Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Burgess v. Biggan*, 2020 BCCRT 934

B E T W E E N :

LLOYD BURGESS and JANINE BURGESS

APPLICANTS

A N D :

STEWART BIGGAN

RESPONDENT

A N D :

LLOYD BURGESS and JANINE BURGESS

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Rama Sood

INTRODUCTION

1. The applicants, Lloyd Burgess and Janine Burgess, and the respondent, Stewart Biggan, own adjoining properties. This dispute is about an easement that permits Mr. Biggan to use a roadway on the applicants' property to access his own property.

2. The same easement was addressed in an earlier decision by the Civil Resolution Tribunal (CRT) in *Mason v. Burgess*, 2019 BCCRT 340. The applicant in that case, Jacqueline Mason, is Mr. Biggan's wife. The decision is discussed in further detail below.

3. The applicants in this dispute say they did some maintenance work on the roadway after Mr. Biggan refused to do so. They seek $1,806 for their out of pocket expenses. They also seek orders for Mr. Biggan to maintain and regularly service the roadway under the easement agreement terms.

4. The applicants also say Mr. Biggan dug a hole on their property for a sign pole and poured cement in it without their consent. The applicants seek $570.16 for the cost of removing the cement. They also say Mr. Biggan vandalized their property and seek a written apology. The applicants also seek an order that the parties are each responsible for clearing their own debris from the roadway.

5. Mr. Biggan denies the applicants' claims. He filed a counterclaim and says the applicants have removed his road sign and harassed his family, guests, and contractors. He seeks orders for the applicants to contribute towards the cost of a new road sign, and to stop their harassment. He also says the applicants have made alterations to the roadway that have made it dangerous and seeks orders preventing the applicants from further disturbing the roadway and also reimbursement for the cost of a truckload of gravel.

6. The applicants are self-represented. Mr. Biggan is represented by his wife, Jacqueline Mason, who as mentioned, was the applicant in *Mason*.

JURISDICTION AND PROCEDURE

7. These are the CRT's formal written reasons. 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.

8. The CRT 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.

9. 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.

10. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

11. As a preliminary issue, I considered whether the principle of *res judicata* (an issue has already been decided) should apply since the CRT considered the interpretation of the easement agreement in *Mason*. A Notice of Objection was filed in *Mason*, and so it is unenforceable and non-binding under the CRTA. Although I will be considering the same clauses, the facts are different and so I find the issues in this dispute are not *res judicata*.

ISSUES

12. The issues in this dispute are:

a. Whether Mr. Biggan did not maintain the roadway under the terms of the easement agreement, and if so, what is the appropriate remedy,

b. Whether Mr. Biggan placed a road sign on the applicants' property,

c. Whether either party vandalized the other's property,

d. Whether the applicants should be ordered to stop the alleged harassment of Mr. Biggan or others,

e. Whether the applicants breached the easement agreement by grading the roadway, and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

13. In a civil claim such as this, the applicants must prove their claim, on a balance of probabilities. Mr. Biggan bears the same burden in his counterclaim. While I have reviewed the parties' evidence and submissions, I have only referenced the evidence and submissions as necessary to give context to my decision.

Previous dispute

14. I agree with the CRT member's summary in *Mason* of the parties' background and I have repeated it here with appropriate modifications. As mentioned above, the parties own neighbouring properties. In 2004, the prior owners of the 2 properties entered into an easement agreement, which is registered on the applicants' title. The easement runs with the land, meaning it binds the parties even though they were not the original parties to the easement agreement. The easement area is a 20 meter wide roadway that connects Mr. Biggan's property to the public road, via the applicants' property.

15. In *Mason*, the CRT member determined that Mr. Burgess breached the easement agreement by installing a cattleguard, fence, and gate without obtaining written consent from Ms. Mason. The CRT ordered that the cattleguard, fence, and gate must be removed at Mr. Burgess's expense, up to a maximum of $2,088.06.

Condition of roadway

16. In this dispute, the applicants say the roadway has significant ruts and erosion. The applicants did not state how long the roadway was in that condition. They say they notified Mr. Biggan several times from June to September 2019 to maintain the roadway but he did not respond. The applicants also say Mr. Biggan has been violating the easement agreement for years by not cooperating or reimbursing for maintenance expenses or performing the necessary maintenance.

17. The applicants say Mr. Biggan must maintain the roadway according to the easement agreement. They say they had to rent a grader and a bulldozer to grade the roadway themselves because Mr. Biggan refused to maintain it. They produced invoices totaling $2,541 for equipment rentals.

18. Mr. Biggan admits when he bought his property in 2014 the roadway was "in deplorable condition" and had ruts, potholes, and weeds. He also says it was narrow and uneven. He says he repaired parts of the roadway and it has vastly improved since then. He says he and his neighbours maintain the roadway year round and keep it in reasonable condition so that it is safe for himself, family, friends, construction workers, and emergency personnel to use.

