IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Arbuckle v. Owen*. 2014 NSSM 32

Claim: SCCH 425118
Registry: Halifax

Between:

Janet Arbuckle, Timothy Gray, Nigel Kerridge and Jane Kerridge

Claimants

v.

Mark Owen, Peter S. Conrod Construction Limited and Peter Conrod's Construction Limited

Defendants

– AND –

Claim: SCCH 428010
Registry: Halifax

Between:

Peter S. Conrod Construction Limited

Claimant

v.

Mark Owen

Defendant

Adjudicator: Augustus Richardson, QC

Heard: July 8, 2014

Appearances: Tracey Smith for the Claimants
Leon Tovy for the defendants Peter S. Conrod Construction Limited and Peter Conrod's Construction Limited
Jonathan Hughes for the defendant Mark Owen

Decision: July 15, 2014

By the Court:

1[] This is a claim by property owners for damage done to their then undeveloped lot by an excavator hired by their neighbour. On the relevant date an excavator allegedly crossed over the property line and "grubbed" an area, resulting in the loss of a number of evergreen trees and brush and the denuding of the land of any undergrowth or greenery. At issue is the following:

a. who owned the land at the time of the damage;

b. whether that owner suffered any damage in law and, if so,

c. what was that damage.

The Hearing

2[] I heard the evidence of the claimants Janet Arbuckle and Timothy Gray, and of a witness subpoenaed by them, Mr Blair Humphries. I also heard from Nicole Morash, a friend of Ms Arbuckle. I refused to let counsel read into the read the contents of an email she had received from the claimants Nigel and Jane Kerridge. They lived in England. In my view an email to counsel was not evidence that I could place any weight on, even were I to admit it under the relaxed rules of evidence in this court. That being the case I saw no reason to permit counsel to introduce its contents.

3[] I also heard the evidence of the defendant Mark Owen, the neighbour whose contractor had allegedly crossed over onto the claimants' land. And I heard the evidence of Nelson Conrod, the owner of the defendant Peter S. Conrod Construction Limited, also known as Peter Conrod's Construction Limited (collectively "Conrod's Construction"), as well as David Hale, a heavy equipment operator working for Conrod's Construction. Conrod's Construction also claims against Mr Owen for contribution or indemnity in the event it is found liable.

4[] The parties also put in two books of exhibits and a few loose documents.

5[] The only real dispute on the facts concerns the discussions that took place between Mr Conrod and Mr Hale, on the one hand, and Mr Owen on the other, on the day the damage was done. I will accordingly simply set out the facts as I find them to be, and deal with the one dispute when I get to it.

The Facts

6[] These claims involve property then known municipally as Lot 1A off of East Chezzetcook Road, East Chezzetcook, Nova Scotia. The property consisted of roughly 80 acres of vacant land. The lot ran roughly east-west between East Chezzetcook Road and Roast Lake. It was heavily wooded in places, with high spots and some low marshy areas. There was a path–perhaps an old logging road–that ran part way into the lot from East Chezzetcook Road. As the path ran into the lot it curved slightly to the north, until it was running close along the northern boundary of Lot 1A.

7[] Immediately to the north of Lot 1A was Lot 2B, which similarly ran roughly east-west along the northern boundary of Lot 1A. It too was basically undeveloped land. Lot 2B has been owned by the defendant Mark Owen for years. He testified and I accept that he knew his land and its boundarys intimately. He fished and hunted there often. He walked the lines. He knew the boundarys of his land, which he had had surveyed in 2007.

8[] In 2012 Lot 1A had been owned for some time by the claimants Nigel and Jane Kerridge. They lived in England, and apparently had done so for years. They decided to sell Lot 1A and put it on the market.

9[] In the fall of 2012 the claimants Janet Arbuckle and Timothy Gray were looking for land on which they could build a house. They were shown Lot 1A. They walked in along the path until it ended. They then walked along the northern boundary line, which had been blazed by a surveyor, to the lake. They liked what

they saw. There was a high point of land just in from the end of the path that had a good view of the ocean. They decided to make an offer to purchase the land.

10[] On October 20, 2012 Ms Arbuckle and Mr Gray made an offer to the Kerridges to purchase the land for $75,000.00. They paid a $1,000.00 deposit. The offer was accepted, with a closing date of December 3, 2012: Ex.C1, Tab 1. Mr Gray returned to the land on November 5th with someone to determine the location of the septic bed. That was the last time either of them were on the land before closing. They did not perform a final, pre-closing inspection of the land.

