IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *United City Properties Ltd. v. Tong,*
2010 BCSC 111

Date: 20100128
Docket: S088525
Registry: Vancouver

Between:

United City Properties Ltd.

Plaintiff

And

Jianqin Tong

Defendant

Before: The Honourable Mr. Justice S.R. Romilly

Reasons for Judgment

Counsel for the Plaintiff:	Kent D. Wiebe
Counsel for the Defendant:	Ian D. Hall
Place and Date of Trial:	Vancouver, B.C. December 8-10, 2009 and January 18, 2010
Place and Date of Judgment:	Vancouver, B.C. January 28, 2010

A. NATURE OF THE APPLICATION

[1] This is an application for the granting of a permanent right of way over the encroachment at issue in favour of the plaintiff. In the alternative, the plaintiff applies for a conveyance of title to the encroachment from the defendant to the plaintiff upon payment of reasonable compensation to the defendant.

[2] For the reasons stated below, the plaintiff's application is dismissed with costs.

B. ADMITTED FACTS

[3] The parties agree to the following facts.

i. The Properties

[4] The plaintiff is the registered owner in fee simple of a property located at 1320 West 15th Avenue, Vancouver (the "1320 Property"). The plaintiff purchased the 1320 Property on May 14, 2004 for $1,700,000.00.

[5] The defendant is the registered owner in fee simple of a property located at 1350 West 15th Avenue, Vancouver (the "1350 Property"). The defendant purchased the 1350 Property on July 17, 2006 for $1,870,000.00.

ii. The Encroachment

[6] The 1320 Property and the 1350 Property share a common property line proceeding north to south along the entire length of each. The plaintiff's asphalt driveway proceeds from West 15th Avenue along the west side of the 1320 Property to the house located at the rear of the 1320 Property and midway along its length encroaches into the 1350 Property approximately 5.5 feet for approximately 150 feet along the length of the driveway (the "Encroachment").

[7] The 1320 Property has been encroaching on the 1350 Property since at least 1946 and the Encroachment has been present through a series of owners. Both

parties knew of the existence of the Encroachment at the time they purchased their respective properties.

iii. The Right of Way

[8] The Encroachment was the subject of a right of way granted between the owners of the two properties in 1946 (the "Right of Way"). The Right of Way remains registered on title to both properties today.

[9] The Right of Way has two components:

(a) A right of way extending over the rear of the 1320 Property onto the 1350 Property granted in perpetuity;

(b) The Encroachment area which was granted for a set period of ten years and has since expired.

Until the defendant applied to the City of Vancouver (the "City") in 2008 for a development permit, the defendant had not taken any action to have the Encroachment rectified.

iv. The Current 1320 Property

[10] The 1320 Property is:

(a) 30,149 square feet in total;

(b) currently being used as a multi-unit rental income property with five tenanted suites;

(c) currently not conforming with existing zoning but was an existing non-conforming use at the time the plaintiff purchased the 1320 Property.

The plaintiff recently submitted four design proposals to the First Shaughnessy Advisory Design Panel (the "FSADP") for its consideration on developing the 1320 Property. Each of the four design proposals includes the construction of a multi-family infill house on the property.

[11] In the event that any of the design proposals receive approval from the FSADP, the City, and a building permit is issued for the 1320 Property, it will trigger a requirement to upgrade the storm water retention system.

v. The Current 1350 Property

[12] The 1350 Property is:

(a) 30,625 square feet in total;

(b) currently being used as a single family dwelling.

The defendant received a permit from the City on October 28, 2008 to build a new driveway on the 1350 Property (the "Driveway Project").

[13] The Driveway Project entails significant grading and landscaping to the property across the frontage of the lot. All trees along or close to the Encroachment area leading down to the northern end of the property have now been removed save for a single mature fir tree which is in the centre of the front yard.

vi. The Current Encroachment

[14] Within the Encroachment area are the following objects:

(a) Part of the existing asphalt driveway (5.5 feet x 100 feet);

(b) part of one granite wall.

Within 20 feet of the property line between the two properties are the following objects:

(a) One semi-mature blue spruce tree;

(b) two semi-mature oriental spruce trees;

(c) one Japanese maple tree.

C. TESTIMONY

i. Jianqin Tong

[15] Ms. Tong testified that the present easement causes her concerns for her safety and the safety of her children. She testified that the traffic on the easement and the free movement of persons, whom she does not know, from the adjoining property cause her great concern.

[16] She testified about her desire for privacy. She wants to put a gate on the driveway with a complete secure fence around her property with security cameras.

ii. Gregory Farquharson

[17] Mr. Farquharson is a shareholder and director of the company that owns the 1320 Property. Mr. Farquharson testified that the owners of the 1350 Property had cut down 75% to 80% of the trees and foliage on their property. Mr. Leyland, Mrs. Tong's architect, testified that they received permission from the City to remove every one of the trees that were removed from the 1350 Property.

[18] Mr. Farquharson testified that as a result of the removal of those trees their heritage home has been exposed to the noise from gridlock traffic. Their property has also been exposed to a multitude of apartment buildings which are located across the street from the 1320 Property. Mr. Farquharson describes the 1320 Property as being fully landscaped with some beautiful first growth trees, a multitude of apple trees and some maple trees. He testified that these trees provide an ambiance to this Shaughnessy property and are irreplaceable. He testified that the trees provide privacy and they help to obscure the apartments which are located across the street and act as a buffer from the noise from the traffic.

