SUPREME COURT OF NOVA SCOTIA
Citation: *Greenwood v. Dhillon*, 2024 NSSC 55

Date: 20240227
Docket: 527367
Registry: Halifax

Between:

David Greenwood and Darah Greenwood

Applicants

v.

Santokh Singh Dhillon and Prabhjot Sian

Respondents

DECISION

Judge: The Honourable Justice Scott C. Norton

Heard: February 13, 2024, in Halifax, Nova Scotia

Decision: February 27, 2024

Counsel: Michael Blades, for the Applicants
Dianne M. Rievaj, for the Respondents

By the Court:

Introduction

[1] David and Darah Greenwood make this Application in Chambers seeking damages for trespass and nuisance, punitive damages, and a permanent injunction against Santokh Singh Dhillon and Prabhjot Sian. The claims arise from events that occurred at their respective neighbouring properties in the south end of Halifax, Nova Scotia.

[2] Like many property based disputes between neighbours, the Court is left to referee and determine disagreements wherein there is no winner, regardless of any award that is made. For reasons that are not entirely clear, the Applicants chose litigation as opposed to dialogue to resolve what the Court finds are minor issues of dispute. Proceeding in this fashion was, with respect, ill-advised.

[3] The Application was originally scheduled for a half day. That too was ill-advised. With requested cross-examination of the principal witnesses of both parties and bilateral objections to the admissibility of parts of the affidavits, this matter ought to have been filed as an Application in Court and set for at least a full day hearing. I granted the Respondents' motion to adjourn and rescheduled the hearing to a full day. As it turned out, counsel had to be limited in time for both cross-examinations and submissions to complete the matter by the end of the full day hearing.

[4] In advance of the hearing, both parties filed Notices of Objection to the contents of the filed affidavits. In addition to the stated grounds of objection in the Notices, both parties addressed part of their written briefs to the issue of vicarious admission by a party's agent as an exception to the hearsay rule. This was further addressed briefly in oral argument prior to the party witnesses (David Greenwood and Santokh Dhillon) being cross-examined. Navad Malim was not cross-examined.

[5] Counsel agreed that, as some of the cross-examination evidence may be relevant to the decision on this issue, the court should reserve its evidentiary rulings to the end of the hearing. I reserved my decision on the merits and advised counsel that I would address the evidentiary objections in my decision.

[6] I have only considered the evidence permitted by my rulings in deciding the merits.

Evidentiary Rulings

[7] Dealing first with the affidavit and rebuttal affidavit of the Applicant, David Greenwood, and the Notice of Objection filed by the Respondents on February 7, 2024:

1. I order struck from the Affidavit of David Greenwood sworn January 4, 2024, the words "improperly" and "wrongfully" on the basis that these words are used as submission or argument.

2. The parties primarily focused their written and oral submissions on the question of whether statements made to David Greenwood by the Respondents' contractor were vicarious admissions by an agent and therefore an exception to the hearsay rule. While that is an interesting legal issue, it is not necessary for me to rule on it in this case. Each statement made by the contractor contained in the Greenwood affidavits was *prima facie* hearsay - an out of court statement by a person who is not a witness offered as proof of the truth of its contents. While there are exceptions that permit hearsay to be admitted, *Civil Procedure Rule* 39.02(2) mandates that any time a party refers to hearsay in an affidavit it "must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information"(emphasis added). There are no exceptions to this requirement. None of the statements objected to contained a sworn statement of belief in the truth of the information. The impugned statements are struck on this basis. (As identified in the Notice of Objection, paras. 38, 61, 65, and 68 in the Affidavit of David Greenwood, sworn January 4, 2024; paras. 15, 17, 35, and 42 in the Rebuttal Affidavit of David Greenwood, sworn February 2, 2024).

3. The remaining objections on the basis of relevance or argument/submission are denied.

[8] With regard to the Affidavit of Santokh Dhillon, sworn January 24, 2024, and the Notice of Objection filed by the Applicants on February 1, 2024:

1. A party's subjective understanding does not determine the terms of a contract. However, it is admissible to explain the party's actions or inaction and also with respect to the intention of the party relevant to the claim of punitive damages. Those objections are therefore denied.

2. The objections to opinion are denied on the basis that the statement is permissible lay opinion and/or an acceptable compendious statement of facts.

3. Paragraph 51 is struck as argument.

4. Paragraph 58 is struck as hearsay with the exception of the first sentence. No exception applies. There was no evidence establishing necessity. The statement relates to a significant contested fact. The maker of the statement should have been called as a witness.

5. The objections based on lack of foundation or the markings made on photographs are denied. That is an issue of weight and was canvassed, as deemed necessary, in cross-examination.

[9] With regard to the Navad Malim Affidavit sworn to on January 24, 2024, and the Notice of Objection filed by the Applicants on February 1, 2024:

1. The objections based on opinion are denied on the basis that the statements are permissible lay opinion and/or an acceptable compendious statement of facts.

Factual Background

[10] The Greenwoods own two adjacent parcels of land near the corner of Inglis Street and Marlborough Avenue in Halifax (collectively, the "Greenwood Land"). Their dwelling home is situated on 6029 Inglis Street (PID 41501545, also known as Lot lG)(the "House Lot"). Behind that (to the north) they own 1023 Marlborough Avenue (PID 00051250, also known as Lot 4G) (the "Vacant Lot") which has no structures on it. The Greenwoods were ultimately holding the Vacant Lot for future possible development.

[11] In 2022, the Greenwoods sold the Respondents the adjacent lot 6023/6025 Inglis Street (PD 41501552, also known as Lot 2G) (the "Dhillon Lot"). It was a vacant lot to the east of the Greenwoods' dwelling. In 2023, the Respondents undertook to construct a dwelling on the Dhillon Lot.

[12] In the time period April through mid-June 2023, the Greenwoods were considering building a house on the Vacant Lot. They had some preliminary work done and were hoping to commence construction later in June 2023. Ultimately, by mid-July, they decided not to proceed with construction at that time.

[13] In late May/early June 2023, before commencing construction of their own house, the Respondents and their construction representatives (including excavation contractor, Peter Hammam) asked the Greenwoods if Peter Hamid could use the Vacant Lot as an access path for machinery to access the Dhillon Lot.

