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Is an Easement Covering Almost All of a Neighboring Property Permissible?

In *Robinson v. Pipito* the British Columbia Court of Appeal considered the legal validity of an innovative scheme involving an easement that covered about 80 percent of a property, and benefitted the owners of the land next to it.

The case involved a land-owning couple who subdivided their property into two lots with the intent of keeping the first lot ("Lot 1") for themselves, and selling the second one ("Lot 2"). Since they wanted to reserve the right to do certain things on Lot 2 (namely farm the land, and remove trees and gravel), they registered an easement over almost 80 percent of Lot 2, in favour of themselves as the present owners of Lot 1. They documented this in a registered Easement Agreement, and proceeded to sell Lot 2 to a third party.

After a period of time, a dispute ensued: The owner of Lot 2 claimed that the practical effect of his duty to tolerate certain activities on his property was to exclude him from it completely, since the Lot 1 owners had essentially taken full possession of the easement area.

At trial, a judge invalidated the Easement Agreement and ordered the cancellation of the relevant Land Titles registration respecting Lot 2. The judge concluded that the over-broad easement granted by the owners was tantamount to them selling that second property to one party, but giving almost the full extent of its use and enjoyment to someone else (in this case, themselves as well as any subsequent future buyers).

In ruling on the later appeal, the B.C. Court of Appeal reflected on the basic legal principles that underpin the "easement" concept. It first acknowledged that by definition, *any* easement over Lot 2, no matter how large or small, would have the effect of impinging on and detracting from the rights of that property's legal owner, so that was not the governing test of whether the expansive easement in this case was valid. Nor was its legality to be gauged solely by the nature of the farming and other activities performed on Lot 2 by the Lot 1 owners. The Court also adverted to a well-settled legal principle that a purported easement cannot grant exclusive possession or unrestricted use of a parcel of land; however that did not apply here as the contentious easement covered only the vast majority of Lot 2, rather than *all* of it.

Applying what it termed a "common sense" analysis, the Appeal Court concluded that the Easement Agreement in this case went too far: It essentially gave the owners of Lot 1 the exclusive use and possession of virtually all of Lot 2, and in fact effectively barred the Lot 2 owner from using the land in any substantial way. The rights granted to the Lot 1 owners (and their eventual successors) were accordingly so inconsistent with the rights of the Lot 2 owner(s) that it actually amounted to "something more than an easement" in law.

As such this arrangement was ruled impermissible; the trial judge's order invalidating the Easement Agreement and striking it off the Lot 2 title register was affirmed. See *Robinson v. Pipito*, 2014 (BCCA).

Can Real Estate Commission be Payable Without a Completed Sale?

It is common knowledge that under a standard listing agreement with a real estate brokerage, a seller is obliged to pay commission once there is a sale of the listed property either during the specified term, or during the stipulated holdover period. But in a recent case heard by the Supreme Court of Canada, the issue was whether on proper interpretation of a listing agreement, any commission was payable even though there was no sale of the property at all.

The case involved the intended sale of commercial property in Quebec. At the time, the standard form listing agreement put out by the province's real estate organization obliged the seller to pay its chosen brokerage firm its commission where an "agreement to sell an immovable" was concluded during the contract's term, or if "the seller voluntarily prevents the free performance of the [brokerage] contract".

The seller received an offer to purchase from a potential buyer, which offer was duly submitted through the brokerage firm in keeping with the brokerage contract requirements. The offer was conditional on the buyer being completely satisfied with the property after performing due diligence.

As it turned out, the buyer's inspection revealed the possibility of contaminated soil, so the buyer withdrew the first offer and submitted a second one; this time the offer was conditional upon the seller eliminating the contamination at its own expense. The seller refused to do so, and

the deal collapsed.

Nonetheless, the brokerage firm claimed its commission from the seller, pointing to the wording of the standard brokerage contract (which was a separate document from the agreement of purchase and sale).

At trial, the Quebec Superior Court dismissed the brokerage firm's commission claim, but the Court of Appeal reversed, finding that the firm was indeed entitled to commission even though no actual "sale" had ultimately been concluded. The matter went to the Supreme Court of Canada for resolution.