[19] Mr. Farquharson testified that the 1320 Property was purchased by his company in 2004. At that time it was a rental property with five suites, four legal and one illegal. As part of the due diligence before purchasing the 1320 Property, Mr. Farquharson's company discovered the rental units on the property had been there for 12 to 15 years prior. At the time of the purchase they had been told by the City

that the 1320 Property was licensed for four legal rental units. Mr. Farquharson testified that because of the history of these suites, they decided to buy the 1320 Property for rental purposes. He testified that at the time of purchase, they had no development plans for the property.

[20] Mr. Farquharson testified that since then their plans for this property have changed. They have investigated, and are investigating whether or not they could develop the property. They submitted four concepts of their plans, prepared by their architect – Mr. James F. Bussey – to the FSADP. According to Mr. Farquharson, one of these plans received favourable comments from the panel. This was a plan that provided for underground parking and the retaining of the trees on the 1320 Property. He testified further that one member of the FSADP asked about what would happen if they could not have the present driveway stay in place. According to Mr. Farquharson, another member of the FSADP, the panel architect, said to them that if the present driveway was moved some trees would have to be taken down.

[21] It is noteworthy that these plans have not been submitted to either the FSADP or the City for official approval. In all of these plans, which were prepared by Mr. Bussey, there is an effort made to preserve the existing trees. According to Mr. Farquharson, one tree, a blue spruce, would have to be taken out because they wanted to limit the impact of the encroachment on Ms. Tong's property. Mr Farquharson testified that these four concepts represent a minimum impact design in order to preserve the vegetation. He testified that in his view the principal consideration reflected in these concepts was the preservation of green space.

[22] Under cross-examination, Mr. Farquharson testified that he had not done a pro-forma analysis for the development on their property. He had no idea what it would cost to develop the 1320 Property. He said that he does not even know if the City would allow them to do the development. According to him, they do know that they will realize a large profit if they are allowed to develop the 1320 Property: $7.5 million dollars according to realtors. He stated, however, that if he got the approval

of the City it would take two and a half years to develop the 1320 Property. It was suggested that it was possible for them to design a driveway that would be entirely on their property without triggering the expensive water retention project that Mr. Bussey proposes. He rejected that idea saying that the blacktop is needed for parking by his tenants which presently accommodates 8 to 15 cars.

[23] In his testimony, Mr. Leyland (an expert who will be discussed further in the subsequent sections), had indicated that it would not be difficult for the plaintiff to remove some of the hard surface parking from the 1320 Property. Mr. Leyland suggested that interlocking paving block instead of asphalt is but one means of doing that.

D. EXPERT TESTIMONY

i. Admissibility

[24] In this proceeding there were some submissions made with respect to the admissibility of the evidence of the experts who were called to testify. Before I proceed to analyze their opinions, I wish to spend some time dealing with this question of admissibility of the evidence of the three experts who were called to testify in these proceedings. These experts included the architects, Mr. Bussey and Loy Leyland, as well as Robert Miranda who acted as the Chairman of the FSADP from 2002 to 2006.

[25] Mr. Bussey is an architect who is acting for the plaintiff in the development of the 1320 Property. Counsel for the defendant submits that his expert testimony should not be admitted because his expert opinion is biased as he is acting as advocate for the plaintiff.

[26] Mr. Leyland is also an architect who is acting for the defendant in the design and development of the 1350 Property. Counsel for the plaintiff also submits that his expert opinion is biased and that he is acting as an advocate for the defendant and as such his expert testimony should not be admitted.

[27] Counsel for the plaintiff objects to Mr. Miranda being qualified as an expert on the basis that, regardless of his position in the past, Mr. Miranda is not qualified to testify as to what position the present FSADP might take with respect to their design. In order to understand this objection it may be prudent for me to explain the role and makeup of the FSADP.

ii. The First Shaughnessy Advisory Design Panel

[28] The FSADP, as the name implies, is an advisory body authorized by Vancouver City Council ("Council"), first of all in 1982, to preserve and enhance the neighbourhood's pre-1940 estate image and single-family character, whilst allowing change.

[29] The FSADP came into existence as a result of pressure from residents in the neighbourhood who had become concerned about the demolition of large numbers of old, character homes in Shaughnessy, and the low standard of architectural design for new replacement houses.

[30] The FSADP has no authority to approve or refuse projects or make policy decisions; it can only make recommendations regarding development matters in the neighbourhood – to Council, the Development Permit Board and to the Director of Planning or to the Board of Variance. However, from its inception, the FSADP developed a reputation for being very hard to please; and Council has usually accepted its recommendations.

[31] The FSADP is composed of 14 members and includes:

1) Four representatives of the Shaughnessy Heights Property Owner's Association;

2) four representatives of the resident members-at-large (current residents);

3) two representatives from the Architectural Institute of B.C.;

4) two representatives from the B.C. Society of Landscape Architects;

5) one representative of the Heritage Advisory Committee; and

6) one representative from the Real Estate Board of Greater Vancouver.

[32] Panel members are appointed by Council for a two-year term and serve without remuneration. A resident appointee who is the current Chair of the FSADP may be re-appointed by Council to a third term.