[14] David Greenwood says he granted a narrow scope of permission to the Respondents as follows:

1. That the Respondents' equipment could temporarily move across the Vacant Lot if necessary for ingress to and egress from the Dhillon Lot (temporarily until the Greenwoods themselves began their own construction work on the Vacant Lot);
2. That nothing, including equipment, would be allowed to be placed upon or parked upon or otherwise left on any portion of the Greenwood Land at any time;
3. That there would be no disturbance of the survey pins associated with the Greenwood Land (given that they had been freshly surveyed and the Greenwoods anticipated needing those survey monuments in connection with their planned construction on the Vacant Lot); and
4. The Respondents and their contractors would be responsible for restoring any impacts upon the Greenwood Land caused by the comings and goings of equipment.

[15] A significant issue in dispute is whether there was any discussion and agreement to use the Vacant Lot to temporarily dump dirt from the excavation on the Vacant Lot. The Respondents assert that they obtained consent from David Greenwood to place the excavated dirt on the Vacant Lot prior to doing so. David Greenwood adamantly denies giving any such consent.

[16] Navad Malim was employed by the Respondents as the initial project manager on the construction. Mr. Malim's evidence is that he and Dr. Dhillon met informally with David Greenwood in the late spring of 2023. He says that they discussed using the Vacant Lot as an access point for the construction vehicles. Mr. Malim attests that there was not a lot of extra space on the Dhillon Land and not enough room to store the excavated dirt. He says they specifically talked about placing the dirt on the Vacant Lot and that he is positive that David Greenwood "specifically said we could use the lot to store the backfill". Mr. Malim went on to attest that "If he had said no, as project manager, I would have been responsible to find another solution to store it because there simply was not enough room on the Dhillon Lot". Mr. Malim

then communicated the understanding that they could use the Vacant Lot to facilitate the construction to Peter Hamid, the excavator operator.

[17] Construction on the Dhillon Lot began in June 2023. Some of the excavated dirt was placed on the Greenwood Land, predominantly on the Vacant Lot, but also on a small portion of the House Lot.

[18] David Greenwood left for a trip to Prince Edward Island on June 15, 2023, and returned on June 17, 2023. During this time period, the Greenwoods' internet/television cable was knocked down and there was damage caused to the curb and pavement on Marlborough Avenue where the excavator accessed the Vacant Lot. The excavator was left parked on the Vacant Lot next to the House Lot driveway. At 5:37 p.m. on Saturday, June 17, 2023, David Greenwood sent Dr. Dhillon an email with photos of the damage to the pavement and the parked excavator and asked that the damage be dealt with immediately and the excavator "removed today". At 8:14 p.m. Dr. Dhillon responded by email that he had spoken to the excavator "guy" and he would clean up the marks on the road and curb and that he would take the excavator away from the Greenwoods' property. The photographs show the presence of dirt from the excavation on the Greenwood Land but it was not mentioned by Mr. Greenwood in the email.

[19] That night, a heavy rainfall caused an excavated trench that ran near the border of the Dhillon Lot and House Lot to collapse. David Greenwood was concerned the collapsed trench would destabilize his side deck. The next morning, Sunday, June 18, 2023, at 8:40 a.m., David Greenwood sent to Dr. Dhillon an email attaching a photo of the excavation and stated:

> I have concerns my deck is in jeopardy and it appears you have encroached on my property. I do not wish any of your contractors to access any of there [*sic*] machinery on my properties. We need to discuss the issue of fill on my property with no permission.

This was the first mention made to the Respondents or their contractors of any concern the Applicants had about the dirt on the Vacant Lot.

[20] Dr. Dhillon replied, via email, the same day at 6:47 p.m.:

> Sorry for the inconvenience. I would have the same concern as you have for this unfortunate incident due to the rain. I have forwarded your pictures to my project manager and contractor Peter who will take care of it. If there is any unintended

> damage to your property, it will be our responsibility to repair it. Regarding refill on your property, i [*sic*] apologize on the behalf of the contractor who did without permission. I will ask him to remove it as soon as possible.

[21] Mr. Greenwood chose to reply the next day through his lawyer. The letter, dated Monday, June 19, 2023, and delivered by email to Dr. Dhillon at 11:10 AM, stated:

> …you or your contractors acting on your direction have unlawfully dumped significant amounts of fill / earth upon the Greenwoods' properties without consent. This has caused substantial harm to the aesthetic and structural integrity of the Greenwoods' lands. Additionally, a boundary pin demarcating the Greenwoods' lands has been displaced or removed entirely, thereby infringing upon the Greenwoods' legal rights as the rightful owners. Landscaping, hardscaping and structures located on the Greenwoods' lands have also been damaged.

[22] The letter demanded that <u>within 24 hours</u> of receipt of the letter by email, the Respondents were to take the following steps:

(a) Remove any fill from the Vacant Lot;

(b) Reinstate any 'impacted' survey markers;

(c) Restore the House Lot and Vacant Lot to original condition.

[23] I pause here to note that known to the Greenwoods and presumably their lawyer, was that Dr. Dhillon is a pediatric cardiologist employed at the children's hospital. I would also note that English is not Dr. Dhillon's first language (so as to explain some of his email grammar and spelling).

[24] Along with the requirement that the Respondents only had <u>five hours</u> to provide a written response that they would comply with the demands, the letter contained a 'No Trespass Notice' pursuant to the *Protection of Property Act*, RSNS 1989, c. 363, that explicitly said that neither the Respondents or their agents could set foot upon the Greenwood Land:

> To be clear, under no circumstances whatsoever are you or any of your agents, representatives or contractors, or your / their heavy equipment and machinery, permitted to enter upon or make use of the Greenwoods' lands in any way whatsoever, including without limitation in respect of any future development or construction activities upon your lands. …

> Any and all of the foregoing demanded rectification and remediation steps may only be undertaken upon the express pre-approval and supervision of the Greenwoods.
>
> …Please provide a written response within 5 hours from the receipt of this letter via email confirming that the foregoing demanded steps will be undertaken, and I invite you to reach out to the Greenwoods directly to make those arrangements.