That Court was asked to determine whether, despite the aborted underlying deal, there was either an "agreement to sell the immovable" within the particular wording of the brokerage contract, or whether the seller had voluntarily prevented the free performance of the brokerage contract, so as to trigger the commission payment obligation nonetheless.

The Supreme Court concluded that the intended buyer's promise to purchase had not been *unconditionally* binding on it, to the point where it could be said that an "agreement to sell the immovable" had actually been reached. The legal test was whether, when all was said and done, either the buyer or the seller had the right to bring an action to compel transfer of title.

Under this particular failed agreement of purchase and sale, neither of them did: the buyer's second offer, in which it requested the seller to remediate the soil contamination at its own expense, was a repudiation of the first offer, which the seller had never accepted. Moreover the second offer was conditional upon the contaminated soil being remediated and was never accepted. Further, the Court found that the seller did not have an obligation to decontaminate the soil and its failute to agree to do so did not prevent the free performance of the contact.

Accoridngly, the Supreme Court of Canada found that under the wording of the brokerage contract, no commission was payable. Conceivably however, a differently-worded contract may have resulted in an outcome calling for commission payment, even absent a completed underlying sale. See *Societe en commandite Place Mullins v. Services immobiliers Diane Bisson Inc.*, 2015 (SCC).

Condo Parking Spot Left Off Title Transfer: Court Rectifies it 20 Years Later

In 1997, a buyer entered into an Agreement of Purchase and Sale which covered both a residential condominium unit and its related parking spot. The deal closed and the condo corporation provided the buyer with the customary certificate attesting to his ostensible ownership of the parking spot. The buyer moved in and lived there for almost 20 years, duly paying the related property taxes and common area charges for the parking unit.

When the buyer started to consider selling his condo unit, he learned that – through the apparent inadvertence of all the lawyers involved at the time – he never received registered title to the parking spot; instead, title to the spot was still held by the original seller.

Despite diligent efforts to locate the seller, he could not be found. As such, the buyer went to court to obtain a declaration that he owned the parking spot that he thought he had purchased almost 20 years ago. The court considered the situation and found that this was a clear instance of inadvertence. However, it struggled to find the proper legal basis upon which to make the declaration sought. The fact that the buyer used the spot unchallenged for almost two decades was not determinative, since "adverse possession" was a concept no longer recognized under the Land Titles regime.

The court then reasoned that although legal title to the parking space was not properly transferred to the buyer at the time of the 1997 deal, the equitable title was, starting from the moment that he paid the purchase price in full. Under the signed written agreement, at that point the seller was obliged to transfer title upon payment; commencing on the closing date, the seller served as a "constructive trustee" of the title to the parking space, which he held for buyer's legal benefit.

Despite the passage of almost two decades, by being the beneficiary of the constructive trust, it was determined that the buyer could enforce his equitable title to land, provided that he was not out of time under the relevant statutory limitation periods. On this issue, the court found that the limitation period was not an issue since, although the error took place almost 20 years ago, it was just discovered. Thus, the court granted the buyer the requested declaration as to his ownership of the parking spot and ordered the Land Registrar to register the transfer accordingly. See: *Chopra v. Vincent*, 2015 (ONSC).

Electronic Signatures Are Now Valid for Ontario Land Transactions

The Ontario *Electronic Commerce Act, 2000* was initially introduced 15 years ago, and was amended in 2013 to theoretically allow for electronic signatures on Agreements of Purchase and Sale and other documents that "create or transfer interest in land". Although those changes were not put into force at that time, they are now effective as of July 1, 2015.

The wording of the newly-enacted changes stipulates that an electronic signature is effective only if at the time it is made: 1) it is reliable for the purpose of identifying the person using it, and 2) the association between the signature itself, and the relevant electronic document, is also reliable. The use of electronic signatures remains optional, however.

These long-delayed legislative changes finally bring Ontario in-step with several other Canadian provinces that allow for electronic signatures in land-related deals.