[33] Mr. Miranda served as Chairman of the FSADP from 2000 to 2006. He was one of the four representatives of the resident members-at-large. Apart from that his Curriculum Vitae is extensive and includes approximately 40 years of academic and work experience in the field of architecture. Mr. Miranda has two honours degrees from the University of Liverpool School of Architecture, a master's degree from Harvard, as well as a master's degree from Cambridge among other professional degrees and memberships. Mr. Miranda's professional work experience spans the United Kingdom, Canada and the United States over several decades.

iii. Decision on Mr. Miranda's Qualifications to Testify

[34] I have reviewed the qualifications of Mr. Miranda and I find him to be a properly qualified expert. He meets all of the criteria set out in ***R. v. Mohan***, [1994] 2 S.C.R. 9. His expert evidence is admissible in this hearing.

iv. Impartiality and Expert Evidence

[35] The more difficult legal question, however, deals with the issue of the impartiality and admissibility of expert evidence as raised by both counsel for the plaintiff and counsel for the defence.

[36] An expert's function is to provide a ready-made inference that the judge and jury, due to the technical nature of the facts, are unable to formulate themselves: ***R. v. Abbey***, [1982] 2 S.C.R. 24, at p. 42, 138 D.L.R. (3d) 202, *per* Dickson J. In another ***Abbey*** case, ***R. v. Abbey***, 2009 ONCA 624, 246 C.C.C. (3d) 301, writing for the Ontario Court of Appeal, Doherty J.A. observed at para. 73:

> [73] Despite justifiable misgivings, expert opinion evidence is, of necessity, a mainstay in the litigation process. Put bluntly, many cases, including very serious criminal cases, could not be tried without expert opinion evidence. The judicial challenge is to properly control the admissibility of expert opinion evidence, the manner in which it is presented to the jury and the use that the jury makes of that evidence.

[37] Canadian trial courts have taken different positions on the issue of whether an expert witness's impartiality will disqualify him or her from giving evidence at trial. Some courts generally decline to exclude expert opinions on the basis that bias only affects the weight to be given to the evidence. Other courts have held that bias is presumed to inure to certain relationships, and when that is the case the evidence is inadmissible. Still other courts have favoured a factual inquiry into whether bias does, in fact, exist, and if so, whether it is of such a degree as to outweigh its probative value. In my view, the second and third approaches described are consistent with each other and are supported by statements from the Supreme Court of Canada as well as the rationale underlying the exception which allows expert opinion.

[38] The literature and the case law support different positions with respect to the admissibility of biased expert evidence. The decision of Finch J. (as he then was) in ***Vancouver Community College v. Phillips Barratt*** (1988), 26 B.C.L.R. (2d) 296 (S.C.) was of some limited assistance. In my view, however, a more detailed analysis is needed to resolve this issue.

[39] Some courts have excluded experts having a connection with one of the parties giving rise to an apparent conflict of interest. The most restrictive approach to the issue was employed in ***Royal Trust Corp. of Canada v. Fisherman*** (2000), 49 O.R. (3d) 187 (S.C.J.), and requires, at para. 22, as a precondition to qualification as an expert, that the expert's evidence be "independent of any conflicting interest through connections with any of the parties." In ***Royal Trust***, one of the parties was facing charges in the United States and sought to have his United States lawyer testify on a matter of American law. The court refused to qualify the expert because of his connection to the party.

[40] A similar approach was adopted in ***Fellowes, McNeil v. Kansa General International Insurance Co.*** (1998), 40 O.R. (3d) 456 (Gen. Div.). In that case, the law firm Fellowes, McNeil was being sued by the insurance company for negligence with respect to a certain legal matter. The insurance company had hired another lawyer to take over the file from Fellowes, McNeil and to look into the extent of Fellowes, McNeil's negligence; the insurance company sought to have that lawyer testify regarding the appropriate standard of care. The court granted the application to disqualify this expert, holding, at p. 459, that the expert having been hired as "an advocate for Kansa's positions since he became involved in the matter", he did not meet the "minimum requirement of independence." Of note is that this case was varied on appeal but with respect to other matters: (2000), 138 O.A.C. 28.

[41] The judges in these cases did not require actual bias in order to justify excluding the experts' evidence; rather, an unacceptable level of bias was presumed from the nature of the existing relationship between the expert and the party. This approach is consistent with the emphasis on appearances in the first of the listed expert witness's duties and responsibilities enunciated in the English "***Ikarian Reefer***" case, formally: ***National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd***., [1993] 2 Lloyd's Rep. 68, at 81 (Q.B), which states:

> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation [citation omitted].

[42] The second duty or responsibility for an expert witness found in the ***Ikarian Reefer*** case expands on the underlying principle:

> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within [their] expertise [citation omitted]. And expert witness in the High Court should never assume the role of an advocate.

[43] The above reasoning from ***Ikarian Reefer*** was endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.) at p. 496.

[44] The ***Ikarian Reefer*** approach has the advantage of providing a bright-line rule in cases where there is an unmistakable appearance of bias. It is incomplete, however, in that more guidance is needed for those cases in which bias is present even though it may not be readily apparent from the relationship.

[45] The least restrictive approach to the biased expert is that articulated in ***R. v. Klassen***, 2003 MBQB 253, 179 Man. R. (2d) 115, the reasoning which holds as admissible any expert evidence meeting the criteria from ***Mohan***, with bias only becoming a factor as to the weight to be given to the evidence. In ***Klassen***, Justice Scurfield considered whether to exclude the expert evidence on marihuana trafficking given by an RCMP officer who worked in the same office as the officers who conducted the investigation. The court's ratio on the issue of bias is found at paras. 31 and 32:

> [31] Clearly, the degree to which the expert is separated from the investigation is significant. Ideally, the expert should not be an employee of the investigating police service. At minimum, if he works for the same department, he should work independently from the investigating officers. The degree to which the expert is insulated from the investigation should be considered by the court before attaching weight to the expert's evidence. Reliance on the opinion of a witness who carries with him the appearance of bias should be avoided.
>
> [32] When experts are not independent, the weight given to their evidence should vary with the degree to which their opinions are supported or contradicted by other evidence and common sense. Where little or no support exists, the evidence may be rejected. Where it is supported and not contradicted, the trier of fact may choose to rely upon it.