[25] However, by this point, June 19, 2023, the Dhillon Lot had been excavated and was prepared for footing markers to be laid so it was no longer possible to access the dirt pile, except by crossing the Vacant Lot. The Respondents communicated this to the Greenwoods and sought their express permission to travel across the Vacant Lot for the purpose of complying with their demand to remove the dirt. At 12:54 p.m. that day, Dr. Dhillon wrote by email to David Greenwood, stating:

> I couldn't come yesterday to talk to you as I was on call in hospital. Do you have time to talk today in the evening or tomorrow. It is better we can sit and talk.

[26] David Greenwood replied by email at 12:58 p.m. that he was out of town on business and that email was best. Dr. Dhillon responded by email at 5:04 p.m.:

> …I also thank you for permitting to use your back empty lot for the transit of equipment used for excavation. I also acknowledge that contractor did refill your empty lot without your permission and my knowledge. Since I knew about it, contractor has been instructed to remove all the refill from our excavation from your property. I apologies [*sic*] for his actions.
>
> …If there is any unintentional damages to your property during construction, I will take care of it. Nobody wanted your retaining wall to collapse, it happened because of unexpected heavy rain and we will take care of it.
>
> Though verbally you told me and my friend when we met int the morning to use your back lot for movement of the equipment, with this email, I formally request your permission to use your back empty lot for movement of equipment for the construction. I promise that we will leave your property as intact as it is now…
>
> Last week I was quite busy in hospital being on call. Hopefully this week will be better to keep eye on the work.
>
> I wish I could speak to you in person.

[27] The Greenwoods refused to allow the Respondents to travel across the Vacant Lot, but continued to demand the encroaching dirt be removed. The Respondents sought alternative options to remove the dirt without crossing the Vacant Lot but found none.

[28] Dr. Dhillon attests that on (Thursday) June 22, 2023, he and his project manager spoke to David Greenwood in person on the sidewalk in front of their properties but before they finished he was paged to go to the hospital and he left. On Friday, June 23, 2023, at 9:51 a.m., Dr. Dhillon emailed David Greenwood:

> Sorry on Friday [*sic*] I have to run to the lab and couldn't complete the conversation. Just exploring the options, If [*sic*] I need to use your empty back lot for concrete pouring and refill back, what will be the term and conditions and how much will be the deposit and lawyer cost to execute the contract? Is there option to use my own lawyer? I will be away next week but your can contact [project manager]. Once again, I apologize for any miscommunication in the past.

[29] David Greenwood replied at 12:45 p.m. that his lawyer would draft the document and he had no idea of the cost. He went on to state that he would want $35,000 with the "obvious stipulations" and asked what actions Dr. Dhillon had taken to return his property to its original state and "when will my demand note be met?". Dr. Dhillon replied at 1:22 p.m. stating that:

> We need written permission to step on your property to clear pick up the refill and return your lot status to what it was before. I also need to know how long the contract will be valid and when the deposit will be returned. After reviewing the contract along with lawyer fee, i [*sic*] will decide whether to pursue or not weighing against other options.

[30] David Greenwood responded at 3:08 p.m. by email:

> I'm done wasting my time with you. I want you to remove the earth you put on my land immediately..…It was done without stepping on my land and will need to be done the exact same way. You will not have permission given your track record. It needs to be completely [*sic*] immediately…. Our patience are gone. The rain coming will create further issues.

[31] Dr. Dhillon replied at 3:50 p.m.:

> I do understand your frustration and like to solve this issue asap as well. One morning, You [*sic*] personally told me and my project manager that we can use your back empty lot for equipment. I apologize for not asking your permission specifically for temporary earth deposit. The excavator will need to bring his machine on your property to lift the earth. There is no access for machine from my lot as it has been excavated. I request your permission to use so that this issue can be solved immediately.

[32] David Greenwood replies at 4:19 p.m. with a copy to his lawyer:

> Your issues are not mine. Remove the earth immediately. Do not go on my property. It can easily be done from your land. My message is clear there is no need for further contact.

[33] Dr. Dhillon attests that over the next few weeks he tried to find a workable solution that did not involve going on David Greenwood's property. No one was able to suggest an option that did not require a machine to cross the Vacant Lot to access the dirt pile.

[34] Navad Malim attests that following the heavy rainfall that caused one of the excavated trenches to collapse he was told by Dr. Dhillon that they no longer had permission to use the Vacant Lot or the House Lot for any purpose and that he had been given a no trespass notice. He says Dr. Dhillon asked him to remove the dirt from the Vacant Lot as soon as possible. As the excavation for the footings had been completed, he advised Dr. Dhillon that it was not possible for an excavator to travel across the Dhillon Lot to access the dirt at the back of the lot. He advised Dr. Dhillon that the only practical way to move the dirt would be to bring an excavator onto the Vacant Lot. Despite consulting with a civil engineer, he could not envision another solution.

[35] It appears that nothing happened with respect to the dirt pile over the next few weeks.

[36] On July 20, 2023, the Respondents received notice from the Greenwood's lawyer that if they did not remove the encroaching dirt from the Vacant Lot by end of day July 27, 2023, that the Applicants would do it themselves by placing the dirt back on the Dhillon Lot wherever it suited them and then charge the Respondents for the work. Notably, the letter repeats that "No machinery will be allowed to otherwise enter upon the Greenwoods' lands" and that the trespass notice remains in effect, save and except any agreement by the Greenwoods.

[37] As the Dhillon Lot was excavated and ready for footing markers to be laid, the Respondents were very concerned by this threat. They hired a lawyer to respond. Again, the Respondents communicated clearly that they remained willing and ready to remove the encroaching dirt, but were unable to without the Greenwoods' permission to cross the Vacant Lot. The Respondents' lawyer made it clear that the Respondents would have the work completed in one day and would return the property to its previous condition.

