IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Carmichael v. Pearson,*
2023 BCSC 632

Date: 20230420
Docket: S30729
Registry: Cranbrook

Between:

David Andrew Madsen Carmichael and Shawna Jodine Dawe

Petitioners

And

Tara Layne Pearson

Respondent

Before: The Honourable Justice Tammen

Reasons for Judgment

(In Chambers)

Counsel for the Petitioners:	G.A. Purdy, K.C.
Counsel for the Respondent:	R. Miles
Place and Date of Hearing:	Cranbrook, B.C. November 29 and December 1, 2022
Place and Date of Judgment:	Cranbrook, B.C. April 20, 2023

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Introduction and Overview

[1] The petitioners, David Carmichael and Shawna Dawe, seek declaratory relief in relation to an easement and restrictive covenant registered on the title of their rural residential property. The easement grants to the respondent, Tara Pearson, broad rights to use the subject lands for a variety of purposes, including for her personal enjoyment and for grazing her horses. The petitioners seek to have both the easement and restrictive covenant cancelled, pursuant to s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377. The respondent opposes the relief sought.

[2] The two real properties at issue are in Cranbrook, BC, at the easternmost end of 17th Street, approximately in line with 46th Avenue. The petitioners' property is immediately to the north of the respondent's property, and is designated Lot C of Plan NEP83896. The respondent's property is designated Lot B of that same plan number. There is no vehicle access to Lot B from 17th Street, and such must be effected by travelling through a portion of Lot C. For that reason, an access easement was granted and registered on title of Lot C in June 2007. That access easement is not at issue in this litigation, and the petitioners concede that it must remain on title. The access easement essentially commences where 17th Street terminates at the western edge of Lot C, and runs east and south, curving toward the respondent's home on Lot B.

[3] Contemporaneous with the access easement, a restrictive covenant was also registered on title of Lot C in 2007. In October 2011, the impugned easement was registered on title. It is those two charges that are the subject of this petition proceeding.

[4] The petitioners advance four bases on which to set aside the easement and restrictive covenant. They are:

a) The easement detracts so significantly from the petitioners' possessory rights that it effectively vests exclusive or unrestricted use with the respondent;

b) The positive covenants contained within the easement are void, and not severable, thus invalidating the easement;

c) The easement offends the provisions of the *Agricultural Land Commission Act*, S.B.C. 2002, c. 36 [*ALCA*]; and

d) The easement and restrictive covenant amount to an attempt to circumvent s. 73 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], the restriction on subdivision.

[5] The respondent submits that neither the easement nor restrictive covenant should be set aside and removed from title. She notes that the petitioners knew of the restrictions when they purchased the property. Moreover, the respondent does not enjoy, nor seek to enjoy, exclusive use of the easement lands, and there is no reason the status quo cannot be maintained. The respondent points out that the driving consideration of the petitioners is their desire to raise alpacas on the lands, which use cannot comfortably co-exist with the respondent's horse grazing activities. Thus, it is not all uses that are unavailable to the petitioners, but merely their preferred use.

[6] For the reasons that follow, I conclude that the easement is invalid and must be cancelled. I reach the same conclusion in respect of the restrictive covenant.

History of the Charges and Property Ownership

[7] In 2007, both Lot B and Lot C were owned in joint tenancy by Kathy Koochin and William Demchuk. They were the only parties to the access easement and restrictive covenant, executed in May 2007 and registered on title in June 2007. In executing the underlying terms of instrument for both charges, Ms. Koochin and Mr. Demchuk were in effect contracting with themselves.

[8] The parcel of land covered by the restrictive covenant is the same as that later referenced in the 2011 easement. In essence, it is the portion of Lot C to the southwest of the access easement, and to the north of Lot B.

[9] By October 2011, when the impugned easement was registered on title, Ms. Koochin and Mr. Demchuk no longer owned Lot B. It was then owned jointly by Kyle and Caroline Ferguson (collectively, the "Fergusons"). The Fergusons are the grantees of the easement, and the beneficiaries of the rights granted under it.

[10] In January 2014, modification agreements for both easements and the restrictive covenants were executed by the property owners. All three agreements were registered on title on April 1, 2014.

[11] By then, the Fergusons had sold Lot B, which was then owned by Coenraad and Hendrina Fourie. Ms. Koochin and Mr. Demchuk remained the owners of Lot C.

[12] The respondent and her former spouse, Chris Novak, purchased Lot B in May 2014, and took possession in August 2014. The respondent is now the sole owner of Lot B.

