Civil Resolution Tribunal

Date Issued: November 2, 2021

File: SC-2021-001824

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Liu v. Stevens,* 2021 BCCRT 1158

B E T W E E N :

JANE LIU

**APPLICANT**

A N D :

PENELOPE STEVENS

**RESPONDENT**

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**REASONS FOR DECISION**

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Tribunal Member: Shelley Lopez, Vice Chair

## INTRODUCTION

1. This dispute between neighbours is about tree roots and driveway damage. The applicant, Jane Liu, says she has tried to have her neighbour, the respondent Penelope Stevens, address her poplar trees' growth since 2005. Ms. Liu says in the

last 2 years, her cement driveway slab has lifted and her foundation has become unstable. Ms. Liu hired Davies Contracting (Davies) to resurface her damaged driveway, during which process the poplar trees' roots were identified under her driveway. Ms. Liu claims $4,921.87 in damages for Davies' work.

2. Mrs. Stevens says the tree roots were already long established in a downward direction before development began on Ms. Liu's property. Mrs. Stevens says Ms. Liu's driveway sits on a retaining wall 5 feet above the trees' base, and so the roots did not grow upwards. Mrs. Stevens also says Ms. Liu has not proved the roots in question are from Mrs. Stevens' poplar trees, and says it is more likely from a large fir tree on the other side of Ms. Liu's house. Mrs. Stevens further says Ms. Liu should not have built so close to established trees and then complain about impracticality.

3. Ms. Liu is self-represented. Mrs. Stevens is represented by a family member, RG.

## 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. CRTA section 39 says 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 find I can fairly hear this dispute based on the submitted evidence and through written submissions.

6. Under CRTA section 42, 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 CRTA section 118, 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 CRT considers appropriate.

8. I note the issues with the tree roots potentially date back to 2005. *In K&L Land Partnership v. Canada (Attorney General)*, 2014 BCSC 1701, the BC Supreme Court held that a nuisance continues so long as the activity causing the nuisance is ongoing. While K&L dealt with a previous version of the *Limitation Act*, I find that the same reasoning applies to the current version, and therefore to this dispute. So, as the tree root issue is ongoing, I find Ms. Liu's claim is not time barred and note Mrs. Stevens does not argue it is out of time.

## ISSUE

9. The issue is whether Mrs. Stevens is responsible for the claimed tree root damage to Ms. Liu's property, and if so, what is the appropriate remedy.

## EVIDENCE AND ANALYSIS

10. In a civil claim like this one, the applicant Ms. Liu has the burden of proving her claim, on a balance of probabilities (meaning "more likely than not"). I have only referenced below what I find is necessary to give context to my decision.

11. In short, Ms. Liu says roots from Mrs. Stevens' poplar trees encroached on Ms. Liu's property and significantly damaged her large cement slab driveway.

12. I find that the photos in evidence show the damaged driveway, including buckling and cracks. Other photos and video show the driveway partially under repair with

the tree roots directly under the slab, and in some cases clearly having lifted up the slab.

13. I accept the tree roots caused the driveway's buckling and cracks, which is not disputed. Based on the photos and video, I accept Ms. Liu had to have her driveway broken up, the tree roots removed, and the driveway replaced.

14. At issue in this dispute is whether the removed tree roots came from Mrs. Stevens' trees, and even if so, whether Mrs. Stevens is responsible for the damage.

15. RG alleges the roots are not from her poplar trees and instead suggests they are from a different neighbour's fir tree. I disagree. I find expert evidence is required to determine the source of the roots that damaged Ms. Liu's driveway. Ms. Liu submitted a July 28, 2021 expert opinion from Dr. Julian A. Dunster of Dunster & Associates, Environmental Consultants Ltd. Dr. Dunster's report shows they are a registered consulting arborist and tree risk assessor, since 1999 and 2013 respectively. I accept Dr. Dunster's opinion under the CRT's rules.

16. Dr. Dunster examined Ms. Liu's property and from a distance (so as not to commit a trespass) neighbouring properties including Mrs. Stevens'. Dr. Dunster concluded the roots removed from Ms. Liu's driveway are poplar roots, which Dr. Dunster said are known to have invasive roots systems. Dr. Dunster concluded that given the "close proximity" of Ms. Liu's driveway to the base of Mrs. Stevens' poplar trees, and the "clear evidence of the roots" under the existing slabs as they were being removed, Dr. Dunster had "no doubt" the roots belonged to those poplar trees "and nothing else". Dr. Dunster specifically addressed the fir tree adjacent to Ms. Liu's property and concluded that tree was too far away and there was "no possibility" its roots would affect Ms. Liu's driveway.

17. In short, I accept Dr. Dunster's opinion and I find that Mrs. Stevens' poplar tree roots damaged Ms. Liu's driveway. I have no contrary expert opinion in evidence. I do not accept RG's unsupported assertion that the damage could not have been caused by Mrs. Stevens' poplar trees due to the fact Ms. Liu's retaining wall and

driveway are about 2 feet higher than the base of the poplar trees that are directly adjacent to it. RG is not an expert and in any event is not sufficiently neutral given his role as Mrs. Stevens' representative. Dr. Dunster also expressly noted from their site visit that the trees' base was about 60 cm (almost 2 feet) from the retaining wall's base, and so Dr. Dunster clearly did not find the driveway's height a relevant factor.

