

SUPREME COURT OF NOVA SCOTIA
Citation: Podgorski v. Cook, 2012 NSSC 418

Date: 20121130
Docket: BWT. No. 334600
Registry: Bridgewater

Between:

Mary-Ann Podgorski

Applicant

- and -

James D. Cook

Respondent

DECISION ON COSTS

Judge: The Honourable Justice Kevin Coady

Heard: January 30, 31, February 1, 2, 2012, Bridgewater, Nova Scotia

Decision: November 30, 2012

Counsel: John Di Costanzo, for the applicant
Kathryn Dumke, for the respondent

By the Court:

[1] This Application in Chambers involved adjacent neighbours in Riverport, Lunenburg County, Nova Scotia. The Cook family have resided on their property for generations. Ms. Podgorski bought her property in 2007 after moving from Alberta. It was not long before a conflict arose as to the location of their mutual property line. Ms. Podgorski claimed that Mr. Cook moved tires, barrels and building materials onto her side of the property line.

[2] The conflict continued for some time without resolution. In time Ms. Podgorski retained Berrigan Surveyors Limited to make a determination as to the location of the line. Mr. Cook then retained Robert Becker, NSLS to create a responding survey.

[3] Ms. Podgorski started this application in chambers seeking an order as to the location of the subject property line. She also requested damages for trespass as well as special damages and costs.

[4] Mr. Cook filed a Notice of Contest seeking an order as to the property line as well as a dismissal of the other relief sought.

[5] This application was heard over 3 ½ days. Most affiants were subjected to cross examination. There were pre-trial discovery examinations and extensive briefs were filed.

[6] Ms. Podgorski was of the view that there was little distance between where she felt her line was located and where Mr. Cook felt the line was located. On the other hand Mr. Cook's view of the line would have captured one-half of Ms. Podgorski's lot below the road. He relied on the Becker Survey, and the principle of adverse possession, to support his claim for that much of the lot.

[7] Mr. Berrigan stated as follows in his expert report:

At the time of our field survey in 2009 there was no occupation of mowed lawn or physical evidence to indicate that James Cook was occupying any of the Podgorski lands. The Mary-Ann Podgorski lands consisted of tall grass and low bushes and no clear indication of occupation by James Cook.

Mr. Berrigan's report also addressed whether Mr. Cook had paper title to any of the disputed land:

James Cook is claiming a land parcel approximately 60 feet in width running parallel to other property boundaries. However there is no description in James Cook's favour to claim for this land strip as the land has been conveyed through title to Mary Ann Podgorski.

[8] Mr. Becker, the Cook surveyor, did not really challenge Mr. Berrigan's lines. He relied entirely on Mr. Cook's evidence of occupation to support his survey. I concluded that Mr. Becker's evidence, as a whole, did not support Mr. Cook's possessory claim to one-half of the disputed lot.

[9] I also concluded that the evidence of the lay witnesses, including James Cook, did not support a claim of ownership by possession.

[10] In my decision dated May 2, 2012 I found in favour of Ms. Podgorski. I ruled that the mutual property line is as shown in the 2009 Berrigan Survey. I declined an award of damages as I did not find Mr. Cook's trespass to be worthy of damages.

[11] The principle issue in this application was the location of the property line. The claim for damages was clearly a secondary issue. Assessment of damages played a minor part in pre-trial and trial proceedings. Very little of the witness examination involved damages. Consequently I rule that Ms. Podgorski is the successful party.

[12] Ms. Podgorski's position on costs is as follows:

Calculation of Plaintiff's claim for costs under
Tariff "A" scale 2 (basic)

Amount involved (based on the listed price of the property, 199,900.00)	\$16,750.00
Trial days (3.5 days)	\$ 7,000.00

Disbursements:

Berrigan Surveying	\$ 2,655.00
Filing fee	\$ 191.16
Law Stamp	\$ 28.75
For the Record Transcript Services	\$ 132.25
Photocopying incurred, binding and misc.disbursements	\$ 450.00
Total	\$27,207.16

[13] Mr. Cook's position on costs is as follows:

That the amount involved be set at \$18,800.00 which, pursuant to Tariff "A", is:	\$ 4,000.00
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Trial Dates: 3.5	\$ 7,000.00
Total	\$11,00.00

Mr Cook He then goes on to argue that “given the mixed success, it is our respectful submission that the success on costs should be divided at a ratio of 60% to the applicant and 40% to the [defendant].

[14] *Civil Procedure Rule 77* addresses the issue of costs. Rule 77.02 states:

77.02(1) A presiding judge may, at anytime, make an order about costs as the judge is satisfied will do justice between the parties.

77.02(2) Nothing in these rules limits the general discretion of a judge to make any order about costs.

As a general rule the successful party is entitled to costs and should not be deprived of costs except for very good reasons. Costs should represent a substantial contribution to a party’s expenses but are not meant to represent a complete indemnity.

[15] The law relating to costs is summarized in Orkin’s Law of Costs as follows:

A successful litigant has by law no right to costs. Although he may have a reasonable expectation of receiving them, this is subject to the court's absolute and unfettered discretion to award or withhold costs. This discretion, which is absolute, is a judicial one to be exercised according to the circumstances of each particular case and based upon material before the court. It is the discretion of the trial judge and its exercise is not to be referred or delegated; nor can it be fettered by any consent of the parties, even though great weight should be given to such consent; nor should it be interfered with on appeal.

[16] And further:

As a rule costs should follow the result. That is to say, it is well settled that where a plaintiff is wholly successful in his action and there is no misconduct on his part, he is entitled to costs on the ground that there is no material on which a court can exercise a discretion to deprive him of costs.

[17] The first task is to determine the "amount involved". The rule states that "where there is a substantial non-monetary issue involved ... an amount determined having regard to (i) the complexity of the proceeding, and (ii) the importance of the issues". This was not a particularly complex issue. The importance factors does not extend beyond the parties. I am setting the amount involved at \$75,000.00. The basic scale on Tariff "A" allows an award of \$9,750.00.

[18] I set the “length of trial” at 3 ½ days which allows for an award of \$7,000.00.

[19] Ms. Podgorski seeks the following disbursements:

Berrigan Surveying	\$2,655.00
Filing Fee	\$ 191.16
Law Stamp	\$ 28.75
Transcript Services	\$ 132.25
Photocopying, etc.	\$ 450.00
Total	\$3,457.16

[20] I find these all reasonable expenditures.

[21] I order total costs to the applicant Ms. Podgorski in the amount of \$20,207.16.

J.