[38] On July 25, 2023, the Greenwoods' lawyer wrote a letter that is at the root of the Application. After referring to the threatened action described in his July 20 letter, he stated:

> If your clients are prepared to remove that fill / earth from my clients' lands by the aforementioned deadline [July 27, 2023], then my clients will allow machinery engaged by your clients for that purpose to access my clients' lands ***on the condition*** that your clients forthwith deliver to my attention $25,000 to be held in trust to serve as payment of the costs of reinstating my clients' lands, landscaping, hardscaping, structures and survey markers to their original condition to my clients' satisfaction, and to serve as payment of all of my clients' legal expenses associated with these matters. Any portion of those funds remaining after payment of such amounts (if any) would be returned to your clients. The Greenwoods would also have to be present during any such work and have the ability to direct the movements and operations of machinery so as to ensure the protection of their lands.

[39] The Respondents' lawyer responded that she was advised that Dr. Dhillon would pay the $25,000 and have it delivered, and was arranging an excavator to remove the soil prior to the deadline.

[40] The Respondent, Prabhjot Sian, personally delivered the $25,000 trust funds to the Greenwoods' lawyer's office on July 26, 2023.

[41] Dr. Dhillon arranged for the excavation contractor, Peter Hamid, to attend at the site on July 27, 2023. He worked all day, past the 5:00 o'clock deadline to about 8:00 p.m. According to Dr. Dhillon, there was approximately 1-2 feet of encroaching soil left on the Vacant Lot at the end of the day on July 27, 2023. David Greenwood attests that there was a significant volume of fill remaining and that the survey pins were still buried and obscured.

[42] David Greenwood's affidavit contains an email exchange on the afternoon of July 27, prior to the excavation work being completed. Dr. Dhillon sent the Greenwoods' lawyer by email some photos of what he suggested was the condition of the Vacant Lot prior to the fill being dumped and stating he was prepared to reinstate it to that condition and if David Greenwood did not agree to please send him photos of what was there before so it could be matched. The Greenwoods' lawyer replied that the terms of the agreement of July 25 were that the landscaping, hardscaping, structures and survey markers were to be restored to his clients' satisfaction and he would speak to them about their satisfaction with the work. In reply Dr. Dhillon wrote:

> I do understand the agreement of restoration of your clients' satisfaction but it has to be reasonable in extent and time frame. It would be unreasonable to ask for a tennis court or pool or stone sculptures if those were not there on 4G lot in the first place before depositing the soil/earth. The soil was rugged with no grass as you can see in the pictures. Your client did not convey his objectives of this satisfaction beforehand in a reasonable time frame to make timely arrangements. My project manager told Mr. Greenwood that a fresh soil and sod will be laid over the lot but it needs time to deliver and execute which is hard to accomplish in a day in addition to lifting the soil and earth. To which Mr. Greenwood said "I know it is hard to do in a day that's why I asked for" which to me is harassment and beyond reasonable concept. I hope you understand.

Mr. Greenwood did not refute this statement.

[43] Another lawyer letter arrived on August 1, 2023, informing the Respondents that the Greenwoods were not satisfied with the dirt removal and intended to hire their own contractors to finish the job, using the Respondents trust money to do so. This caused the Respondents to hire a litigation lawyer to represent them.

[44] David Greenwood's affidavit attached correspondence from Respondents' new lawyer dated August 4, 2023, confirming she was retained by the Respondents at this point and explaining the miscommunication and confirming that the Respondents still remained willing to remove the remaining dirt. She also noted that the excavator operator had been asked by David Greenwood to dig a trench along what he believed to be the property boundary and this could have caused the destruction of the survey marker. Two dates the following week were suggested when Dr. Dhillon could be available to be onsite so that no further miscommunication occurred and both parties could be confident that the situation was resolved to the Greenwoods' satisfaction.

[45] On August 8, 2023, the Greenwoods' lawyer responded to say he would pass her letter along to his clients for review and taking issue with her characterization of the issues. The Respondents' lawyer replied on August 9, 2023, confirming that the Respondents remained willing to remove the dirt and had been willing to do so since David Greenwood first notified him that the excavator had inadvertently put it on the Vacant Lot. There was further debate on the meaning of the July 25 letter and escrow conditions related to the $25,000.

[46] Later on August 9, 2023, the Greenwoods' lawyer replied that David Greenwood was out of the province and returning August 12, 2023, and that he would get back to her after his return. The Respondents' lawyer replied on August 10, 2023, and put forward two additional dates that Dr. Dhillon was available.

[47] Without responding, the Greenwoods engaged a survey firm to locate and reinstate the survey pins prior to engaging a contractor to remove the remaining encroaching dirt. A photograph taken by David Greenwood on August 16, 2023 (Greenwood exhibit 27), compared to a photograph taken by David Greenwood on July 28, 2023 (after the work done by Dr. Dhillon's excavator) (Greenwood exhibit 23), shows that the Greenwoods' contractor excavated an area far greater than the area where the fill had been dumped, including removal of undamaged grass immediately north and east of the driveway to the House Lot.

[48] On August 17, 2023, the Greenwoods' lawyer wrote to the Respondents' lawyer that the Greenwoods had already hired their own contractors who dumped the dirt back on the Dhillon Lot. Neither the Respondents nor their project manager was notified or present when the work was undertaken. The Respondents were also notified at this time that the Greenwoods intended to have the area sodded and watered by professional landscapers, also to be paid for out of the Respondents' trust money.

[49] On August 23, 2023, the Respondents' lawyer communicated their position to the Greenwoods' lawyer:

1. He did not have the authority to unilaterally release any trust funds;
2. No funds should be paid regardless since it was the Applicants own action that prevented the Respondents from restoring the Vacant Lot to its original condition;
3. Sodding was inappropriate to return the Vacant Lot to its original condition, which was scrub; and
4. The whole situation was ridiculously unfair since Mr. Greenwood only revoked his consent to store dirt on the Vacant Lot after the Respondents were beholden to his permission to remove it.

[50] The Greenwoods' lawyer rejected this position and responded on August 30, 2023, threatening that he planned to release $11,359.01 of the trust funds to the Greenwoods.

[51] In the face of continued objection, the funds were not released, but a new position was put forward late in the afternoon of Friday, September 15, 2023, which stated if the Respondents did not consent to a release of the funds by end of day the following Monday, that the Greenwoods would commence the court application attached to the threat letter.

[52] A further demand letter from the Greenwoods' lawyer to the Respondents' lawyer was received on September 27, 2023, now also stating that the Greenwoods wanted $7,548.32 in legal fees paid out of the trust funds. The Respondents remained unwilling to comply with the demands and the Greenwoods commenced this Application on October 10, 2023.