[13] The petitioners purchased Lot C in October 2019.

Salient Terms of the Charges/Agreements

The Access Easement

[14] The access easement is comparatively straightforward. Its recitals recognize that the grantee requires an easement in order to access Lot B, and grants such access in consideration for the sum of one dollar. The owner of Lot C also covenants not to do various things which might restrict access by the grantee.

The Restrictive Covenant

[15] The restrictive covenant is not straightforward in any respect. As noted, the parties were contracting with themselves. The terms are a mixture of negative and positive covenants, and there are certain terms that appear on their face to be legally unenforceable.

[16] Noteworthy are the following provisions:

a) The recitals contain an obvious error, stating that the Grantee has agreed with the Grantee;

b) The consideration is one dollar;

c) The owner agrees not to place any building, structure or chattel of any kind on the Restricted Area;

d) The owner agrees not to remove or disturb any vegetation from the Restricted Area;

e) Clause 3 is a positive covenant, requiring the owner to execute or cause to be done, at the reasonable request of the grantee, all acts, deeds and conveyances for better assuring the grantee the benefit of the restrictive covenant;

f) Clause 5 is a severability clause. Clause 5(d) requires the parties to make all reasonable efforts to amend or vary the agreement to confirm their mutual intention, to avoid contractual frustration, if any part of the agreement is declared invalid by a court of competent jurisdiction; and

g) The agreement purports to run with the land.

The 2011 Easement

[17] The recitals read, in part, as follows:

> AND WHEREAS the Grantee has applied to the Grantor for the right to construct a fence around the easement area, to drain water from the easement area and to graze livestock, construct and maintain a drainage ditch, undertake the control of weeds on the easement area and to otherwise use the easement area for the personal enjoyment of the Grantee ("the works") for the use and benefit of the Grantee.
>
> AND WHEREAS this Easement is necessary for the construction, operation and maintenance of the works.

[18] The consideration is $5,000.00. For that sum, the grantee was given broad rights of usage to operate and maintain the works, and virtually unfettered rights of access.

[19] Clause 2 contains the covenants of the grantee, which include:

a) Not to construct any building or structure;

b) Not to remove or disturb any soil; and

c) To pay one fifth of the annual property taxes related to Lot C, excluding improvements.

[20] Clause 3 sets out the covenants of the owner, and I reproduce it in its entirety:

> 3. The Owner hereby covenants with the Grantee:
>
> (a) Not to make, place, erect or maintain any building, structure, foundation, pavement, excavation, well, pile of material or obstruction or to plant any growth upon the easement area or which might obstruct access by the Grantee, the Grantee's servants, agents, licensees, to the works or any part thereof.
>
> (b) Not to disturb any of the vegetation or remove any of the soil from the easement area.
>
> (c) Not to direct any water drainage or runoff into the easement area.
>
> (d) Not to do or knowingly permit to be done any act or thing which might, in the opinion of the Grantee in any way, whatsoever, interfere with or injure the works, access to the works or the use and benefit to the Grantee of the easement hereby granted.
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> (e) If the Grantee is successful in subdividing the easement from the Land and consolidating it with Lot B the purchase price for the easement area will be Thirty-five Thousand Dollars ($35,000.00).
>
> (f) From time to time and at all times upon every reasonable request and at the cost and charges of the Grantee to do and execute or cause to be made, done or executed all such further and other lawful acts, deeds, things, devices, conveyances, and assurances in law whatsoever for the better assuring unto the Grantee of the rights, liberties and right of way hereby granted upon and within the easement area.

[21] Clause 4 is a severability clause, which, like that contained in the restrictive covenant, requires the parties to make all reasonable efforts to amend or vary the agreement, to avoid frustration, if any part of the agreement is declared invalid by a court of competent jurisdiction.

[22] Clause 7 stipulates, among other things, that the agreement runs with the land, and is binding on the executors, administrators, successors and assigns of the parties.

The 2014 Modifications

[23] The changes to the access easement made in 2014 were minor and are not germane to the present application.

[24] The changes to the restrictive covenant were these:

a) A correction of the recitals, replacing “Grantee” with “Owner”; and

b) Replacement of clause 6, the grantee’s covenants, with modified provisions setting out the grantee’s obligations.