[46] Justice Scurfield ruled the expert's evidence admissible and accepted that evidence, holding that the expert appeared credible, his expertise was unchallenged, and his evidence was corroborated by both common sense and physical evidence. Scurfield J. took note of ***Fellowes***, ***McNeil*** and ***Royal Trust***, and refused to follow them.

[47] ***Klassen*** would appear to be the more accepted approach, having been followed in ***R. v. Jackman***, 2008 ABPC 213, 452 A.R. 164; ***R. v. Castillo***, 2004 MBQB 45, 181 Man. R. (2d) 259; and ***Stoddart v. Canada (National Parole***

Board), 2004 FC 1350; as well as my judgments in ***Shearsmith v. Houdek***, 2008 BCSC 997 and ***R. v. Violette***, 2008 BCSC 920.

[48] Casey Hill et al., *McWilliams' Canadian Criminal Evidence*, looseleaf (Aurora, Ontario: Canada Law Book, 2009) at section 12:30:20:50 presents a strong case for considering bias as a precondition to admissibility. *McWilliams* suggests a restrictive, but contextual, approach. The argument is based on the importance of impartiality in light of the rationale for allowing expert evidence, at p. 12-58:

> The importance of impartial expert opinion testimony cannot be overemphasized. The expert's evidence is permitted in the limited circumstances of a necessary exception to an exclusionary rule. Partial or biased evidence amounts to an abuse of the exceptional indulgence or opportunity to provide opinion testimony. This is so having especial regard to the limited effectiveness of cross-examination of an expert witness and … the contours of the hearsay exception relating to an expert's reliance in formulating an opinion on facts, data or material not otherwise proven by admissible evidence at trial.

[49] Several options are suggested for logically situating the impartiality screening in the overall expert qualification analysis: it could be subsumed into the discussion of the necessity or reliability criteria; it could be treated in the context of the trial judge's residual discretion to exclude overly prejudicial evidence; or, preferably, it could be elevated to become a fifth criterion for qualification of the expert witness. While the authors do not suggest a particular test, they do list 14 factors which might warrant consideration when ascertaining bias and impartiality. Those factors appear at pp. 12-63 through 12-64:

> (1) the nature of the stated expertise or special knowledge;
>
> (2) statements publicly or in publications regarding the prosecution itself or evidencing philosophical hostility toward particular subjects;
>
> (3) a history of retainer exclusively or nearly so by the prosecution or the defence;
>
> (4) long association with one lawyer or party;
>
> (5) personal involvement or association with a party;
>
> (6) whether a significant percentage of the expert's income is derived from court appearances;
>
> (7) the size of the fee for work performed or a fee contingent on the result in the case;

> (8) lack of a report, a grossly incomplete report, modification or withdrawal of a report without reasonable explanation, a report replete with advocacy and argument;
>
> (9) performance in other cases indicating lack of objectivity and impartiality;
>
> (10) a history of successful attacks on the witness's evidence;
>
> (11) unexplained differing opinions on near identical subject matter in various court appearances or reports;
>
> (12) departure from, as opposed to adherence to, any governing ethical guidelines, codes or protocols respecting the expert witness's field of expertise;
>
> (13) inaccessibility prior to trial to the opposing party, follow through on instructions designed to achieve a desired result, shoddy experimental work, persistent failure to recognize other explanations or a range of opinion, lack of disclosure respecting the basis for the opinion or procedures undertaken, operating beyond the field of stated expertise, unstated assumptions, work or searches not performed reasonably related to the issue at hand, unsubstantiated opinions, improperly unqualified statements, unclear or no demarcation between fact and opinion, unauthorized breach of the spirit of a witness exclusion order; and
>
> (14) expressed conclusions or opinions which do not remotely relate to the available factual foundation or prevailing special knowledge.

[50] The approach advocated by *McWilliams* is consistent with, if not entirely identical to, the state of the law in England. In Hodge Malik, *Phipson on Evidence*, 16th ed. (London: Sweet & Maxwell Ltd., 2005) at part 33-42, the author reviews the English law, including conflicting decisions of the lower courts and a more recent decision of the Court of Appeal, and concludes at p. 1011:

> The current state of the law may be summarized by the following principles:
>
> (1) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.
>
> (2) The existence of such an interest, whether as an employee of one of the parties or otherwise, does no [sic] automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.
>
> (3) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.
>
> (4) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of

> apparent bias is not relevant to the question of whether an expert witness should be permitted to give evidence.
>
> (5) The questions which have to be determined are whether:
>
> (a) the person has relevant expertise; and
>
> (b) he is aware of his primary duty to the Court if they give expert evidence, and are willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.
>
> (6) The judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.
>
> (7) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence.

[51] From this summary, the English position on the issue at hand appears to be that bias is a question of fact, that experts may be forbidden to testify for reasons of bias at the judge's discretion, and that in any case, bias may affect the weight given to the expert's testimony.