[53] Included in their claim, the Greenwoods also claim a variety of instances of trespass over their properties. The security or doorbell camera photos provided in support of these claims are not clear enough to identify any particular individual. These photos were provided by David Greenwood to the Halifax Police in support of a request that they fine Dr. Dhillon for breach of the *Protection of Property Act* Notice. The Respondents communicated to their various independent contractors on a regular basis, verbally and in writing, that there was a 'No Trespass' notice and that they were explicitly not permitted on the Greenwoods' properties.

[54] On or about October 13, 2023, the Respondents' contractor allowed concrete to splash onto the Greenwoods' house. David Greenwood complained to Dr. Dhillon who arranged for the Greenwood house to be cleaned the following day, to David Greenwood's satisfaction, and with no permanent damage to the house. Also on October 13, 2023, Dr. Dhillon was issued a ticket by HRM Police for trespassing.

[55] There is no evidence of damage to the Greenwoods' property from these additional instances of alleged trespass other than a small tree branch that was broken when a fence blew over in strong wind, to which the Respondents responded by immediately offering to buy the Greenwoods a new tree. The Greenwoods declined the offer, responding that they would rather make it part of this lawsuit. No evidence of the value of this tree was provided at the hearing.

Issues

[56] The following issues require determination:

(a) What acts of trespass and nuisance have occurred upon the Greenwood Land?

(b) What compensation and other relief are the Greenwoods entitled to as a result of the Respondents' various repeated acts of trespass and nuisance?

(c) What were the agreed upon terms between the parties that resulted in the Respondents delivering $25,000 to the Greenwoods?

Analysis

(a) What acts of trespass and nuisance have occurred upon the Greenwood Land?

Law

[57] The parties agree on the applicable legal principles. Trespass to land is a direct interference with land, and it is actionable without proof of actual damage. The essential characteristics of trespass are well-established: (a) any direct and physical intrusion onto land that is in the possession of the plaintiff, (b) the defendant's action is voluntary (but need not be intentional), (c) trespass is actionable without proof of actual damage, and (d) some form of physical entry onto or contact with the plaintiff's land is required, but the act may involve placing or propelling an object or discharging some substance onto the plaintiff's land: *Mclnnis v. Stone*, 2016 NSSC 69, at para. 115.

[58] Trespass will occur where a limited scope of permission was granted that is exceeded, or where permission originally granted is subsequently withdrawn. As the authors of *Introduction to the Canadian Law of Torts* (4th ed.) state:

> Acts of trespass must be voluntary. If the invasion of the plaintiff's land is involuntary, for example where the alleged wrongdoer is thrown by another onto the plaintiff's property, there is no trespass. Any invasion of another's land, however slight, is an actionable trespass. ... At common law, where a person entitled by law to enter premises abuses his or her privilege and performs acts outside the scope of his or her licence to enter the land, he or she might be treated as if he or she has been a trespasser from the moment he or she first entered the land – that is, he or she becomes a trespasser *ab initio*. The moment permission to come onto land, in the form of a licence to enter, is terminated either by the wrongful act of the licensee or the revocation of the licence by the landowner, the licensee becomes a trespasser.

[59] There is no trespass if the defendant has the express or tacit consent of the plaintiff to the defendant's entry on the plaintiff's land. The burden of proving consent lies with the person who asserts it: *Fridman's The Law of Torts in Canada* (4th ed.)(Toronto: Thomson Reuters, 2020) at p. 57. In *York v. Ferguson*, [1991] B.C.J. No. 3742, Justice Cashman examined the issue of consent at para. 31:

31 In a case bearing a striking similarity to this case, Mr. Justice McColl in *Webb v. Attewell* (1990), 43 C.L.R. 160 considered this issue of consent at pp. 167-168. I will set out what he said because it is applicable to this case and I could not say it any better:

> "The question that arises on these facts is whether the defendants have trespassed upon the Webb property. In G.H.L. Fridman, *The Law of Torts in Canada*, 2 vols. (Toronto: Carswell, 1989), Vol. 1, the author states (at p. 11):
>
> > 'Trespass to land consists of entering upon the land of another without lawful justification, or placing, throwing or erecting some material object thereon without the legal right to do so. ... To constitute trespass the defendant must in some direct way interfere with land possessed by the plaintiff.'
>
> It is clear that the concept invokes the question of consent. That is, if a property owner has given consent for one to enter upon the land, there can be no trespass. It is fundamental that the rights of the property owner are paramount, and consent (absent a statutory authority) may be withheld for any reason: *Austin v. Rescon Construction* (1984) Ltd. (1989), 36 B.C.L.R. (2d) 21, 48 C.C.L.T. 64, 57 D.L.R. (4th) 591 (C.A.).
>
> It follows that where consent is alleged the consent must be consistent with the subsequent use of those who claim consent. Thus, where consent is obtained to use the land for one purpose and is used for an entirely different purpose, there will be no consent at all and the entry upon the land will constitute a trespass. No authorities were cited to me concerning the nature of consent. Counsel for the plaintiff seemed to be satisfied that consent had not been given just as counsel for the defendants seemed not in doubt that consent had been given.
>
> There are, I think, two self-evident principles that emerge:
>
> 1. That if consent has been given it cannot, without notice, be unilaterally withdrawn once the encroachment has taken place any actionable wrong occasioned to the land once it is entered upon will resound in negligence; and
>
> 2. Consent in any event must mean an informed consent; that is the property owner should be fully informed of the nature and degree of the encroachment so that the consent is founded upon a knowledge of the circumstances in which the encroachment will take place.

Neither of these two principles take into consideration the state of mind of the encroacher. That in my view is a matter to be considered if and when a trespass is found."

[60] A person who aids or facilitates another person to commit trespass, or counsels or directs such person to commit the tort of trespass, is deemed to be a joint trespasser, and will be equally responsible for the consequences of the trespass: Lewis N. Klar, Allen Linden, Earl A. Cherniak, et al, eds, *Remedies in Tort*, vol. 3 (Toronto: Thomson Reuters looseleaf) at §26:15; Allen M. Linden and Bruce Feldthusen, et al, *Canadian Tort Law*, 12 ed (Toronto: LexisNexis, 2022) at 551.

