



Civil Resolution Tribunal

Date Issued: July 31, 2018

File: SC-2017-007596

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Scheulin v. Kimmerly, 2018 BCCRT 402*

B E T W E E N :

Martin Scheulin

APPLICANT

A N D :

Kathryn Kimmerly

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This is a dispute about who owns a walnut tree and whether the respondent, Kathryn Kimmerly, must pay to cut the tree down and reimburse the applicant, Martin Scheulin, for past trimming expenses. The respondent says the tree is a

shared tree, straddling the parties' property line and the applicant has not proven otherwise. As such, the respondent says she is not responsible for the applicant's claims. The parties are each self-represented.

JURISDICTION AND PROCEDURE

2. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
3. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
4. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
5. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

6. The issues in this dispute are a) who owns the walnut tree, b) who is responsible for the walnut tree's maintenance, and c) to what extent, if any, must the respondent cut down the walnut tree at her expense and/or reimburse the applicant for his past trimming expenses of \$1,275.75.

EVIDENCE AND ANALYSIS

7. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only referred to the evidence as necessary to give context to this decision.
8. The applicant says the walnut tree is on the respondent's property and is a dangerous hazard for his neighbouring home. The applicant has asked the respondent several times to cut down the tree, but she has not done so. The respondent provided a copy of her September 29, 2017 email to the applicant. In it, the respondent set out her position that the walnut tree appeared to be a shared tree. She gave her permission for the applicant to remove the walnut tree by a certified arborist, and on a "strictly without prejudice basis (i.e. without admitting any liability whatsoever)", she stated she would consider sharing the cost of the tree's removal.
9. Ultimately, the applicant hired a professional to remove some of the walnut tree's limbs that the applicant says were of the highest danger to his property and tenants. That October 2, 2017 invoice was for \$1,275.75 and the applicant asks for an order that the respondent reimburse him for it.
10. Apart from that invoice, the applicant's evidence consisted of photos of the large and tall walnut tree. Based on the photos, the walnut tree is large in diameter at its base and the trunk straddles the parties' property line, assuming the fence sits on the property line. The link fence actually wraps around the tree because the tree's trunk prevents the fence from continuing in a straight line.
11. The respondent bought her home in September 2008, at which time the walnut tree was already a large tree. Based on the tree's size in the evidence before me, I accept this evidence. The applicant bought his home in 2009 or 2010, which he rents out. The applicant first asked the respondent in June 2017 to address the walnut tree.

12. The applicant did not submit a survey or anything to show where the property line is located in relation to the walnut tree. Based on a November 3, 2017 letter from the respondent's lawyer to the applicant, at least 1/3 of the walnut tree's trunk sits on the applicant's property. This appears consistent with the photos in evidence and is not disputed by the respondent. I note the applicant did not provide any submission about the parties' respective obligations with a shared tree, although it is clear from that November 3, 2017 letter the applicant was on notice this was the respondent's position.
13. Based on the limited evidence before me, the applicant has not proved that the walnut tree is not a 'shared tree' that straddles both properties. In other words, there is insufficient evidence before me to support the applicant's position that the walnut tree is entirely the respondent's responsibility. The law is that a shared tree is held by the owners of the adjoining properties as tenants in common, which gives rise to certain legal consequences (see *Demenuk v. Dhadwal*, 2013 BCSC 2111).
14. In *Demenuk*, the court reviewed the law and found that the proper means of fixing a tree's location was deciding where the trunk, at chest height (about 1.4 metres from the ground) was located. Based on this figure and looking at the photos, it appears the walnut tree is a shared tree. I am unable to conclude on the evidence before me that the walnut tree is solely the respondent's responsibility, as alleged by the applicant.
15. The law of nuisance is clear. A homeowner is entitled to trim the branches of their neighbour's tree to the extent those branches extend over the property line onto the homeowner's property (see *Anderson v. Skender*, 1993 Canlii 2772 (BCCA) at paragraph 15). In other words, the applicant was entitled to trim the walnut tree's branches that extended over onto his property, even if the tree was solely the respondent's. However, in these circumstances where the applicant has not proved the walnut tree is solely the respondent's responsibility, I do not agree that the applicant is entitled to reimbursement for trimming the tree's branches on his

side of the property line. I dismiss the applicant's claim for reimbursement of the trimming invoice.

16. What about the applicant's request for an order that the walnut tree be removed at the respondent's expense? For the same reasons set out above, I dismiss that claim. Bearing in mind the tribunal's mandate that includes recognition of ongoing relationships, nothing prevents these owners from agreeing to share the cost of the tree's removal, as the respondent suggested in September 2017. I make no order in that respect however.
17. The applicant was not successful in this dispute, and therefore in accordance with the Act and the tribunal's rules, I find he is not entitled to reimbursement of tribunal fees.

ORDER

18. I order that the applicant's claims, and therefore this dispute, are dismissed.

Shelley Lopez, Vice Chair