



Civil Resolution Tribunal

Date Issued: July 22, 2020

File: SC-2020-001945

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Westridge Ventures Ltd. v. Shaw*, 2020 BCCRT 814

BETWEEN:

WESTRIDGE VENTURES LTD.

APPLICANT

AND:

SCOTT EDWARD SHAW and JACQUELINE MARY SHAW

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about alleged property damage. The applicant, Westridge Ventures Ltd. (Westridge), says 2 of its iron property pins were disturbed by the respondents' contractor during their driveway construction. Westridge claims a total of \$4,758.36,

for resetting 2 pins, payment for site cleanup and for correspondence, and for a surveyor to file a “posting plan”.

2. The respondents, Scott Edward Shaw and Jacqueline Mary Shaw, deny the property pins were disturbed, and say their contractor’s trespass was minor and a reasonable mistake given Westridge’s property appears derelict. The Shaws also deny otherwise damaging Westridge’s property and ask that the dispute be dismissed.
3. Westridge is represented by its principal, Luigi Mandarino. The Shaws are self-represented. For reasons discussed below, I find the Shaws are not responsible for their contractor’s trespass.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT’s mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT 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.
5. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Bearing in mind the CRT’S mandate that includes proportionality and a speedy resolution of disputes, I decided to hear this dispute through written submissions.
6. The CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT 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.
8. I note Westridge originally asked that the Shaws be ordered to not trespass on Westridge's property. Westridge later withdrew that request and so I do not consider it below, other than to say the CRT does not have the ability under its small claims jurisdiction to grant such injunctive relief, as it is not permitted under section 118 of the CRTA.

ISSUES

9. The issues in this dispute are:
 - a. Did the Shaws' contractor trespass and cause damage on Westridge's property, and if so, are the Shaws responsible for it?
 - b. To what extent, if any, is Westridge entitled to the claimed remedies?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicant Westridge bears the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.
11. The Shaws owned a strata lot next to the undeveloped lot owned by the applicant developer, Westridge. Westridge says its land was serviced but admits it had no buildings on it and there was vegetation growth.
12. The Shaws hired Top Tier Lawn Maintenance (Top Tier) as their contractor to construct their driveway expansion. The relevant work occurred on October 14 or 15, 2019. The Shaws' Top Tier contact was with Mark Dyck, Top Tier's owner. Neither Top Tier nor Mr. Dyck are parties to this dispute.

13. Briefly, the parties do not dispute Top Tier trespassed a few feet onto Westridge's property, and at least for a period of time left a trailer and dumped some sand on it in preparation for the work on the Shaws' property. The Shaws and Top Tier now say this was a reasonable error as Westridge's property was "derelict" and so Mr. Dyck reasonably assumed it was Crown or "wild" land.
14. I do not agree the condition of Westridge's property reasonably entitled that assumption and a trespass. I do not accept that there was implied consent, and I note the Shaws and Mr. Dyck do not allege there was such consent. Rather, they say Top Tier's trespass was a reasonable mistake.
15. The law of trespass is well summarized in *Lahti v. Chateauvert*, 2019 BCSC 1081, which at paragraph 6 quotes from Fridman, *The Law of Torts in Canada*:

Trespass to land consists of entering upon the land of another without lawful justification To constitute trespass the defendant must in some direct way interfere with land possessed by the plaintiff.

16. A "mistaken trespass" is not a defence (see *Lahti*, paragraph 8). However, the interference with land must be direct, and, intentional or negligent. As applied to this dispute, the "intentional act" refers to the completion of a voluntary and affirmative act (parking and placing sand on Westridge's property), rather than an intention to do something wrongful (trespass).
17. Based on the evidence before me in this dispute, I accept that Top Tier's excavation machine travelled on the edge of Westridge's property. Mr. Dyck admits in his March 17, 2020 statement in evidence that he hand dug around 1 pin and painted it, moved 1 pin's white wooden marker and later replaced it. However, Mr. Dyck denies disturbing the 2 iron pins, contrary to Westridge's central claim. Further, Top Tier says it removed all debris that it admittedly had left on Westridge's property, which removal Westridge disputes. Given my conclusion below, for the purpose of this dispute I find I do not need to resolve the particular extent of Top Tier's admitted trespass.

