

SUPREME COURT OF NOVA SCOTIA

Citation: *Pitcher v. Merritt Developments Limited*, 2020 NSSC 157

Date: 20200511

Bwt No.: 482989

Registry: Bridgewater

Between:

Jacqueline Alicia Pitcher and Robert Allan Pitcher

Applicants

v.

Merrit Developments Limited and Michael Welton

Respondents

And Between:

Bwt No.: 482996

Registry: Bridgewater

Richard Krane, Daniel Flinn, Emery Peters and Jacqueline Pitcher

Applicants

v.

Merrit Developments Limited and Michael Welton

Respondents

<p>COSTS DECISION</p>

Judge: The Honourable Justice James L. Chipman

Written Submissions: April 27, 2020, Applicants
April 6 and May 4, 2020, Respondents

Counsel: Allen C. Fownes, for the Applicants
Rubin Dexter, for the Respondents

By the Court:

[1] This is my costs decision in respect of *Pitcher v. Merritt Developments Limited*, 2020 NSSC 93 (the main decision). In the main decision I described the lawsuits leading to the December, 2019 application in court as follows:

[27] On November 19, 2018, companion lawsuits were filed by Jacqueline and Robert Pitcher, and by Dr. Krane, Mr. Flinn, Mr. Peters and Ms. Pitcher against Merritt and Mr. Welton. The applicants filed Applications in Court and these were met with Notices of Contest filed February 7, 2019.

[28] Pursuant to an amended consent order for directions, the parties agreed that the evidence in both lawsuits would be heard together. In the result, the matters were heard over four days. In addition to the viva voce evidence, the Court received affidavits (in several instances, more than one) from the parties. The applicants also filed affidavits from Oliver Berrigan, Adam Towill, Stephen LeBlanc and their expert, Kevin Fogarty, NSLS. In addition to Mr. Welton's affidavits, the respondents filed affidavits from Ms. Welton, Robert Tupper, Bruce Weir and Kevin Moore. They also entered a September 18, 2019 report of their expert, photogrammetrist Curtis A. Speight. All of the applicants' affiants were cross-examined. Of the respondents' affiants, Mr. Welton and Ms. Welton were cross-examined. In total, 14 exhibits were entered, inclusive of several of the affidavit exhibits in larger (easier to read) sizes.

[2] As for the matters in issue, I distilled these in the main decision in this manner:

[36] Given the pleadings and evidence, the within applications may be reduced to these issues:

- 1) Through the doctrine of ouster and adverse possession:
 - a. do the Pitchers have ownership of an eastern portion of PID 60399227 along Clearwater Lake?
 - b. do the applicants have ownership of portions of PID 60399227 encompassing the planned Stonebroke Road?
 - c. do the applicants have ownership of portions of the de facto roads?
- 2) What is the nature of the four fingers, and are the respondents entitled to develop them as an RV park?
 - a. Do the applicants have a right of way over the fingers?
- 3) Are damages warranted and, if so, under what headings and for what amounts?

[3] On issues 1) a. and 3), I found against the Pitchers. On the other issues there was divided success between the parties.

[4] Absent agreement on costs, I invited written submissions within 30 days of the main decision. Mr. Dexter, on behalf of the Respondents submitted his brief on April 6, 2020. Given that Mr. Fownes was out of the country for two weeks in March, he submitted the Applicants' brief on April 27, 2020. Due to the delay, and because Mr. Fownes' brief was responsive to the Respondents' brief, I permitted Mr. Dexter to submit a rebuttal brief, received May 4, 2020.

[5] In arriving at my costs decision I have reviewed the relevant *Civil Procedure Rules* and caselaw along with the briefs and attachments, inclusive of the offers to settle.

[6] At the outset I wish to make it clear that I am of the view that approximately three quarters of the four-day application was dedicated to the Krane application in court. Accordingly, whereas I am open to much of Mr. Dexter's costs submissions on the Pitcher application, they must be modulated to account for the fact that the Krane application consumed approximately one quarter of the Court's time; not half as argued by the Respondents.

[7] On the Pitcher application the successful parties, the Respondents, seek \$17,375.00 in costs plus \$4,597.41, representing one-half of their expert Curtis Speight's accounts, for a total of \$21,972.41. The Pitchers counter with a suggested award of \$3,000.00 plus \$2,500.00 (and HST) toward the expert fee.

[8] On the Krane application the Applicants seek party and party costs of \$40,000.00, submitting that this figure represents "a bit more than 60 percent of their actual legal costs". The Respondents respond by arguing costs should be awash, and that they should be entitled to the other half of Mr. Speight's accounts (\$4,597.41).

[9] In assessing costs I have kept in mind the fact that the Pitchers were unsuccessful in their application and that there was divided success on the Krane application. I hasten to add that I do not regard the divided success to equate with equal success. In this regard, I accept the thrust of Mr. Fownes' submissions that the contemplated RV park was the central issue. Having said this, I do not agree that it involved 90 percent of the Court's time. Rather, I simply repeat that the entirety of the Krane application consumed approximately 75 percent of the application in court.

[10] With respect to the quantum of costs claimed on the Krane application, I am of the view that the degree of success was not such that lump sum party and party costs anywhere approaching \$40,000.00 is warranted. I would add that were I to entertain such a request, I would expect a detailed affidavit attaching legal accounts so as to be open to proper scrutiny.

[11] In any case, when I assess costs from an equitable and dispassionate perspective, bearing in mind the overall context and degrees of success, I am left with an award to the Krane Applicants which simply offsets the Respondents' award in the Pitcher application. That is to say, whereas I have decided the Respondents shall be awarded a total of \$15,000.00 costs and disbursements from the Pitchers in Bwt No. 482989, an identical \$15,000.00 costs and disbursements shall be paid by the Respondents to the Applicants in Bwt No. 489226.

[12] I reiterate my request made during our April 20, 2020 conference call, that Mr. Dexter prepare the Pitcher Order and Mr. Fownes prepare the Krane Order.

[13] By way of conclusion, I note that during our call Mr. Dexter informed the Court that his client "removed the privy and RV" from the land in question. This action was presumably taken in compliance with para. 134 of the main decision:

[134] In the result, I hereby order that within 30 days of this decision Merritt remove all personal property from the ROWs.

[14] Through Mr. Fownes' costs submission and submitted photographs it has come to the Court's attention that (at least as of April 27, 2020) there exists Merritt personal property on the land. In accordance with the main decision, I hereby direct the Respondents to remove any remaining personal property (and to fill in the privy hole so as to restore the ROW to its former state and to eliminate a potential hazard) on or before May 22, 2020.

Chipman, J.