[25] The changes to the subject easement were more substantial. They included the following:

a) A proscription on the grantee removing any healthy trees from the easement area;

b) A proscription on the grantee constructing any fences that would impede the owner’s access to its driveway;

c) Deletion of clause 3(e), which envisaged the sale of the easement area at a price of $35,000.00, assuming subdivision was permitted; and

d) Replacing clause 6, the indemnification provision binding on the grantee, with a new clause 6, containing mutual indemnification provisions. The new clause 6A requires the owner forthwith, on

demand, to indemnify the grantee for various potential costs or losses arising from the owner's use of the easement area. In short, it is a positive covenant binding on the owner.

Issues and Discussion

[26] For ease of reference, I re-state the four points advanced by the petitioners:

1) The easement detracts so significantly from the petitioners' possessory rights that it effectively vests exclusive or unrestricted use with the respondent;
2) The positive covenants contained within the easement are void, and not severable, thus invalidating the easement;
3) The easement offends the provisions of the *Agricultural Land Commission Act*; and,
4) The easement and restrictive covenant amount to an attempt to circumvent s. 73 of the *Land Title Act*, the restriction on subdivision.

Issues #3 and #4

[27] I would not set aside the easement and restrictive covenant based solely on these arguments, but here observe that there is considerable merit to both. I prefer to consider those matters in my assessment of the other two issues.

[28] First, it is clear that the subject property is zoned rural, which includes farming use. It is equally clear that the overall effect of clause 3, in particular 3(a) and (b) is to preclude the owner from farming the land. That proscription may offend s. 22 of the *ALCA*, which reads:

22(1) The commission may enter into a covenant under the *Land Title Act* with an owner of agricultural land.

(2) A covenant that restricts or prohibits the use of agricultural land for farm purposes has no effect until approved by the commission.

[29] However, this argument was not fully developed, and I remain uncertain if the *ALCA* precludes private individuals from entering into such covenants. Nonetheless, I will consider the proscription on farming when I consider the overall effect of the easement and covenants, in particular when I address the first issue raised by the petitioners, the allegation of significant detraction from their possessory rights.

[30] With respect to issue four, the alleged attempt to circumvent s. 73 of the *LTA,* I need not categorically decide the matter. It certainly seems likely, based on all the evidence, that the original intention of the owners, Ms. Koochin and Mr. Demchuk, was to subdivide Lot C and transfer ownership of the easement area to the owner of Lot B. That was the reason for the original clause 3(e), since deleted. With that amendment, the only other evidence consistent with an intention to pass ownership to the owners of Lot B is the provision that the grantee pay one fifth of the property taxes.

[31] I will consider that evidence as well when I address the first issue, the extent to which the easement divests the owner of all possessory rights. In addition, when I consider the second issue, in particular severability of the positive covenants, I will need to address the original intentions of the contracting parties. Thus, the entirety of the original clause 3 will be germane, insofar as it evinces those intentions.

Issue #1 – Significant Detraction from the Petitioners' Possessory Rights

[32] In my view, this is the crux of the matter. I am persuaded that the overall effect of the easement and covenant does detract significantly from the possessory rights of the petitioners. That being so, the easement should be set aside and its registration on title cancelled.

[33] In reaching that conclusion, I have ignored entirely the assertion of the respondent, in a text exchange with one of the petitioners in January 2021, that she enjoys exclusive use of the easement area. Ms. Pearson acknowledges that her position was in error, and no longer advances a claim for exclusive use.

[34] I have also considered the submission of Ms. Pearson that the agreement does not preclude many potential uses by the petitioners, merely their preferred use, raising alpacas. The corollary submission is that Mr. Pearson primarily uses the easement area for grazing horses, and that is primarily what the original agreement envisaged. However, Ms. Pearson concedes that she also uses the easement area for other activities, including snowmobiling in the winter months. Moreover, it is not

the actual usage which is determinative. Rather, it is the sum total of the rights and obligations created by the overall agreement.

[35] In *Robb v. Walker*, 2015 BCCA 117, at paras. 31–33, Justice Willcock affirmed that the contractual interpretation principles set out in *Creston Moly Corp. v. Sattva Capital Corp*., 2014 SCC 53, apply to the interpretation of an easement. The court is thus required to take a common-sense approach to interpreting the easement, looking first to the plain and ordinary meaning of the words in the agreement, to try to determine the true intention of the parties at the time.