Is Mr. Biggan responsible for maintaining the roadway?

19. Clause 4 of the easement agreement states that the transferee (in this case Mr. Biggan) is responsible for maintaining the easement area roadway in reasonable condition at all times. He must also cooperate with other users about such maintenance. In *0730729 B.C. Ltd. v. Shoker and Shoker*, 2007 BCSC 540 at paragraph 24, the court referred to the *Canadian Oxford Dictionary, 2d ed.* and defined "maintain" to mean "to cause to continue, keep up, and preserve". Based on this definition, I find that Mr. Biggan must keep up the roadway in reasonable condition, keeping in mind its condition when the easement was created in 2004.

20. Has the roadway been maintained in reasonable condition? I find the applicants have not proved that the roadway's condition has deteriorated since the easement

was created. Although the parties provided numerous photographs of the roadway from 2006 to October 2019, I find I cannot determine whether its condition has changed. I find assessing the roadway's condition and whether it requires maintenance is outside the knowledge and experience of the ordinary person (see *Bergen v. Guilker*, 2015 BCCA 283).

21. The applicants provided a May 7, 2020 statement from a road maintenance supervisor as an expert opinion about the roadway's condition and annual maintenance recommendations. The applicants redacted the writer's name and contact information. Mr. Biggan objects to the statement because of the redactions. He also says a road maintenance supervisor is not a qualified expert and the roadway should be assessed by a civil engineer.

22. I give the statement no weight because it does not comply with CRT Rule 8.3(2). Rule 8.3(2) states that an expert must state their qualifications in any written expert opinion evidence. I find this includes the writer's name. The applicants say they redacted the writer's information to prevent Mr. Biggan from contacting the writer without the applicants' knowledge. The applicants say they are prepared to provide the CRT with the original statement if the writer's name is withheld from Mr. Biggan. The CRT Rules do not permit me to withhold an expert's name from another party and so I cannot accept the applicants' condition.

23. Even if the statement met the Rule 8.3(2) requirements, I find it only addressed the roadway's current condition and did not state whether the roadway's condition has changed since 2004 or even more recently. For this reason, I find it would not have been helpful. Since the applicants have not proved the roadway required maintenance, I dismiss their claim for the cost of equipment rental.

24. The applicants also claim that Mr. Biggan must hire a grader to maintain the easement area driveway at least twice annually, and as needed and that Mr. Biggan remove snow from the easement area driveway and add sand or gravel as needed throughout the year. An order requiring someone to do something is known in law as "injunctive relief". Injunctive relief is outside the CRT's small claims jurisdiction,

except where expressly permitted by section 118 of the CRTA. Although the CRT can make an order for specific performance of an agreement relating to personal property or services under section 118(1)(c) of the CRTA, the easement agreement does not provide details about how the roadway is to be maintained or describe a maintenance schedule. I find there is no relevant CRTA provision here that permits me to grant the injunctive relief.

Mr. Biggan's road sign.

25. The parties agree Mr. Biggan attempted to install a metal road sign that stated Mr. Biggan's address and a warning to use the roadway at the driver's own risk (metal sign) and the applicants removed it. The applicants say Mr. Biggan dug a hole or "pit" for the metal sign on their property and filled it with cement to anchor the metal sign's pole. The applicants say this breached clause 5 of the easement agreement. Clause 5 states that written consent is required from both parties to excavate, drill, install, or construct any pit, well, or foundation on or under the easement area. I find clause 5 does not apply because the applicants' photographs do not show the hole was dug in the roadway but instead, beside it. However, this still leaves the question of whether the hole was dug on the applicants' property.

26. Mr. Biggan denies he placed the pole on the applicants' property. He says he installed it on the side of the highway where it meets the roadway, which he says is provincial land, after obtaining a permit from the Ministry of Transportation and Infrastructure (MTI). Mr. Biggan did not provide a copy of the permit. However, I find this does not affect my decision since MTI is not contesting whether the metal sign can be placed beside the highway.

27. Was the hole dug on the applicants' property? The applicants provided photographs of survey markers near the metal sign. Mr. Biggan alleges the applicants moved the survey markers and "staged" the photographs. However, I find I cannot determine from the photographs whether the hole was on the applicants' property or the soft shoulder of the highway because the photographs do not clearly show the applicants' property boundaries.

28. I now turn to Mr. Biggan's claim that the applicants should not have removed his metal sign because it was on provincial property and he had a permit. I find the burden is on Mr. Biggan to prove that the metal sign was placed on provincial property. Mr. Biggan submitted a May 2016 survey. The hole's location was handwritten onto the survey and showed it was on the highway. The applicants disagree with the location. I find the survey is not objective evidence of the hole's location since Mr. Biggan or Ms. Mason added the hole's location. As stated above, I cannot tell based on the evidence before me if the metal sign and pole was installed on the applicants' property or on the highway's soft shoulder. And so, I find Mr. Biggan has not met the burden and I dismiss his claim as well.