18. I turn then to the Shaws' liability for the trespass. There is no suggestion that the Shaws personally trespassed on Westridge's property. Rather, Westridge says the Shaws are responsible for Top Tier's trespass on its property. In particular, in its reply submission Westridge disputes the Shaws' assertion they were entitled to rely on Top Tier's professional expertise. Westridge says the Shaws had an obligation to ensure Top Tier "worked on the correct property". Westridge expressly argues that its claim properly was against the Shaws, not Top Tier or Mr. Dyck. I disagree, as discussed further below.
19. While Westridge originally alleged that the Shaws directed Top Tier to trespass, in its later submissions it argued the Shaws were negligent in failing to supervise or adequately direct Top Tier. I find there is no evidence before me to support a conclusion the Shaws directed the trespass. Having read all of the emails in evidence, including those exchanged around the date of Top Tier's trespass, I find the Shaws were not aware of Top Tier's trespass until it had already occurred. The evidence shows Mr. Mandarino was on site and spoke directly with Mr. Dyck about the trespass and that Mr. Dyck apologized.
20. The substance of Mr. Dyck's March 17, 2020 letter in evidence is that he made the decision to place his trailer and sand just over the property line onto the Westridge property, under his mistaken belief it was "wild" or Crown land. Mr. Dyck wrote that he did not ask about who owned the property. Further, the Shaws' contemporaneous October 2019 emails and texts with Westridge support the conclusion the Shaws hired Top Tier to handle the project entirely, and they gave no specific instructions about how to approach it. This supports my conclusion the Shaws did not direct and were not aware of the trespass until after it happened.
21. I turn to the nature of Top Tier's relationship with the Shaws, as this is relevant to whether the Shaws can be held responsible for Top Tier's trespass. The relevant factors to consider in determining whether a person is an independent contractor or employee are discussed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 and further in *Kirby v. Amalgamated Income Limited Partnership*,

2009 BCSC 1044. These factors include the level of control the employer has over the worker's activities, whether the worker provides his own equipment, whether the worker hires his own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his tasks. These factors are not exhaustive, and the relative weight of each factor depends on the facts and circumstances of each case. The central question is whether the worker is performing services as a person in business on their own account. If so, the person is more likely an independent contractor.

22. I find Top Tier and its crew were independent contractors, rather than employees of the Shaws. Top Tier had its own equipment and crew and were not directly supervised in their work by the Shaws. The evidence before me supports a conclusion Top Tier operated as a landscaping business, independent from the Shaws. None of this is particularly disputed and this conclusion is consistent with the factors and evidence I have summarized above. Namely, Top Tier was hired to do the driveway project, and the Shaws were not providing site supervision or specific instructions about how it was to be completed.
23. Why does it matter that Top Tier was an independent contractor rather than an employee? Generally speaking, an employer can be held vicariously responsible for its employee's conduct, whereas with certain exceptions, a party is not held responsible for the negligence or trespass of an independent contractor the party reasonably hired to do work.
24. In *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 SCR 1145, Madam Justice McLachlin's conclusion was that a court (or CRT, in this dispute) must examine the relationship between the parties and ask whether it possesses elements that make it appropriate to hold a defendant liable for the negligence of its independent contractors. In *Lewis*, which involved highway maintenance, this involved a discussion of whether a duty can be delegated or whether it is non-delegable. Where there is a strict statutory duty to do a particular thing, then a party

cannot escape liability by delegating the job to an independent contractor. There is no relevant statutory duty in this dispute.

25. The court's majority in *Lewis* held at paragraph 19:

In some circumstances, the duty to take reasonable care may well be discharged by hiring and, if required, supervising a competent contractor to perform the particular work. The standard of reasonable care is met by exercising reasonable care in the selection and, in some situations, the supervision of an independent contractor qualified to undertake the work. If this is done, then the principal will usually not be held liable for injury caused by the negligence of the independent contractor.

26. In the circumstances here, I find that the task of building a residential driveway expansion is not a non-delegable duty such that the Shaws would be held liable for the negligence of their independent contractor, Top Tier. There is also no inherent harm or risk in the task, which are other factors discussed at paragraph 51 in *Lewis* that might give rise to a non-delegable duty.

27. Westridge argues that the Shaws were negligent for failing to ensure "proper supervision" of Top Tier and for failing to provide "adequate directions". I find in the circumstances the Shaws acted reasonably in hiring Top Tier, and I note Westridge has provided no evidence that the Shaws should have known Top Tier would trespass or any argument that it was an underqualified business. So, I find the Shaws cannot be held responsible for Top Tier's negligence or trespass. As Top Tier and Mr. Dyck are not parties to this dispute, I make no findings or orders about their responsibility for Westridge's claims.

28. Given my conclusion that the Shaws cannot be held responsible for Top Tier's trespass, I find I do not need to address in any detail Westridge's claimed damages. I find Westridge's claims against the Shaws must be dismissed.

29. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to the recovery of their CRT fees. The Shaws did not pay fees. As Westridge was unsuccessful, I dismiss its claim for reimbursement of CRT fees. No dispute-related expenses were claimed.

ORDER

30. I dismiss Westridge's claims and this dispute.

Shelley Lopez, Vice Chair