11[] Shortly after the deal closed Ms Arbuckle took her friend Nicole Morash to the land to show her where they planned to build their house. They walked in along the path. As they came to the end of it Ms Arbuckle stopped and said that some of the land near the high spot had been cleared. She was shocked. The land that had been cleared had had a stand of trees that would have provided a privacy screen between the house they intended to build (on a spot close to the northern boundary) and their neighbours to the north. Such privacy had indeed been a condition of Mr Gray's willingness to move out of the city.

12[] While Ms Arbuckle and Ms Morash were looking at the cleared area a man some distance away waved to them and came over to introduce himself. It was Mr Owen. He was pleasant. He apologized to Ms Arbuckle. He told her that he had hired a contractor to clear some land for him (he was building a house at the time), and that the contractor had accidentally crossed over the boundary onto Lot 1A and done some clearing there. (Mr Owen did not deny that this conversation or his apology had taken place.) While he was talking to them he picked up, and then put back, a survey marker that had been knocked over and was lying on the ground.

13[] As it turned out, the excavation of the area of land on Lot 1A had happened on November 14th, 2012–that is, after the agreement of purchase and sale had been entered into but before the transaction had closed. Mr Owen, who was acting as his own contractor in building his house on his land, had hired Conrod's Construction to do some clearing. His evidence was that he had clearly

pointed out the property line to Mr Hale, had gone about his business, and had then discovered that Mr Hale was working across the line. Mr Conrod's evidence, on the other hand, was that he had told Mr Owen to make sure to point out the line to Mr Hale when he arrived (because Mr Conrod had to leave before Mr Hale arrived). Mr Hale's evidence was that he had been told by Mr Conrod to follow Mr Owen's instructions. When he arrived on the site Mr Owen directed him to grub off the hill and take the fill for use on Mr Owen's project. Mr Conrod then showed up later, and told him to stop working where he was because he (Mr Conrod) had discovered from a subsequent discussion with Mr Owen that Mr Hale was on the wrong side of the property line.

14[] I pause here to note that I was satisfied on the evidence of Ms Arbuckle and Mr Gray, as well as that of Mr Owen, that the excavation did in fact happen on the claimants's side of the boundary and that it happened on November 14th. I am also satisfied that the "accident" happened because–and only because–Mr Owen either misdirected–or failed to take care in directing–Mr Hale as to the location of the boundary line. Mr Owen on his own evidence was intimately familiar with his land. He visited it often. He had had it surveyed in 2007. I am satisfied he knew where the boundary was. I am also satisfied that Conrod's Construction–that is, Mr Conrod and Mr Hale–were acting reasonably in relying upon Mr Owen to direct them as to where the work was to be done. That being the case the only one responsible for the excavating that took place on the wrong side of the boundary on November 14th was Mr Owen.

15[] Time then passed. Building for the Arbuckle/Gray house started in the early summer of 2013 and was finished in September 2013. They did not build the house in a different spot because the location in question was on high ground with a good view of the ocean; and other areas further away from the northern boundary were in lower ground that was marshy. Nor could they move the foundation of the house too far from the original location because there was a large outcropping of rock that would have been prohibitively expensive for them to have removed. There was no evidence given as to whether they could have rotated the house in such a way as to minimize its principal views and, in particular, its view of the neighbouring property to the north.

16[] Once the house was completed in September 2013 it was clear that they could see their neighbours' buildings to the north: see, for e.g., Ex. C1, Tab 2, p.1. They obtained a quote from Mr Humphries as to what it would cost to supply and install spruce trees in the excavated area so as to screen out the neighbours.

17[] Mr Humphries testified that he arrived at the quote after attending the site with Ms Arbuckle. He thought based on his experience that the area prior to grubbing would have been naturally treed with spruce trees of roughly 40-50 years in age. He did not know whether the trees were green or black spruce. Ms Arbuckle pointed out to him the area that she thought had been excavated. He estimated the dimensions of the area, and then divided the area by 100 to arrive at an estimate based on one tree per 100 square feet. This area of coverage was not a standard. It was simply what he thought would be sufficient to cover the area. He then arrived at a quote of $24,900.00 plus HST to supply and install 50 green spruce trees that would be 150 cm (approximately 5 feet) tall. The quote was dated December 4, 2013: see Ex. C1, Tab 6. He testified in cross that he used green as opposed to black spruce in his quote because nurseries only provided green spruce. Black spruce was available only as seedlings "because people don't typically use black spruce for residential purposes."