[52] The case of ***R. v. Bedford*** (2000), 184 D.L.R. (4th) 727, 143 C.C.C. (3d) 311 (Ont. C.A.), could be said to support the approach advocated by *McWilliams*, though it is somewhat vague on this issue and so cannot properly be cited as authority. In this case, the Ontario Court of Appeal reviewed the decision of a trial judge to exclude the evidence of five defence witnesses who purported to be experts on the subject of sadomasochism. After describing the experts and their evidence and referring to the ***Mohan***, factors, Justice Finlayson upheld the lower court's decision, agreeing at para. 49 that the expert evidence was "irrelevant, lacking in objectivity and in the case of two of them … clearly biased" and hence "falls short of the criteria of relevance, necessity and the need for a properly qualified witness". Finlayson J.A. went on to state that the biggest problem was relevance, but the fact that it was a novel area requiring a higher level of reliability was also enough to warrant exclusion.

[53] The recent Ontario case of ***R. v. INCO Ltd.*** (2006), 80 O.R. (3d) 594 (S.C.J.) offers clarity on this issue and is consistent with *McWilliams* and *Phipson* in that it examines whether there is actual bias, although it would also accept the propositions

discussed above from ***Fellowes***, ***McNeil*** and ***Royal Trust***. In ***INCO***, the summary appeal court judge overturned the decision of the lower court excluding an expert witness for the Crown Ministry of Environment who was employed by that Ministry. Although not an investigator on this particular case, the lower court judge had found that the proposed expert "could be perceived as lacking independence" (at para. 43). The lower court explicitly found that the witness was impartial, but held that, owing to the lack of separation between the party and the witness, there was no appearance of professional objectivity.

[54] Hennessy J. held that this was not the correct test, and that absent actual bias or the existence of a partisan relationship, there was no reason to exclude the evidence:

> [49] … A finding of lack of independence or impartiality cannot be based on a cursory examination of the employment relationship or status. Unless the court is satisfied that the witness is in a co-venture with the party, is currently in a position as an advocate for the party or has acted as advocate for the party on the same matter, the court must test any perceived partiality through a *voir dire* hearing that tests the substance of the opinion to be proffered. After such a *voir dire*, the trial judge will be in a much better position to assess the partiality of the witness.

On the *voir dire*, the court will be able to determine if there is, in fact, bias, "in light of the opinions tested under cross-examination, in particular the assumptions, the disclosure of material facts, the completeness and the level of expertise.": para. 45. The fact that the proposed witness is employed by one of the parties is not, in itself, sufficient to warrant exclusion, although it can be taken into account when assessing weight: para. 47.

v. The Trial Judge as "Gatekeeper"

[55] The leading case in this area – ***Mohan*** – established four criteria which expert evidence must meet before it should be ruled admissible at p. 20:

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule; and

(d) a properly qualified expert.

[56] Sopinka J., writing for the Supreme Court of Canada, elaborated on the criterion of relevance, stating that admissibility depends not only on logical relevance, but also on a cost-benefit analysis. Justice Sopinka went on to explain the particular costs involved with expert evidence at p. 21:

> Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.
>
> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

[57] The court focused on the tendency of juries to accept expert evidence at face value, which in turn requires vigilance on the part of trial judges in determining whether the weight that a jury might give the evidence would be out of proportion to its reliability; if it would, it should not be admitted. The threshold becomes even more strict as the evidence approaches the ultimate issue in the case or if it involves novel science: ***Mohan***, at p. 25.

[58] In ***R. v. J.-L.J.***, 2000 SCC 51, [2000] 2 S.C.R. 600, the Supreme Court of Canada dealt specifically with the trial judge's gatekeeper function vis-à-vis experts in the context of novel scientific evidence. Justice Binnie, for the Court, reiterated the statements from ***Mohan*** quoted above, and remarked on the trial judge's role as gatekeeper at para. 28:

> In the course of *Mohan* and other judgments, the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

Further, at para. 47:

> … Because the concept of relevance provides a low threshold ("some tendency"), *Mohan* built into the relevance requirement a cost-benefit analysis to determine "whether its value is worth what it costs" (p. 21) in terms of its impact on the trial process. Thus the criteria for reception are relevance, reliability and necessity measured against the counterweights of consumption of time, prejudice and confusion: R. J. Delisle, "The Admissibility of Expert Evidence: A New Caution Based on General Principles" (1994), 29 C.R. (4th) 267.
>
> [Emphasis in original.]

[59] In the result, the Supreme Court of Canada reversed the Quebec Court of Appeal and upheld the trial judge's decision to exclude the impugned evidence, emphasizing the discretion of trial judges in the exercise of their role at para. 61:

> The *Mohan* analysis necessarily reposes a good deal of confidence in the trial judge's ability to discharge the gatekeeper function (*Malbœuf, supra*). … The trial judge's discharge of his gatekeeper function in the evaluation of the demands of a full and fair trial record, while avoiding distortions of the fact-finding exercise through the introduction of inappropriate expert testimony, deserves a high degree of respect.

[60] Although these cases deal with expert evidence more generally, rather than the particular issue of bias, they inform this discussion in two ways. First, the approach advocated by ***Klassen*** is less restrictive than that endorsed by the Supreme Court of Canada. ***Klassen*** makes the broad statement that evidence not meeting a certain minimum standard of independence is nonetheless admissible, with bias being considered solely as a matter of weight. ***Mohan*** and ***J.-L.J***., on the other hand, demand up-front scrutiny of the proposed evidence to ensure that expert evidence is not put before the trier of fact if its reliability is not consonant with the level of deference which we can expect the trier of fact to give it.