[36] Pursuant to the clear words of the agreement, the respondent, as dominant tenant, has the right to do the following in relation to the easement area:

- Construct a fence
- Drain water
- Graze livestock
- Construct and maintain a drainage ditch
- Control the weeds
- Otherwise use the easement area for their personal enjoyment

[37] The petitioners, as servient tenants, are precluded from doing the following:

- Planting any growth on the area which might obstruct access by the grantee
- Disturbing any vegetation or removing any soil
- Directing any water into the easement area
- Permitting any act, or performing any act, which might, in the opinion of the grantee, interfere in any way with “the works”

[38] “The works” is only defined in the recitals, but clearly includes the right of the grantee “to otherwise use the easement area for the personal enjoyment of the Grantee.” Thus, the grant in relation to permitted use is extremely broad, akin to complete possessory rights. The corresponding proscription on the servient tenant from doing anything which might, in the opinion of the grantee, interfere with those broad rights, has the effect of ceding complete control of the lands to the dominant tenant.

[39] An easement which confers a right to possession or control inconsistent with the possessory rights of the servient owner is not legally valid, and is subject to being set aside by the courts: *Robinson v. Pipito*, 2014 BCCA 200 at para. 22. Courts have traditionally been reluctant to invalidate instruments affecting title to land, and have sought to interpret grants in a manner that preserves some proprietary rights in servient tenant owners. However, where that cannot be done "without doing violence to the easement agreement, grants that practically curtail any such interests will be set aside": *Robinson* at para. 44.

[40] In *Kassell v. Probasco*, 2007 BCSC 937, Justice Hinkson, as he then was, declined to make a declaration of invalidity in respect of an easement that permitted the grantee to "fully use and enjoy" the easement area "for all purposes connected with the use and enjoyment." However, the same clause contained language as to the express purpose for which the easement was granted, namely access to the grantee's adjacent property. There was other evidence that the dominant tenant needed a means of access from the street to that property. In those circumstances, access and egress was found to be the dominant purpose.

[41] In this case, I cannot find that access to the adjacent property is a purpose of the easement at all, much less the dominant purpose. At all material times there has been a separate access easement designed for exactly that purpose. That easement will remain in place in order to permit street access to the respondent's property. The dominant purpose of the easement at issue here was to confer broad rights in the grantee to use the lands for grazing animals and other purposes related to personal enjoyment.

[42] In *Robinson*, the Court of Appeal upheld a decision to set aside an easement which ceded to the grantee free and uninterrupted usage of the area for farm and recreational uses. At paras. 45–47, Willcock J.A. said this:

> [45] *Gale on Easements* reminds us that common sense must play a role in our analysis. By granting to the dominant tenant the right to use all of the easement area for farming and recreational use, and by barring the servient tenant from making any inconsistent use of the property, the Easement Agreement permits the owners of the dominant tenement in the case at bar to

> plant crops over the entire easement area. It thereby grants them exclusive use of all of the easement area.
>
> [46] It is open to the owners of the dominant tenement to remove all timber from the easement area, without apparent restriction. By granting to the owners of the dominant tenement the right to all the timber, the Easement Agreement prevents the owner of the servient tenement from removing trees or making any use of the easement area that would interfere with the removal of trees. The owners of the dominant tenement, similarly, enjoy the right to remove all gravel from the easement area, without restriction. The dominant owners can prevent the owner of the servient tenement from removing gravel or to making any use of the easement area that would interfere with the removal of gravel from any part of it.
>
> [47] The exercise of these rights and the right to restrain the servient tenant from any use of the property inconsistent with such uses would permit the owners of the dominant tenement to exercise dominion over the easement area inconsistent with the servient tenant's proprietary interests. In the circumstances of this case, common sense supports the view expressed by the trial judge that by the Easement Agreement the dominant tenants gave to themselves such rights as to amount to a complete derogation of any rights to the proprietorship or possession of the easement area by the defendant as servient tenement owner.

[43] I reach the same conclusion. The combined effect of the grant to the dominant tenant to use the easement area for personal enjoyment and the proscription on the servient tenant of doing anything which, in the opinion of the grantee, interferes with such usage, is to derogate all rights of proprietorship of the petitioners as servient tenement owners.

[44] As a purely practical matter, many potential uses by the servient tenement owners are precluded, including farming. Moreover, the breadth of clause 3(d), which makes the grantee the sole arbiter of which uses by the owners interfere with the grantee’s usage rights, in essence transfers to the grantee the rights which normally attach to property ownership.

[45] That being so, unless the offending clauses can be severed, the easement must be set aside.

Issue #2 – Severance

[46] As noted at para. 44 of *Robinson*, courts are traditionally loath to set aside instruments affecting title to land, and seek to interpret grants in a manner that

preserves some proprietary rights in the hands of the servient tenant. One of the means by which this may be done is by severing the offending clauses of the instrument. Where that can be done, without doing violence to the intention of the parties, it is to be preferred over a declaration of invalidity.