[61] Nuisance, on the other hand, occurs where there is an indirect and unreasonable interference (which originates elsewhere) with a plaintiff's use and enjoyment of land: *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, beginning at para. 84.

Trespass

[62] From my review of the evidence, there is no doubt that during the excavation of the Dhillon Lot, for purposes of placing the footings and foundation, the Respondents' excavator operator placed excavated dirt in the area bounded by the Dhillon Lot, the House Lot, and the Vacant Lot. The evidence establishes a *prima facie* trespass on the House Lot and the Vacant Lot. The amount of dirt placed on the House Lot was minimal. The amount of dirt placed on the Vacant Lot was sizeable. The Respondents are responsible in law for the placement of this dirt by their contractor.

[63] There is no evidence that the Respondents had permission to place any excavated dirt on the House Lot. Accordingly, the Greenwoods have established a trespass.

[64] The more significant issue is whether the Respondents had the permission of the Greenwoods to place excavated dirt on the Vacant Lot. David Greenwood is adamant that they did not. However, he acknowledges that the fill was present on the Vacant Lot when he returned from his trip to PEI on June 17, 2023. Yet, when he met in person with Dr. Dhillon on the night of June 17, and in the email sent that night he did not raise any question about it. It was not until the next day, June 18, 2023, after the rain had caused the excavated trench to collapse, that he raised any concern about the placement of the excavated dirt.

[65] Navad Malim's evidence is that he believes that David Greenwood gave permission to store the backfill on the Vacant Lot when he met with David Greenwood and Dr. Dhillon on June 4, 2023. Otherwise he would have had to find somewhere else to store the backfill.

[66] Dr. Dhillon attests (para. 33):

> I want to be clear that it was my understanding after we spoke prior to excavation that I had his consent to use the Vacant Lot as necessary to facilitate the excavation. I understand from speaking to him after the fact, that he disagrees that he ever gave this permission. For the sake of making amends and moving the construction forward, I decided to tell him that I must have misunderstood what he said prior to excavation commencing. This is what I communicated to him in the June 19, 2023 email.
>
> [Underline in original]

[67] The latter part of this testimony addresses the communications made by Dr. Dhillon to David Greenwood, directly and through counsel in which he admits not having permission to place the backfill on the Vacant Lot. More specifically:

(a) June 18, 2023, email from Dr. Dhillon to David Greenwood: "Regarding refill on your property, i [sic] apologize on behalf of the contractor who did without permission. I will ask him to remove it as soon as possible".

(b) June 19, 2023, email from Dr. Dhillon to David Greenwood: "I also acknowledge that the contractor did refill your empty lot without your permission and my knowledge".

(c) June 23, 2023, email from Dr. Dhillon to David Greenwood: "One morning, You [sic] personally told me and my project manager that can use your back empty lot for equipment. I apologize for not asking your permission specifically for temporary earth deposit".

[68] On the balance of probabilities, I am satisfied that David Greenwood did not give express permission to dump the excavated soil on the Vacant Lot. I believe that after the discussion of the use of the Vacant Lot for equipment, the project manager and Dr. Dhillon assumed, without asking, that it would be acceptable to use it to store the excavated dirt as well. There was no discussion whatsoever of using the House Lot for any purpose. Dr. Dhillon's contemporaneous emails show that, on reflection, his understanding that he had that permission to use the land to store the dirt had not been sought and obtained. I find that the Respondents, through their agents, mistakenly but voluntarily placed the dirt on the Vacant Lot and House Lot. It was a trespass nonetheless.

[69] With respect to the claims of trespass arising from the still photograph evidence captured from the doorbell and security cameras by David Greenwood, I find that the evidence is insufficient to conclude that those incidents amount to trespass for which the Respondents are liable. As to each photograph, David Greenwood testified that he was not present at the time, and could not identify the person(s) in the photograph. In addition, I cannot determine where the persons are in relation to the property line from the evidence. In at least one instance, David Greenwood falsely reported to police that the identity of the person in the photograph was the Respondent, Prabhjot Sian, who he admitted he had never met.

[70] With respect to the concrete that sprayed on the Greenwoods' house, that was dealt with to the satisfaction of the Greenwoods when it was washed off the following day at the expense of the Respondents.

[71] Finally, the Respondents' acknowledge that a construction fence blew over and damaged a small tree on the Greenwood Land. The Respondents offered to pay to replace the tree but David Greenwood replied that it would be dealt with at the hearing of this Application.

Nuisance

[72] With respect to the claim for nuisance, the Greenwoods' claim that the excessive noise of the construction, disruptively occurring far outside of allowable time limits, would fit within the realm of nuisance. The evidence before the Court is insufficient to find that the tort of nuisance has been proved. The affidavit of David Greenwood is entirely too vague as to what dates and times the alleged nuisance occurred, whether the level of noise was "excessive", whether the time of the noise was "unlawful" and whether it was caused by the Respondents or their agents. Further, there is no evidence as to how this "interfered with our family's use and quiet enjoyment of our own home".

[73] The claim for nuisance is dismissed.

(b) What compensation and other relief are the Greenwoods entitled to as a result of the Respondents' various repeated acts of trespass and nuisance?

[74] The Greenwoods claim special damages, general damages, punitive damages, and a permanent injunction as a result of the trespass.

Special Damages

[75] *McInnis v. Stone, supra*, citing prior authority from this court, makes it clear, at para. 120, that compensation commensurate with the expense of reinstating property (i.e. ameliorating damage, etc.) is an established approach to awarding special damages for trespass. At para. 120, Justice Pickup stated:

> [120] The applicant referred the court to *Patterson v. Municipal Contracting Ltd.* (1989), 98 N.S.R. (2d) 259, 1989 CarswellNS 108, where the court commented on the awarding of damages in a trespass case at para. 35:
>
> > The overriding consideration in trespass cases is that the Plaintiff should as nearly as possible be placed in the same position as before the trespass and generally this is considered done if the Plaintiff is paid the amount of the diminution of the value of the property caused by the trespass. However, there are cases where it is reasonable in order to fairly compensate the Plaintiff to make an award based on a consideration of the cost of reinstatement or replacement even though such an award may exceed the diminution of the value of the property caused by the trespass.
>
> [Emphasis added]

[76] Special damages must be specifically proved: *Air Canada v. Bush*, 1992 NSCA 6.