[61] The second observation is that the analysis of an expert's impartiality would be a logical aspect of the trial court's responsibility to weigh the probative value against the prejudicial effect of the evidence under the relevance criterion of ***Mohan***.

vi. Policy Arguments

[62] A few practical considerations arise from this discussion. First, in a jury trial, requiring a judge to pronounce on an expert's bias adds one more potentially time-

consuming inquiry to the *voir dire*. In a trial by judge alone, there is no additional consumption of time required.

[63] Second, in some cases there may be few practical alternatives to the proposed expert, and so a finding that the expert is too biased could leave the court without any assistance at all. Of course, if the expert is biased, then the negative effect of his or her evidence might actually be worse than having no assistance at all. The availability of alternative experts to assist the court could be incorporated into the relevance analysis, as suggested by the English approach.

[64] A third consideration is that enforcing impartiality could be expected to have positive long-term effects on expert evidence. An expert who knows that his evidence becomes less valuable to the court the more he is associated with one particular side or party is apt to broaden his clientele, thus forcing him to keep an open mind.

vii. Practical Considerations

[65] After considering the positions taken in the jurisprudence and literature discussed above, in my view, an approach which allows any expert evidence to be adduced and considers bias only as a factor affecting the weight of the evidence is not supported by the rationale underlying the exception for expert evidence, or the strong statements of the Supreme Court of Canada regarding the gatekeeper role of the trial judge with respect to expert evidence. The framework set down by ***Mohan*** invites consideration of the expert's degree of bias as part of the relevancy criterion. Expert evidence should be excluded on the basis of bias if, in the trial judge's opinion, the effect of that evidence on the jury is out of proportion to its reliability. In making the determination, great assistance can be had from the factors suggested by *McWilliams*, and the considerations at play in the English jurisprudence.

[66] In the recent ***Abbey*** decision of the Ontario Court of Appeal, Doherty J.A. makes some helpful and practical suggestions for trial judges faced with this issue. He wrote:

> [76] Using these criteria, I suggest a two-step process for determining admissibility. First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence: see *Mohan*; *R. v. D.D.*, [2000] 2 S.C.R. 275; *J.-L.J.*; *R. v. Trochym*, [2007] 1 S.C.R. 239; *K. (A.)*; *Ranger*; *R. v. Osmar* (2007), 84 O.R. (3d) 321 (C.A.), leave to appeal to S.C.C. refused (2007), 85 O.R. (3d) xviii.
>
> [77] I appreciate that *Mohan* does not describe the admissibility inquiry as a two-step process. It does not distinguish between what I refer to as the preconditions to admissibility and the trial judge's exercise of the "gatekeeper" function. My description of the process as involving two distinct phases does not alter the substance of the analysis required by *Mohan*. In suggesting a two-step approach, I mean only to facilitate the admissibility analysis and the application of the *Mohan* criteria.
>
> [78] It is helpful to distinguish between what I describe as the preconditions to admissibility of expert opinion evidence and the performance of the "gatekeeper" function because the two are very different. The inquiry into compliance with the preconditions to admissibility is a rules-based analysis that will yield "yes" or "no" answers. Evidence that does not meet all of the preconditions to admissibility must be excluded and the trial judge need not address the more difficult and subtle considerations that arise in the "gatekeeper" phase of the admissibility inquiry.
>
> [79] The "gatekeeper" inquiry does not involve the application of bright line rules, but instead requires an exercise of judicial discretion. The trial judge must identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence. This cost-benefit analysis is case-specific and, unlike the first phase of the admissibility inquiry, often does not admit of a straightforward "yes" or "no" answer. Different trial judges, properly applying the relevant principles in the exercise of their discretion, could in some situations come to different conclusions on admissibility.

[67] A presumption of bias arising from certain types of relationships between the party and the expert is not inconsistent with this approach, but in general, bias is a question of fact to be determined by the trial judge.

[68] In ***Violette***, I held that impartiality, or bias, goes to the issue of weight and not to admissibility. In ***R. v. Palma*** (2000), 149 C.C.C. (3d) 150 (Ont. S.C.J.), Watt J.

described the difference between admissibility and weight to be given to evidence. He stated at pp. 158-159:

> The *admissibility* of evidence is a question of law. Issues of admissibility are for the trial judge to decide. Where the tribunal is a divided one, a decision on admissibility merely means that an item of evidence will go to the jury, the trier of fact, for consideration. See for example, *R. v. Gaich* (1956), 24 C.R. 196 (Ont.C.A.) at p. 199, *per* Mackay J.A.; *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont.C.A.) at p. 501, *sub nom, R. v. Charette***,** *per* Dubin J.A.; and *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 181 (S.C.C.).
>
> ...
>
> On the other hand, the *weight* of evidence, its *sufficiency* to prove a proposition in support of which it is offered is a question of fact. See, for example, *R. v. Sunbeam Corp*., [1969] 2 C.C.C. 189 (S.C.C.) at p. 197, *per* Ritchie J. In a divided tribunal, questions of fact are for the jury. See, *R. v. Parsons, supra*, at p. 502, *per* Dubin J.A. Where the tribunal is *not* divided, issues of weight and other questions of fact are for the trial judge, as the *trier* of *fact*.
>
> [Emphasis in original.]

viii. Decision on the Evidence of Mr. Bussey and Mr. Leyland

[69] Needless to say, I have instructed myself on the law as enunciated above. I have instructed myself on the principles in ***Mohan***; I am fully aware of my gatekeeping function; I considered the cost-benefit analysis of admitting the expert testimony of Mr. Bussey and Mr. Leyland. After doing all of this, I hold that the expert evidence of Mr. Bussey and Mr. Leyland is admissible on this application subject to weighing where they espouse any bias.