18[] Ms Arbuckle and Mr Gray then commenced their claim against Mr Owen and Conrod Construction on March 6, 2014. When the latter defended on the ground *inter alia* that they had not owned the property at the time the damage was done, they added the Kerridges as claimants.

Analysis and Decision

19[] As noted at the beginning of this decision, the issues are as follows:

a. who owned the land at the time of the damage;

b. whether that owner suffered any damage in law and, if so,

c. what was that damage.

A: Who Owned the Land

20[] The defendants argue that as of November 14th, 2012 the land was owned by the Kerridges. I do not agree. The law is clear that upon the execution of an agreement of purchase and sale the beneficial interest in land passes immediately to the purchasers; legal title is held by the vendor merely as security for the purchase price: see *Clem & Comeau v. Hants-Kings Business Development Centre* 2004 NSSC 114; *Gould v. Davis* 2014 NSSC 241 at para.25. On that basis I am satisfied that Ms Arbuckle and Mr Gray were the owners of the land at the time the excavation took place.

21[] The defendants rely upon clause 7 of the agreement of purchase and sale, which provides that "[a]ll lands ... being purchased hereby shall be and remain at the risk of the Seller." They say that the clause means that the risk of damage remained with the Kerridges as sellers as of November 14th. I do not agree. Clause 7 exists precisely because of the principle enunciated in *Clem* and *Gould*. The purpose of the clause is to keep the burden of insurance (which otherwise would have passed with the beneficial interest to the purchasers) on the vendor. This is the reason the clause goes on to provide that "[p]ending completion of the sale the Seller shall hold all insurance policies and the proceeds thereof in trust for the parties as their interests may appear, and in the event of damage to the said property, the Buyer may either have the proceeds of the insurance and complete the purchase, or may terminate this Agreement and the deposit shall be returned to the Buyer."

B: Did Ms Arbuckle/Mr Gray Suffer Any Damage in Law

22[] I am satisfied that the answer to this question is 'yes.' They were the owners of the land. Trees (which belong to the land) which they owned were

removed. Trees have value as lumber. They also add to the value of the land by reason of aesthetics, as well as providing privacy screens. Grubbed land itself lacks aesthetic appeal. All of this amounts to a change to–or damage to–the property they had purchased. It was no longer what they had seen and agreed to purchase. It was something else.

23[] The defendants argue that to the extent the claimants Arbuckle and Gray rest their claim on the tort of trespass it must fail because they did not have actual possession of the land at the time the damage occurred. I agree. However, that leaves the issue of negligence. As noted above, I am satisfied that the reason the work was carried out on the wrong side of the boundary was because Mr Owen failed to instruct properly or to supervise Mr Hale to ensure he was working in the right spot. In so failing he was negligent, and that negligence caused damage to the property then owned beneficially by Ms Arbuckle and Mr Gray.

24[] The defendants argue that the claimants are either wholly or partly to blame for the loss because they failed to conduct a pre-closing inspection. Had they done so they would have discovered the damage and could either have backed out of the deal or sought a reduction in the purchase price. I do not agree. The land in question was a large, vacant lot of undeveloped land in an area of undeveloped land. Purchasers of such land are in my opinion entitled to assume that such land will remain in the condition in which they saw it, at least where, as here, there was nothing to indicate that any development or construction was going to be carried out in the area.

25[] Even if I am wrong in this conclusion, the question of whether the claimants got what they paid for is an issue between the buyers and the sellers. The defendants are strangers to the agreement of purchase and sale. They are not entitled to rely upon any rights that might have arisen between the claimants as buyer and sellers because of the wrong that they committed.

C: What is the Value of the Damage That Was Done?

26[] I accept that the damage that was done impacted the aesthetics of the land, both in creating a patch of bare, grubbed land and in removing the privacy screen. This type of damage is general damage, and this court is limited in awards of general damages to $100.00. I find that the claimants have established at least that extent of damage and so award it.

27[] The more difficult question has to do with the claim for special damages by way of the cost of replacing the trees that were removed.