[77] The special damages claimed by the Greenwoods are comprised of the invoiced costs, including taxes, of having the survey monuments replaced ($589.38); removing the additional backfill ($5,560.13); spreading topsoil and sodding ($4,519.50) and watering the sod ($690). No evidence was given by any of these contractors. With respect to the small tree that was damaged by the construction fence blowing over, no evidence was offered as to its value.

[78] Addressing the cost of replacing the survey monuments, I find that it was reasonable for the Greenwoods to engage a surveyor to reinstate the property line monuments, so as to know precisely where the property line was between the Vacant Lot and the Dhillon Lot, before undertaking the excavation. The Respondents shall pay to the Applicants the sum of $589.38.

[79] Turning to the invoice for excavation from Crad Price Construction ($5,560.13), the invoice states that the work included “Repositioning of soil from neighbour’s site”, “grubbing and grading of soil at 1023 [the Vacant Lot]”, “Placement of new top soil”, and “Cordination [*sic*] between Stebran Resources and

K-Con". There is no evidence explaining the identity or involvement of "Stebran Resources" or "K-Con" or how much of the invoice relates to that work.

[80] The photographic evidence clearly establishes that the area "grubbed and graded" by the Greenwoods' excavator was far greater than the area damaged by the Respondents' placement of the excavated dirt on, and the movement of the Respondents' equipment over, the Vacant Lot. Dr. Dhillon's Exhibit 4, photograph 2 provides a clear picture of the state of the Vacant Lot behind the Dhillon Lot at the end of the day on July 27, 2023, when the Respondents' excavator stopped work. It shows how much excavated dirt remained and its location. It also shows the grass to the north and east side of the driveway at the House Lot, both as to where it was damaged and the quality of the grass (containing extensive crab grass and weeds). Dr. Dhillon's Exhibit 4, photo 3 shows a side by side photo allowing a comparison of the amount of earth left at the end of the day on July 27, 2023, and after the work done by the Greenwoods' excavator in August. There is very little difference in the volume of backfill that was on the Vacant Lot.

[81] David Greenwood's Exhibit 20 shows the state of the grass to the north of the driveway at the House Lot when the Respondents' excavator arrived on July 26, 2023. His Exhibit 23 photograph shows the area to the north of the House Lot driveway and where the Dhillon Lot and Vacant Lot meet, and the extent of excavated dirt remaining at the end of the work done on July 27, 2023. David Greenwood's Exhibit 27 is a photograph taken by him on August 16, 2023, after his excavator began doing the "grubbing and grading". Two things are readily apparent from a comparison of these photographs and Dr. Dhillon's Exhibit 4, photograph 2: there is no appreciable difference in the volume of excavated dirt removed from the back of the Dhillon Lot where it joins the Vacant Lot; and the Greenwoods' excavator has grubbed and graded all of the grass on the north side of the driveway that was undamaged as shown in the July 26, 2023 photograph.

[82] David Greenwood's Exhibit 29 is a photograph of the back of the House Lot and shows the area where the Vacant Lot meets the Dhillon Lot after the completion of the placement of new top soil.

[83] David Greenwood's Exhibit 31 shows the area that was covered in new sod. This area is far greater in square footage than that damaged by the trespass. It also highlights the difference in quality between the pre-existing ground cover and the new sod.

[84] I am satisfied that the physical area of "grubbing and grading" work done by the Greenwoods' excavator and the corresponding placement of new top soil and sod was materially in excess of that required to repair the damage caused by the trespass.

[85] I find that to require the Respondents to pay the full amount of these invoices would be unfair and result in a betterment of the Greenwoods' property at the expense of the Respondents. In order to place the Greenwoods in as nearly as possible the same position as before the trespass, but not a better position, I order that the Respondents pay 50% of these invoices: $2,780 for the excavation, $2,260 for the sod, and $345 for the watering.

General Damages

[86] The Greenwoods seek an award of general damages to compensate them for the loss of use and enjoyment of their property throughout this ordeal.

[87] Each case will be assessed on its own unique facts. In this case, I have found that the dumping of the excavated dirt was mistaken, not callous and deliberate as characterized by the Greenwoods. No evidence was provided from Darah Greenwood or their children. David Greenwood claims that their use and enjoyment of the Vacant Lot was curtailed for most of the summer. In fact, that was, to a large measure, because they refused the repeated offers of the Respondents to remedy the situation, but needed access to the Vacant Lot to do so. I find that this conduct was unreasonable and a failure to mitigate their claimed loss of enjoyment.

[88] Further, the evidence of lack of enjoyment is sparse. This was a vacant property covered by low groundcover, not lawn. There were no specifics as to what it was that the Greenwoods' children did on the Vacant Lot. David Greenwood attested that he planned to place a trampoline on the space for use by his children. There was no evidence that it was placed elsewhere on the property instead or that it was placed on the Vacant Lot after it was restored. David Greenwood also attested that they used the Vacant Lot to run their dogs.

[89] David Greenwood attests that the entire incident was a significant stressor. Having sold the property to the Respondents for the purpose of building a house, in my view, the Greenwoods knew or should have known they would be inconvenienced from their normal routines by the construction process. Despite the finding of trespass, the length and extent of the inconvenience was not substantial in

quality or extensive in duration and, as stated, was substantially contributed to by the Greenwoods' failure to mitigate.

[90] The entire dispute was, in my view, ill-considered by David Greenwood and based substantially on his refusal to engage in neighbourly behaviour and dialogue with Dr. Dhillon.

[91] Considering all of these circumstances, I award general damages of $1,000.