Vandalism to the applicants' property.

29. The applicants say Mr. Biggan painted his address on their fence post, rails, and also on a "Private Drive" sign which was stapled to a wooden utility pole. The applicants say to the best of their knowledge, Mr. Biggan was the most likely person to do this, but did not suggest any other names. The applicants seek $5.59 for the cost of replacing the sign and a written apology. Mr. Biggan denies he painted anything on the applicants' property.

30. Faced with conflicting evidence from the parties, it is impossible to know what truly happened. As noted above, the burden is on the applicants to prove on a balance of probabilities that Mr. Biggan painted the numbers on their fence post and sign. I find they have not met that burden on this issue. Therefore, I dismiss the applicants' claim.

31. I note that even if I had found Mr. Biggan had painted the numbers, I would not have ordered him to apologize since this is a form of injunctive relief and, as stated above, I do not have jurisdiction under section 118 of the CRTA to grant this relief.

32. The applicants also allege either Mr. Biggan, his family, or his friends have left horse droppings, garbage, or debris on the roadway. The applicants provided photographs that they say are of horse droppings on the roadway and also of a

person riding a horse on the roadway. Other than this, they did not provide any proof of other debris. They seek an order that any party using the roadway must remove any feces, garbage, or debris immediately.

33. Mr. Biggan says there are many wild animals that also leave droppings on both parties' properties since they are in a rural area. He also says the applicants have used the area around the roadway for pasturing cows and horse droppings are no worse than cow dung or other animal droppings. I find the applicants have not shown that the horse droppings are excessive or have affected the roadway's use. They have also not provided any supporting evidence that Mr. Biggan, his family, or friends have left other garbage or debris on the roadway. Also, the order the applicants are requesting is a form of injunctive relief. As stated above, I do not have jurisdiction under section 118 of the CRTA to grant this form of relief. So, I dismiss the applicants' claim.

Harassment

34. Mr. Biggan requested orders that the applicants stop harassing him, his family, neighbors, guests or family on horseback, or spooking his horse by driving a motorcycle up and down the easement road. Although I am not bound by it, I agree with the CRT's decision in *Hallmark Carpets (93) Ltd. v. Kenan Kilic (dba Keenan Associates Home Services)*, 2020 BCCRT 259 at paragraph 29 that this is a form of injunctive relief and I do not have jurisdiction under section 118 of the CRTA to grant this relief. For this reason, I decline to grant the requested orders.

Ditches

35. Mr. Biggan says that the applicants graded the roadway in October 2019 and also removed the gravel Mr. Biggan had spread on it. He also says the applicants widened the roadway by filling in some of the nearby ditches. He says the roadway is left covered in loose dirt that turns to thick mud after heavy rain, which makes it dangerous. Mr. Biggan says the applicants should remove the dirt they used to fill in

the ditches. He also seeks $250 for the truck load of gravel he says the applicants took.

36. The applicants admit in October 2019 they graded the roadway and altered the ditch drainage to make the roadway more accessible for their family and friends. However, the applicants deny they added to or removed any materials on the roadway or the ditches. They say they used the grader to spread out the gravel Mr. Biggan had added to the roadway more evenly. They also deny the roadway has become more dangerous.

37. I agree with the CRT's member's observation in *Mason* at paragraph 19 that the easement places a significant restriction on what the applicants can do without Mr. Biggan's written consent. Under clause 6 of the easement agreement, the applicants cannot hinder or interrupt Mr. Biggan's roadway use. I find grading the roadway has disrupted Mr. Biggan's roadway use, contrary to clause 6.

38. Mr. Biggan seeks $250 for the cost of 1 truckload of gravel. The parties disagree about whether the applicants spread the gravel or removed it and I find there is an evidentiary tie since there is no persuasive evidence either way. Faced with conflicting evidence from the parties, I am unable to determine what happened to the gravel. As noted above, the burden is on Mr. Biggan to prove his counterclaim on a balance of probabilities and I find he has not done so. As a result, I dismiss his claim for compensation for the gravel.

39. Mr. Biggan also seeks orders that the applicants not grade over or remove gravel he adds to the roadway, that the applicants remove dirt from the ditches, and they comply with the easement agreement in the future. Again, I find these are forms of injunctive relief and I do have jurisdiction to make these orders. So, I dismiss these claims as well.

40. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general

rule. Since neither party was successful, I find each party should bear their own CRT fees.

ORDER

41. I dismiss Lloyd Burgess and Janine Burgess's claims, Stewart Biggan's counterclaims, and this dispute.

Rama Sood, Tribunal Member