28[] A property owner has to act reasonably to mitigate damage to his or her property. I was not convinced that the Humphries quote represented reasonable mitigation. The cost–$24,990.00 plus HST–is roughly a third of the value of the 80-odd acres that was purchased. Mr Humphries arrived at his quote on the basis of Ms Arbuckle's estimate as to the size of the area that had been grubbed, and then assumed that 50 green spruce trees equally spaced (at a cost of roughly $166.00 per tree) could be fit into that area. That seems to me to be an unreasonable approach to assessing the damage that was done for a number of reasons.

29[] First, there was no evidence as to the exact area that had been grubbed. Second, there was no evidence as to how many trees were removed; what type they were (whether black or green spruce or, indeed, something else); their age; their height; or their spacing. All of these factors would be important determinants in determining the reasonableness of a "replacement" proposal. But there was no evidence other than the photos that were introduced of the remaining land, and those photos suggest that the trees that were removed were a mixed range of types, sizes, age and health. Nor was it clear to me that 50 trees (the number in the Humphries estimate), as opposed to some smaller number, was necessary to provide a privacy screen.

30[] The other point is that in looking at the photo in Ex. C1, Tab 2, p.1 it is not clear that trees would have to be planted in the grubbed area in order to obtain a privacy screen in the near future in any event. On this point I note that the photograph in Ex. C1, Tab 2, p.1 shows a line of trees in the mid-foreground of

the photo. The tops of those trees come just below the baseline of the neighbour's buildings in the background. This suggests to me that with a few year's natural growth the trees already there will grow high enough to provide the screen desired by the claimants.

31[] I am also concerned by the fact that the claimants have not actually contracted with Humphries to conduct the remediation they argue is necessary. Claims for property damage are generally assessed on either the cost of repair that is actually incurred or the diminished value of the property. Here there was no fair market analysis conducted of the difference in the value of the land before and after the damage. Nor was there any actual remediation carried out. As well, there were other things that the claimants could have considered in mitigating their loss. They could, for example, have planted their own trees. They could take seedlings or small trees from other areas of their property and move them to the area necessary to provide a screen. But there was no evidence that any of that was done.

32[] One other wrinkle in this case is the fact that the claimants Arbuckle/Gray had to grant an easement along the "driveway" up to their house to NS Power. The driveway followed along–and extended–the lines of the old path. That easement gave NS Power the right to insist on the removal of trees that might interfere with the power line. In other words, some of the trees that were grubbed out by Conrod's Construction may have had to be removed in any event, either at the time the power line was put in or later.

33[] In wrestling with this issue I have also reviewed the decisions of Adjudicator Slone in *Horne v. Burrows* 2009 MSSM 47 and *Compton v. Hurley* 2011 NSSM 61; and of Hutchinson, J in *Barnstead v. Ramsay* [1996] BCJ No. 970. All involved the unauthorized removal of trees due to trespass or negligence or both. In *Barnstead* the cost of restoration work (in the amount of $1,700.00) that was found to be reasonable was allowed. In *Horne*, a case involving a home "sitting on a lovely several acre lot property" in Lower Sackville, Adjudicator Slone rejected an estimate of over $9,000.00 to replace some trees as "unrealistic," but allowed $250.00 for each of 15 trees, for a total of $3,750.00. In

Compton, a claim involving undeveloped, wooded land, Adjudicator Slone concluded that the claimant there had failed to prove damage and dismissed the claim.

34[] At the end of the day the onus is on the claimants to prove the value of their loss. I was not satisfied that they had done that on the evidence supplied by them. So while I accept that there was a loss of some trees caused by the negligence of Mr Own, I was not satisfied on a balance of probabilities as to the value of that loss (other than the $100.00 in general damages).

35[] The last part of the claim is for the cost of replacing the survey marker. Based on the facts set out above I am satisfied that the marker was knocked out of the ground by Mr Hale, and that that too was a result of Mr Owen's negligence. The cost of replacing that marker by a surveyor was estimated at $500-$600.00: Ex.C1, Tab 7. I allow $550.00 plus HST of 15% for a total of $632.50 for that cost.

36[] I accordingly order that the defendant Mr Owen shall pay to the claimants Arbuckle and Gray:

a. .....general damages $100.00

b. ..... survey marker replacement $632.50

c. .....costs $377.55

37[] The claim of Conrod's Construction against Mr Owen is dismissed since no liability was found against it for which it could claim contribution or indemnity as against Mr Owen.

DATED at Halifax, NS this
15th day of July, 2014

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Augustus Richardson, QC
Adjudicator