18. I also do not accept RG's unsupported assertion that there are other poplar trees in neighbouring yards that could have been under Ms. Liu's driveway, and note RG did not identify any such trees. Dr. Dunster did a site visit and also included in their report a drone overview shot of the parties' and other neighbouring properties and so I find it likely Dr. Dunster would have identified any other relevant poplar trees.

19. RG also argues Ms. Liu's claim is only an attempt to get the poplar trees removed. Dr. Dunster said the removed roots will be part of an extensive root system, and that the roots will keep encroaching and additional driveway damage may recur. It is true Dr. Dunster recommended removal of the poplars and their stumps. In any event, Ms. Liu does not seek an order for their removal in this dispute, and the CRT has no jurisdiction under the CRTA to grant such injunctive relief in any event. That would be a matter for the BC Supreme Court. This dispute is about compensation for property damage.

20. I turn then to the applicable law and find the law of nuisance applies to this dispute. A nuisance is the substantial (non-trivial) and unreasonable interference with the use and enjoyment of property (see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraph 18). Where a respondent does not actively create the nuisance, that respondent can only be found liable in nuisance if they knew or ought to have known about the potential nuisance through the exercise of reasonable care and failed to take reasonable steps to remedy the situation (see *Lee v. Shalom Branch #178*, 2001 BCSC 1760).

21. When there is actual physical damage (such as the driveway damage in this dispute), there is a strong indication that the interference is unreasonable (see *Murray v. Langley (Township)*, 2010 BCSC 102, paragraph 33, citing *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64). The onus is then on the respondent to establish that the use of the land was reasonable (see *Murray*, paragraphs 36 and 37). I find Mrs. Stevens has not done so.

22. Contrary to RG's submission, I find it does not matter if the trees pre-existed Ms. Liu's home purchase, though I note Ms. Liu's evidence is that the trees were there when she bought the home and undisputedly grew significantly over the years.

23. In *Lee v. Shalom*, the court dismissed the plaintiff's claim for damage caused by the roots of a tree because the court found that the defendant had taken active steps to remove the nuisance, by not only cutting down the tree but building a retaining wall. In the dispute before me, there is no evidence Mrs. Stevens did anything to address the poplar trees' growth, despite Ms. Liu raising damage concerns about overhanging branches in a 2016 letter, which is in evidence. I also accept Ms. Liu's undisputed evidence that she repeatedly expressed concerns to Mrs. Stevens earlier, dating back to 2005.

24. *Hayes v. Davis*, 1991 CanLII 5716 (BCCA) involved a nuisance claim for damages after 2 trees fell onto the neighbour's property injuring one of the occupants. The court found that the trees' owner had been warned about 5 to 6 months before the incident about a cluster of trees significantly bending as if they were going to snap, including the 2 that fell. The trees' owner took no active steps to address the concerns. The court's majority agreed with the trial judge that the owner knew or ought to have known that the trees posed a hazard and so was liable for damages as the owner took no steps to prevent the known and foreseeable risk.

25. I find this dispute similar to the facts in Hayes. I find Mrs. Stevens knew or ought to have known her poplar trees' growth, so close to the property line shared with Ms.

Liu, could damage Ms. Liu's property. I find the driveway's damage by Mrs. Stevens' trees was both substantial and unreasonable.

26. RG argues it is "preposterous" to expect Mrs. Stevens to prune the roots of the poplar trees, given the proximity of Ms. Liu's retaining wall that supports her driveway. I find that is not the issue here. Rather, what matters is that Mrs. Stevens allowed her poplar trees, an invasive species, to grow unchecked over time. How she addresses future problems is not the issue before me in this decision.

27. In summary, I find Mrs. Stevens' poplar tree roots caused substantial and unreasonable damage to Ms. Liu's property. I also find Mrs. Stevens knew or ought to have known of the potential for damage. I find Ms. Liu is entitled to damages.

28. Ms. Liu says she has limited her claim to 50% of the driveway's total $9,843.75 repair cost. She submitted a February 16, 2021 receipt from $6,056.25 from Davies for the driveway repair. Ms. Liu claims $4,921.87, which is just under the CRT's $5,000 small claims monetary limit. I allow the $4,921.87.

29. The *Court Order Interest Act* (COIA) applies to the CRT. I find Ms. Liu is entitled to pre-judgment interest under the COIA on the $4,921.87. Calculated from the February 16, 2021 repair date to the date of this decision, this equals $15.73.

30. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. Ms. Liu was successful and I find is entitled to reimbursement of $200 in paid CRT fees. Ms. Liu also claims $840 in dispute-related expenses, for Dr. Dunster's July 28, 2021 invoice. I relied on Dr. Dunster's report and find this amount reasonable, so I allow it. I note dispute-related expenses are exclusive of the $5,000 monetary limit. As Mrs. Stevens was unsuccessful, I dismiss her claim for reimbursement of CRT fees.

## ORDERS

31. Within 21 days of this decision, I order Mrs. Stevens to pay Ms. Liu a total of $5,977.60, broken down as follows:

    a. $4,921.87 in damages,

    b. $15.73 in pre-judgment interest under the COIA, and

    c. $1,040, for $200 in CRT fees and $840 in dispute-related expenses.

32. Ms. Liu is entitled to post-judgment interest, as applicable.

33. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision.

34. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of BC. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of BC.

Shelley Lopez, Vice Chair