

> … To be actionable, the interference must be substantial ... but if there is an obstruction either wholly or partially to the right-of-way caused by a building the interference is actionable whether it is of a substantial nature or not as it amounts to an abridgement of the easement which if submitted to for a sufficient time will forever deprive one of the right to use as a way the portion encroached upon …

[48] In this case, while the patio and wall are not "a building" as was the case in *Grenier*, the construction of the wall and patio that extends into the easement area more than half its width and approximately 8 or 9 feet of its length, is clearly a permanent encroachment that is in violation of the clear words of para. 3 of the easement agreement. In the result, the defendants are in breach of the easement agreement and the obstruction must be removed.

Damages

[49] In addition to an order removing the encroachment, the plaintiff seeks damages including aggravated and punitive damages. However, it is my view that the facts of this case do not justify an award for damages of any kind.

[50] Before they made any changes to the existing patio the defendants sought the permission of the plaintiff. It was their hope the plaintiff would agree to the encroachment, as she had not objected to a minor pre-existing change.

[51] When the plaintiff refused to agree to the proposed change, the defendant created some drawings in an attempt to show that the encroachment would not be substantial and would not have any adverse impact on her ability to use the easement. When the plaintiff still refused to agree to any changes, the defendants sought and obtained legal advice. As already noted, the advice is in evidence and did not give the defendants a clear answer as to whether or not they could build the extended patio. In the end, the defendants chose to construct the extension to their

patio over the objections and without the approval of the plaintiff. To that extent, they took a chance; however, in my view, they did not act in a manner so as to expose them to any award of aggravated or punitive damages. See *Ursel v. Jenkins*, [1988] B.C.J. No. 1277 (B.C. Co. Ct.).

[52] As to general damages, the plaintiff complains about an intrusion into her privacy or interference with her views. Based on the principle stated above in *Browne v. Flower*, it is my view that the plaintiff is not entitled to complain about the loss of prospect or privacy on the terms of the easement agreement at issue here and as a result, it follows she is not entitled to any damages. That conclusion is reinforced by the fact that the plaintiff has rarely used the easement to access the waterfront.

[53] Her real complaint seems to be an interference with her privacy or views over the defendants' property but there is nothing in the evidence to show any loss or damage on that account even if it were a proper head of damage. There is no evidence that the defendants did what they did for any purpose other than to increase the enjoyment of their own property. There is nothing to suggest they had any intention of causing any harm to the plaintiff. I therefore decline to make any award of damages in favour of the plaintiff.

Conclusion

[54] On the facts established in this summary trial, I find that the plaintiff is entitled to an order by way of a mandatory injunction requiring the defendants to remove that portion of their patio and rock walls from the easement and to restore the easement to its natural state. While the plaintiff sought an order to be effective immediately, it seems to me that a reasonable time for removing the encroachment is a period of approximately six months and I direct that the encroachment be removed and the natural state of the easement restored no later than July 1, 2012.

[55] Therefore, there will be declaration that in its current form the easement is a valid and subsisting easement; a declaration that the structure comprising rock walls

and planters and a concrete platform violates the terms of the easement; an order that the portion of the structure that encroaches upon the easement be removed and the easement be restored to its natural state not later than July 1, 2012. The application for damages, aggravated damages and punitive damages is dismissed. The plaintiff is entitled to her costs on Scale B, including any expenses related to the cost of obtaining the survey.

"J. K. Bracken, J."
The Honourable Mr. Justice Bracken