Claim No: SCCH - 464842

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Schnare v. Bowers Construction Inc., 2017 NSSM 56

BETWEEN:

ANDREW SCHNARE

Claimant

- and -

BOWERS CONSTRUCTION INCORPORATED

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on October 25, 2017

Decision rendered on November 1, 2017.

APPEARANCES

For the Claimant	Anthony Rosborough Nicole Heelan Counsel
For the Defendant	Dwayne Rhyno Counsel

BY THE COURT:

[1] The Claimant is the owner of a property on Danville Drive in Bedford, Nova Scotia. Danville Drive is a small dead end street accessible by a tortuous route off other obscure streets branching off Flamingo Drive. The Claimant's property is at the end of the Danville Drive cul de sac. Until recently, there was a small vacant lot next to it. In 2016 the owner of that lot constructed a new home. The Defendant was the contractor hired to build that home.

[2] The construction would not have been possible without some temporary encroachment on the Claimant's property. This is because the driveway access was extremely tight and the new home was being built close to the property line.

[3] Before construction began, Caleb Bowers, the principal of the Defendant company, spoke to the Claimant to inform him of the planned construction and to obtain permission to use part of the Claimant's driveway, at times. The Claimant was cooperative and even declined an offer of $500.00 to compensate him for the inconvenience.

[4] I believe it is fair to say, on the evidence, that the inconvenience turned out to be a bit greater than the Claimant anticipated. Apart from the natural disruption that any nearby construction would cause, there were several things that occurred which prompted this claim:

a. There was excavation near the end of the driveway done by city contractors, to connect the new house to the municipal water system. A significant quantity of earth and debris was piled on the Claimant's driveway, and when removed (to backfill the excavation) left behind damage to the driveway surface, consisting mostly of gouges.

b. A portable toilet was dropped on the Claimant's side of the property line, where it remained for a day or two until moved after the Claimant complained.

c. During the excavation, three surveyor's boundary pins were disturbed, and likely lost, resulting in some uncertainty as to the precise property line.

d. There was a constant issue of the Defendant's subcontractors parking on the Claimant's driveway. The Claimant often returned home to find it difficult to get into his own property.

e. There was damage to the landscaping adjacent to the driveway; namely, formerly grassed areas were worn down and became just dirt and gravel.

[5] Both the Claimant and Mr. Bowers testified. From that evidence I draw the conclusion that Mr. Bowers reasonably tried to minimize the inconvenience to the Claimant, and that he undertook to deal with all of the damage, but very likely he moved on to other concerns and never did fully satisfy the Claimant. Although the new home was completed by the end of 2016, in May 2017 the Claimant felt abandoned by the Defendant and had his lawyer write a letter.

[6] As is often the case, the introduction of lawyers inflamed rather than pacified the situation. On June 21, 2017, this Claim was commenced seeking $25,000.00 in damages for trespass and negligence. Of that total, just over $5,000.00 was for special damages for re-paving part of the driveway, having a new property survey done, and minor landscaping.

[7] By the time of the hearing, the claim had shrunk somewhat. The same claim for special damages was made, but the balance of the claim was reduced

to a modest amount for so-called “mesne profits,” which courts have sometimes awarded as compensation for acts of trespass.

[8] I will deal first with the special damages. The following is the breakdown:

a. $3,018.75 for a new property survey;

b. $591.00 for sodding the area where the grass was damaged, and

c. $1,400.00 plus tax for driveway asphalt repair. (I note that the Claimant appears to have ignored the HST in the Claim, but I believe it should be included).

[9] The property survey estimate was obtained in late May 2017. Since that time, the Defendant instructed a qualified survey company to replace the missing survey pins. For reasons that were not explained, only two of the three missing pins were replaced. On the other hand, it is not clear that all three are needed to mark the property line.

[10] Also, for reasons not explained, the company that replaced the pins did not provide any documentation such as a new survey sketch or even a letter certifying the accuracy of the pins’ position.

[11] I am satisfied that the new survey pins have potentially remedied the situation, and that a brand new survey is not necessary. However, the situation is incomplete, and the Claimant is entitled to some better assurance, in writing, to the effect that the pins are precisely where the existing surveys show them to be. This can be done in one of two ways:

a. The company that replaced the pins can certify that they replaced the pins in the correct place, or

b. A different qualified surveyor can re-survey the land to make sure that the pins are accurate.

[12] I believe the Defendant is in the best position to take option “a” at its own expense. I propose to defer deciding the issue for about a month, to allow the Defendant to satisfy the Claimant that this is no longer an issue. If the Claimant is not satisfied, by December 1, 2017, he may through his counsel ask the court to make a monetary award. Should that occur, I would seek both parties’ further submissions before making a further order. Without prejudging the matter entirely, I anticipate that the amount allowed would be less than what the Claimant is currently seeking, which I believe is based on more work than is needed to restore the Claimant to his prior position.

[13] As for the repairs to the driveway and the land, the Defendant has made some offers - too late, in my opinion - to do such repairs itself.

[14] As a rule I do not like to ask parties in conflict to work with each other, as this can be a recipe for further conflict. I believe the two estimates of $591.00 for sodding and $1,400.00 plus tax ($1,610.00) for paving repairs are reasonable. These amounts total $2,201.00, and I allow these claims.

[15] I reject the Defendant’s argument that the Claimant should pursue Halifax Water or the Municipality for some or all of the damage. I consider that the Defendant was in charge of the project, and any other contractors would have answered to him. If anyone is in a position to pursue third parties, it would be the Defendant.

Mesne profits

[16] The claim for mesne profits is something that, I confess, I had never heard of before hearing this case. Counsel for the Claimant provided a brief and some authorities on the subject.