Punitive Damages

[92] In *Patterson v. Municipal Contracting Ltd*., [1989] N.S.J. No. 483, Justice Tidman addressed the award of punitive damages in cases of trespass, at para. 45:

> 45 With respect to punitive damages the courts have used many adjectives in describing the type of conduct which would justify an award of punitive or exemplary damages. For example, such conduct has been variously characterized in past cases as being high handed [*sic*], arbitrary, disgraceful, wilful, and wanton. In the case of *Lester D. Collicutte* [*sic*] *Lumber & Building Supplies Limited et al v. Dorey et al* (1980), 42 N.S.R. (2d) 204, 77 A.P.R. 204, Mr. Justice Grant of this court described as arbitrary the conduct of a Defendant who trespassed upon a woodlot and indiscriminately stripped it of trees. He assessed punitive damages against the offending party in the amount of $3,000.
>
> [Emphasis added]

[93] In assessing punitive damages, the Court must be satisfied not only that the conduct calls for punishment, but also that adequate punishment and deterrence have not already been effected by the awards of compensatory damages or other means such as criminal prosecution or other process: Cassels and Adjin-Tettey, *Remedies: The Law of Damages* (3rd ed.)(Toronto: Irwin Law, 2014), at p. 330.

[94] As stated above, I do not find the conduct of the Respondents to be high-handed, arbitrary, disgraceful, wilful, and wanton. I am satisfied that adequate punishment and deterrence has been effected by the award of damages and the fact that Dr. Dhillon was issued a ticket for trespassing by the HRM Police.

[95] I deny the claim for punitive damages.

Permanent Injunction

[96] The considerations for granting a permanent injunction in the context of a claim in trespass were canvassed by Justice Bryson, writing for the Court of Appeal, in *778938 Ontario Limited v. Annapolis Management, Inc*., 2020 NSCA 19.

[97] The facts in that case were that while renovating its building, Annapolis extended its roof 18 feet above the roof of the adjacent building owned by 778938 Ontario Limited (Starfish). There was some trespassing on Starfish's roof by Annapolis workers. There was also a risk of increased snow load on Starfish's roof as a result of snow accumulating against Annapolis' new wall. Starfish brought an application for a permanent injunction restraining trespass and nuisance for the anticipated snow load, pending strengthening of its roof by Annapolis. The application judge dismissed the application finding that the trespass had caused no damage and was not ongoing. The snow load issue could be addressed in damages. Starfish appealed, arguing that the judge ignored the presumptive remedy of an injunction in the case of trespass and nuisance. Starfish also argued that the judge erred in finding that serious harm would result to Annapolis by the granting of the injunction. Justice Bryson upheld the trial judge's refusal of an injunction. At para. 28:

> [28] A permanent injunction may follow successful proof of one's cause of action. Subject to equitable remedial discretion, no balancing of interests is required because the loser has no right to balance—the winner has succeeded on the merits. Of course, there remains a discretion about the available equitable remedy. In contrast, the merits typically remain unresolved in an interlocutory setting, when an injunction may be granted to preclude frustration of a meaningful remedy for the plaintiff. In such cases, irreparable harm and balance of convenience only assess the relative injury to the parties caused by issuing or refusing an injunction, pending determination of the merits—not harm flowing from resolution of the merits.

[98] Justice Bryson considered the decision of the Newfoundland Court of Appeal in *Nalcor Energy v. NunatuKavut Community Council Inc*., 2014 NLCA 46, in which that Court rejected irreparable harm and balance of convenience as relevant considerations in a claim for a permanent injunction.

[99] Considering the *Nalcor* analysis, he reasoned:

> [35]…*Nalcor* involved picketing of an access road to Nalcor's construction site. It is not clear what Nalcor's cause of action was; the circumstances suggest trespass or nuisance. The Court did not elaborate and queried whether any cause of action

had been established. But the Court did go on to provide guidelines for the exercise of discretion when considering whether to grant a permanent injunction involving private rights without describing what they might be:

> [72] I will conclude this analysis by saying that the proper approach to determining whether a perpetual injunction should be granted as a remedy for a claimed private law wrong is to answer the following questions:
>
> (i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);
>
> (ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven ***are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction?*** (If not, the injunction claim should be dismissed);
>
> (iii) ***Is there an adequate alternate remedy, other than an injunction***, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy);
>
> (iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's prima facie entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);
>
> (v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?
>
> (vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[36] On a *Nalcor* analysis, injunctive relief for trespass or nuisance should be refused in this case in accordance with at least these two criteria:

> (a) Trespass is unlikely to recur (*Nalcor* criterion No. ii);
>
> (b) A remedy in damages is available for both trespass and nuisance (*Nalcor* criterion No. iii).

[Bold and italics in original]

[100] Similarly, on a *Nalcor* analysis, I refuse to grant a permanent injunction on the grounds that trespass is unlikely to recur and a remedy in damages is available and adequate to protect against the threat of the continued occurrence of the wrong.

(c) What were the agreed upon terms between the parties that resulted in the Respondents delivering $25,000 to the Greenwoods?

[101] I agree with counsel for the Greenwoods that, for the most part, the July 25, 2023 letter is a distraction or "red-herring". The amount of special damages for reinstating the property has been determined by the Court.

[102] The only issue related to the July 25 letter to be determined is the Greenwoods' claim for legal expenses. Throughout the period leading up to the hearing, the Greenwoods refused to provide copies of invoices establishing the specifics of the amount of legal fees claimed. Not even redacted copies of invoices were produced in response to requests by counsel for the Respondents. No evidence of the invoices or details of the legal expenses claimed were presented to the Court. No legal authority was offered by the Greenwoods excusing them from proving this claim in the ordinary way. The Respondents had no opportunity to review, question or contest the amounts claimed. The legal expenses claimed are special damages that must be specifically proved. They have not been. The claim for legal expenses is denied.

Conclusion

[103] In summary, I find in favour of the Applicants with respect to their claim in trespass. I award special damages in the total amount of $5,974.38. I deny the claim for legal expenses. I award general damages in the amount of $1,000. These amounts shall be paid to the Greenwoods from the $25,000 held in trust.

[104] I deny the claim for punitive damages. I deny the claim for a permanent injunction.

[105] The balance of the trust funds, in the amount of $18,025.62 shall be repaid forthwith to the Respondents.

[106] As to costs, counsel for the Greenwoods requested the opportunity to address costs after this Decision was delivered. If the parties are unable to agree upon costs, I will receive written briefs from the parties on or before March 29, 2024.

[107] Order accordingly.

Norton, J.