[70] With the issue of admissibility of the expert evidence now settled, I will now deal with the evidence and facts that are germane to the resolution of this application.

E. THE EXPERT REPORTS

[71] In this portion of the judgment I intend to refer to only portions of the expert reports that were introduced at this hearing. Because of the complex architectural drawings that were introduced in this hearing, it is my view that the issues raised would be better understood by laying out portions of the expert testimony.

i. Mr. Bussey

[72] In Mr. Bussey's opinion, it was "possible to straighten and shift the proposed driveway" approximately six feet west to accommodate the existing driveway on the 1320 Property. Mr. Bussey stated that this scenario would result in costs in the $5000 to $10,000 range with relatively few complications:

> In my opinion, besides having to remove existing landscaping, there is no architectural or by-law issue that would prevent this driveway from being moved west.

[73] Moving the existing driveway on the 1350 Property, in Mr. Bussey's opinion, would be considerably more expensive. In fact, according to Mr. Bussey, such a relocation would cost $169,800. These costs would include the following:

> Relocation of the driveway, including tree removal, tree replacement, demolition and replacement of the existing driveway, and construction of new stone retaining walls, will cost approximately $40,000 - $45,000.

Mr. Bussey goes on to opine that in this scenario:

> ...This will increase the sites impervious surface area by approximately 4.2%. The increase will require installation of a water retention system with related costs estimated [at] $126,700.

ii. Mr. Leyland

[74] Mr. Leyland stressed that Ms. Tong had already received a permit from the City, garnered in conjunction with a "traffic study, arborist report, storm water engineering covenant agreement and numerous meetings with City staff from different departments." Mr. Leyland disagreed with Mr. Bussey stating that the proposed driveway would actually have to be moved nine to ten feet. Mr. Leyland further stated that, in his opinion, the City and the FSADP would not support the move to Ms. Tong's proposed driveway for aesthetic, legal and logistic reasons. He further stated that the move would negatively affect the value of Ms. Tong's property.

[75] Mr. Leyland reviewed the costs provided by Mr. Bussey and concluded that the same scope of work proposed would actually cost $14,410. Mr. Leyland opined that no "retention tank" was required and that, in point of fact, the 1320 Property was

already in contravention of a Bylaw which required such a system for a multiple conversion dwelling. Mr. Leyland took great issue with the report of Mr. Bussey:

> His landscape cost is based on incorrect information, his area for replacing the driveway is disputed, I disagree that rock retaining walls are required and finally, a storm water retention system is not required if the [owner of the 1320 Property] does not increase their impervious area by more than 1%, which is easily achievable.

[76] Mr. Leyland concluded that allowing Ms. Tong to construct the proposed driveway and fence (at her own cost) while requiring the modest renovations on the part of the 1320 Property to rectify the Encroachment "would result in a more neighbourly, attractive, secure and improved situation for both properties than at present."

iii. Mr. Miranda

[77] Mr. Miranda based his opinion on his experience as a member and Chairman of the FSADP from 1999 to 2006 and his academic as well as practical experience in the field of architecture. Mr. Miranda's estimates were more costly than those of Mr. Leyland. For example, with respect to the 1320 Property, Mr. Miranda calculated:

> To remove the existing driveway, to prepare the ground and provide a 12 inch depth road base, and a driveway surface of 2 inch thickness of asphalt = $7.50 / sf.
>
> 2580 sf x $7.50/ sf = $19,350.00

[78] Mr. Miranda stipulated that this estimate did not take into account that the use of asphalt would likely be unacceptable to the City and a more expensive material (concrete) would likely have to be used.

[79] Mr. Miranda estimated the cost of tree removal and landscaping at approximately $3,000 each. Mr. Miranda further opined that the granite retaining walls would have to be rebuilt (at least in part) at a "Budget sum" around $3,500. Notably, Mr. Miranda felt that the rebuilding of the driveway on the 1320 Property would necessitate the construction of a "stormwater retention system" at a cost of approximately $50,000, unless "existing hard surface elsewhere" on the 1320 Property could be reduced in tandem.

[80] In an addendum to that report, Mr. Miranda responded to the opinion given by Mr. Bussey. Mr. Miranda opined that Mr. Bussey's recommendation – that Ms. Tong's proposed driveway be moved six feet to the west – would likely not be acceptable to the FSADP as it would intrude into the "body" of the lot and "break up the sweep of continuous soft landscaping" contrary to what is encouraged in the FSADP Design Guidelines. Mr. Miranda did not believe that Mr. Bussey's proposal would actually save any of the trees. In any event, Mr. Miranda felt that the FSADP would regard the preservation of the trees as only one consideration of many in making its decisions.

[81] I now turn to the law on my discretion to grant, or refuse to grant the easement requested by the plaintiff in this hearing.

F. THE EASEMENT REQUESTED BY THE PLAINTIFF

[82] It is trite law that there is no right of prescription in British Columbia. Consequently the plaintiff does not have any rights to the portion of the easement on the 1350 Property notwithstanding the fact that it had the use of it since 1946 without an easement agreement.