[17] In one of cases cited, *Initiate School of the Canadian Rocky Mountains v. Wolfenden Ventures Ltd.,* 2013 BCSC 257, the court stated:

> [40] A claim for mesne profits is a claim for unliquidated damages. It arises where the parties have not agreed upon the value of the defendant's use of the land. Because the claim is founded in the tort of trespass, a claim for mesne profits should not be treated as a claim for unjust enrichment: *Hawkes Estate v. Silver Campsites Ltd*.(1994), 91 B.C.L.R. (2d) 126 (CA).
>
> [41] Instead, mesne profits are damages suffered by the land owner for having been wrongfully put out of his property. A non-exhaustive list of the factors relevant to the assessment of mesne profits includes:
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> 1. The terms on which the owner could have let the property to another during the trespass period;
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> 2. The rent the occupier paid before the trespass began;
>
> 3. Actual profits obtained by the occupier during the trespass; and
>
> 4. Rents paid by occupiers of similar properties.
>
> [42] It is important to note that no one factor is essential to the award. That is to say, an owner may be entitled to mesne profits even though it cannot show that it would have let the land to someone else.

[18] Other cases cited define these damages as the equivalent to a proper and fair price which would be payable for the unlawful use of the land. It creates a

fictional negotiation and assesses what amount the affected landowner might have accepted as compensation.

[19] It is well understood that the Small Claims Court does not have jurisdiction to award more than the nominal amount of $100.00 in general damages, by virtue of the specific exclusion in Section 11 of the *Small Claims Court Act.* The Act leaves intact a right to claim damages up to the (currently) $25,000.00 monetary limit, but does not specifically apply a term to those damages, such as “special damages.” Even so, the case law tends to recognize damages as either “general” or “special.”

[20] In *Beairsto v. Roper Aluminum Products Inc.*, 1994 CanLII 4381 (NS SC), Scanlan J. (as he then was) considered whether damages for wrongful dismissal from employment were general or special. He cited the provisions of *Halsbury's Laws of England,* fourth edition, vol. 12, p.416, S.S. 1113:

> "In current usage, 'special damage' or 'special damages' relate to post pecuniary loss calculable at the date of trial, whilst 'general damage' or 'general damages' relates to all other items of damage whether pecuniary or non-pecuniary. The terms 'special damage' and 'general damage' are used in corresponding senses.(sic) thus, in a personal injuries claim, 'special damage' refers to past expenses and loss of earnings, whilst 'general damage' will include anticipated future loss as well as damages for pain and suffering and loss of amenity.

[21] In that case, damages for loss of employment were considered to be special damages, and thus within the court’s jurisdiction.

[22] A couple of years later in *Machek v. Willcock*, 1996 CanLII 5567 (NS CA), the Nova Scotia Court of Appeal had to consider whether a claim for

“accelerated depreciation” of a motor vehicle were special or general damages. The court stated:

> With respect to the first issue, s. 11 of the *Small Claims Court Act*, R.S.N.S., 1989, c. 430 provides that a claim for general damages is deemed to be a claim for an amount not exceeding $100. After referring to *Forbes Chevrolet Oldsmobile Ltd. v. Singer* (1984), 65 N.S.R. (2d) 159, and the definition of "General Damages" in Black's Law Dictionary, Justice Davison said:
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> > "The issue of accelerated damages relates directly to the damage to the claimant's motor vehicle. ....the extent of depreciation to the vehicle, in my view, is a claim of special damages and is not governed by s. 11 of the Act."
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> With respect to the evidence issue, Justice Davison said the following:
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> > "As stated in Halsburys Laws of England, (3d) v. 11 at p. 218:
> >
> > 'In contrast to general damages, special damages must be claimed specifically and proved strictly.'

[23] I am satisfied from these authorities that damages are either special or general, for purposes of the Act. In a higher court the distinction might be unimportant, but here the proper characterization of mesne profits is critical.

[24] The biggest strike against mesne profits being special, is that they cannot be strictly proved. Also, they are based in tort, where the distinction between general and special damages is often drawn. They are based on a fictional negotiation, and ask the court to set a fair price that the parties might likely have arrived at. This resembles more closely a claim for general damages. They are not pecuniary damages, in the sense that the Claimant has not lost actual money which he seeks to recover. Essentially mesne profits are a court-created measure to compensate a Claimant for the inconvenience that he has suffered as a result of a trespass to land.

[25] Money is the only measure available to a court to compensate for losses. For example, in a case of personal injury, the court looks at precedent and assesses a reasonable amount that is designed to place the person insofar as money can do so, in the position they would have been in had the tort not occurred. Here, the Claimant is asking the court to place a value on what would in effect have been the granting of a licence to trespass. The Claimant has not really lost anything. He suffered inconvenience.

[26] I believe that the other damages claimed, i.e. the damage to paving and landscaping, are classic examples of special damages, while the claim for mesne profits are simply general damages by another name.

[27] Even so, such a claim in this case suffers from the fact that the Claimant initially gave permission for the anticipated temporary encroachments on his land. Unfortunately, the inconvenience proved to be a little more than he expected. But this was not a case of out and out trespass. The Defendant sought and obtained permission.

[28] I believe that there was sufficient inconvenience to justify general damages of $100.00, which I award, together with the Claimant's costs of $199.35. Prejudgment interest is not appropriate where the money for repairs has not yet been spent.

[29] In the result, the Claimant will have judgment for $2,301.00 in damages plus $199.35 in costs. The question of damages for the boundary pin issue shall be dealt with in accordance with paragraph 12 of these Reasons.

Eric K. Slone, Adjudicator