[47] However, the court must also bear in mind that severance should be used sparingly, only where the part being removed is clearly severable and not part of the main purport of the agreement. The purpose of severance is to give effect to the intention of the parties when they entered into the contract: *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6 at paras. 32 and 36.

[48] On this application, I am asked to consider two discrete aspects of the severability principle. First, the petitioners submit that the easement contains impermissible positive covenants, which cannot be severed, and thus further serve to invalidate the entire agreement. Secondly, the respondent submits that any offending parts of the easement agreement can comfortably be severed in order to give effect to the parties' original intentions, and that such should occur, rather than a declaration of wholesale invalidity. Severance, says the respondent, is both permitted at common law, and contemplated by the agreement itself.

[49] The parties agree that an easement cannot place on the servient tenement owner a positive obligation to act. Although the original contracting parties may make such an agreement, it will not pass with the land. A true easement, which does pass with title to the land, can require no more than sufferance on the part of the servient tenement owner: *Nordin v. Faridi*, [1996] B.C.J. No. 61, 1996 CanLII 3321 paras. 34–36 (C.A.).

[50] The petitioners submit that there are three discrete impermissible positive covenants contained within the easement agreement:

a) Clause 3(e) of the original agreement, which contemplates sale of the easement area, if subdivision is obtained, at a price of $35,000.00;

b) Clause 3(f), which requires the owner to "do and execute or cause to be made, done or executed all such further and other lawful acts, deeds, things, devices, conveyances, and assurances" for assuring the grantee the rights conferred by the easement; and

c) Clause 6A of the modification, a mirror provision to the original indemnification clause operable in respect of the grantee.

[51] I agree with the respondent that clause 6A of the modification is not a positive covenant, but rather a simple indemnification clause. It creates no positive duty on the owner to act, but merely gives the grantee rights of recourse based on potential actions of the owner.

[52] However, both clauses 3(e) and (f) are positive covenants, requiring the owner to perform specified acts. That being so, they cannot form part of the easement, but are only binding on the original contracting parties.

[53] No real issue of severability arises with respect to clause 3(e), since it has already been deleted, pursuant to the modification agreement.

[54] Clause 3(f) is potentially severable. However, it is difficult to discern if severance would do violence to the parties' original intentions. It seems clear, particularly by reference to the recitals and clause 3(e), that the initial intention was to subdivide Lot C, and sell the easement area to the owner of Lot B, effectively combining those two parcels of land.

[55] By removing clause 3(e) in January 2014, the parties evinced a modified intention. However, they did not remove the positive covenant contained in clause 3(f). Even more importantly, the parties left intact clause 3(d), which prevents the owner from doing anything which, in the opinion of the grantee, interferes with the enjoyment by the grantee of the broad panoply of rights conferred by the easement.

[56] The respondent submits that both clauses 3(d) and (f) can be severed or modified, without impacting the original intention of the parties. That intention,

submits the respondent, was to permit the grantee to use the land for grazing horses. I cannot agree. Although grazing horses has been the primary use made by the respondent, and "grazing livestock" is one of the uses encompassing "the works", the parties appear to have contemplated far broader rights of usage than simply that.

[57] The original intention of the parties, as gleaned from the overall agreement and surrounding circumstances, could have only been to vest in the grantee extremely broad rights to use and enjoy the lands, and to preclude the grantor from fully exercising dominion over their own property. The original contracting parties were free to strike such a bargain, but not legally permitted to create an easement which would run with the land, and bind subsequent owners of the property.

[58] For those reasons, I decline to sever offending portions of the agreement, or otherwise attempt to modify it to conform with basic easement principles.

The Restrictive Covenant

[59] The final matter I must decide is the validity of the restrictive covenant, and whether it should remain registered on title. I have determined that the answer to those questions is "no." Once the easement is set aside, the restrictive covenant serves no purpose. The practical benefit of the restrictive covenant stems directly from the rights granted under the easement.

[60] Nor is the restrictive covenant required to ensure that the respondent has access to her property from the street. The access easement ensures that access, and contains all necessary terms in that regard.

Conclusion

[61] For the foregoing reasons, I have determined that the easement agreement must be set aside. I grant the declaratory relief sought by the petitioners. I make a declaration that the easement agreement is invalid and unenforceable as an easement at law and its registration should be cancelled.

[62] For the same reasons, the restrictive covenant should be set aside, and its registration cancelled.

[63] The petitioners have been successful in this proceeding, and are entitled to costs at Scale B.

"Tammen J."