[83] Section 36 of the ***Property Law Act***, R.S.B.C. 1996, c. 377, however, reads:

> 36 (1) For the purposes of this section, "owner" includes a person with an interest in, or a right to possession of land.
>
> (2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application
>
> (a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached or enclosed,
>
> (b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or
>
> (c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

[84] In ***Vineberg v. Rerick***, [1995] B.C.J. No. 2506 (S.C.), Leggatt J. wrote at para. 14:

> 14 It is well founded in law that s. 32 of the Property Law Act was enacted to provide "a basis, on equitable grounds, for resolving disputes over encroachments": *Svenson v. Hokhold*, [1993] B.C.J. No. 859 (B.C.C.A) (QL). See also *Ferguson v. Lepine* (1982), 41 B.C.L.R. 263, 265 (B.C.C.A.).

He continued at paras. 19-21:

> 19 Moving on to the heart of this matter, the test for determining how to use s. 32 is the balance of convenience: *McNutt and McNutt v. Tedder and Tedder* (1982), 34 B.C.L.R. 145 (B.C.S.C.).
>
> 20 Counsel has provided several cases which illustrate how the balance of convenience has been judicially interpreted in similar situations. From these and other cases considering s. 32, I have noted three predominant considerations used in the balance of convenience analysis:
>
> 1. The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are three degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.
>
> 2. The nature of the encroachment: Was the encroachment a lasting improvement? What is the effort and cost involved in moving the improvement? Was [sic] is its effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more these considerations will be weighed in favour of the petitioner.
>
> 3. The size of the encroachment: How does the encroachment effect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.
>
> 21 Before I begin to use these considerations to determine the balance of convenience in this matter, I emphasize that I am looking for exactly what the title of the test denotes--an equitable balance between the interests of both parties.

[85] In ***Manita Investment Ltd. v. T.T.D. Management Services Ltd.*** (1997), 15 R.P.R. (3d) 88, aff'd 2001 BCCA 334, 39 R.P.R. (3d) 178, Quijano J. stated:

> 42 The considerations articulated by Mr. Justice Leggatt in *Vineberg* are set forth as a guide to assist in determining the equities and balance of convenience. They are not intended to be tests that must be applied rigorously in every case but depend for their application on the circumstances of each case.

> 43 The grant of a remedy pursuant to s. 32 of the *Property Law Act* is discretionary. In applying the controlling principles of equity, the promotion of fairness and the prevention of injustice, in cases, such as this one, which present unusual factual circumstances, the court can only apply "tests" formulated in prior decisions to the extent that the tests may be relevant to the factual issues before it in determining whether to grant or refuse relief.

[86] As a final point, in ***Robertson v. Naramata Resorts Ltd.***, 2005 BCSC 467, 31 R.P.R. (4th) 124, Garson J. adopted reasoning at para. 12, that the court discretion to grant relief sought by the plaintiff should be “lightly exercised” and the plaintiff must show that the balance of convenience is “decidedly in his [or her] favour”.

H. DISPOSITION

[87] Before I begin my analysis, permit me to say that I found the plaintiff’s expert, Mr. Bussey, more interested in advocating for the plaintiff than giving the Court an objective assessment of how this issue could be resolved. I attach very little weight to his expert evidence. Mr. Bussey as much as conceded this point in his answers to questions during the following exchange on his cross-examination:

> Q. You see yourself as your client’s advocate; isn’t that correct?
>
> A. Of course I do.
>
> Q. And you see yourself as your client’s advocate here today, sir?
>
> A. Yes, I do.

[88] With respect to his estimates, I have difficulty accepting any of them, especially the need to spend approximately $126,000 to build a pond. In this regard, I accept the evidence of Mr. Leyland that there are many areas on the plaintiff’s property where the blacktop could be removed to keep the blacktop area below the 1% level.

[89] Of all the expert evidence that was introduced at this hearing, I found Mr. Miranda’s to be the most objective and helpful. Although he is not licensed to practice architecture in British Columbia, he is an architect with considerable knowledge and experience. In addition, his six years’ experience as chair of the

FSADP from 2000 to 2006 makes his opinion invaluable. I accept his evidence in total.

[90] Ultimately, this is a request for an Encroachment on the defendant's property to avoid the plaintiff having to move its own driveway. One would have expected the plaintiff to introduce into evidence a surveyor's certificate to show the smallest area of encroachment that would be required to preserve the trees on the 1320 Property, together with an appraisal report as to the value of that smallest possible encroachment requested. Instead the plaintiff closed its case asking, in effect, for an encroachment of 5 1/2 feet wide by 100 feet long of the defendant's property without any evidence as to what such an encroachment would be worth. No appraisal report has been filed with the court.

[91] Adequate access to one's own property is an important consideration in determining the balance of convenience. I note that the defendant has been denied privacy and security with the existence of the present easement. On the other hand, Mr. Miranda suggested that there are options open to the plaintiff to obtain approval for and to build a driveway on its own property. The plaintiff does not seem to have explored any of these options.

[92] Taking into account all of these considerations, I find that the balance of convenience points to the refusal to grant a permanent right of way over the encroachment in favour of the plaintiff. The application is therefore dismissed with costs.

[93] As a result of this decision, the plaintiff will be left with very little access to the 1320 Property. I therefore order the continuance of the interim injunction restraining and enjoining the defendant, her agents, employees or servants from taking any steps to demolish or otherwise alter the Encroachment until June 18, 2011 or until further order of the court.

"Romilly J."