Civil Resolution Tribunal

Date Issued: June 9, 2022

File: SC-2021-006906

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Olesen v. Kidd Real Estate Holdings Ltd.*, 2022 BCCRT 676

B E T W E E N :

AGNER OLESEN

APPLICANT

A N D :

KIDD REAL ESTATE HOLDINGS LTD.

RESPONDENT

A N D :

SLEW FOOT LOGGING LTD.

RESPONDENT BY THIRD PARTY CLAIM

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. The applicant, Agner Olesen, says the respondent, Kidd Real Estate Holdings Ltd. (Kidd) logged four 50-foot spruce trees on Mr. Olesen's property without permission. Mr. Olesen seeks $5,000 in damages. Mr. Olesen represents himself.

2. Kidd disputes that the logged trees were on Mr. Olesen's property and disputes the value of the trees. Kidd is represented by its owner.

3. Kidd also says responsibility lies with the contractor who carried out the logging, Slew Foot Logging Ltd. (Slew Foot). Slew Foot is the respondent by third party claim, but did not file a dispute response and is in default, as discussed below.

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). Section 2 of the CRTA states that 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 the dispute's parties that will likely continue after the CRT process has ended.

5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, the parties in this dispute call into question each other's credibility. Credibility of witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh

the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions.

6. Section 42 of the CRTA says 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, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUES

8. The issues in this dispute are:

    a. Were the 4 felled spruce trees on Mr. Olesen's property?

    b. What are the damages, if any?

    c. Must Slew Foot indemnify Kidd?

EVIDENCE AND ANALYSIS

9. As the applicant in this civil proceeding, Mr. Olesen must prove his claims on a balance of probabilities, meaning more likely than not. Kidd must prove its third party claim against Slew Foot to the same standard. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision. Kidd provided submissions but chose not to provide evidence. Slew Food did not provide evidence or submissions because it did not participate in the dispute.

10. It is undisputed that Mr. Olesen owns 2 adjacent properties that I will refer to as 5044 and 5026. Aerial photos show a dwelling and other buildings on 5044. There appears to be at least one structure, but no dwelling, on 5026.

11. The north side of those properties abuts a property owned by Kidd. Logging and clearing started on Kidd's property in December 2019 to prepare for a residential development. Kidd hired Slew Foot to do that work. None of this is disputed.

12. Mr. Olesen says Slew Foot felled 4 spruce trees on 5026. He says the trees were 50 feet tall, planted in 1968 by Mr. Olesen and his wife. The trees are part of 2 rows forming a corridor along the northern border of Mr. Olesen's 2 properties and Kidd's property. The tree corridor, Mr. Olesen says, served as a windbreak and a natural fence.

13. There is no dispute that Kidd neither sought nor received consent to fell trees on Mr. Olesen's property. Rather, the dispute is about the trees' location and value.

14. Aerial photos from a municipal website show the trees in 2018 and 3 of 4 visible stumps in 2020. From the property lines on the aerial photos, the trees were well within Mr. Olesen's property. Mr. Olesen says he measured the stumps and they are 14 feet from the property line, which is consistent with photos he submitted showing property markers and the stumps.

15. Kidd says the aerial photos are not accurate. Kidd says Albert Koehler surveyed and flagged the property, and Slew Foot said it logging within that area. It says Mr. Olesen must prove his claim with a land survey.

16. Although Mr. Olesen bears the burden of proof, I do not agree that a land survey is necessary here. First, despite saying it obtained a survey before logging began, Kidd did not provide a copy of the survey. When a party fails to provide relevant evidence without a reasonable explanation, the CRT may draw an adverse inference. An adverse inference is where the CRT assumes that a party failed to provide relevant evidence because the missing evidence would not support their case or does not actually exist. I find that an adverse inference is appropriate here. I find that either

Kidd did not obtain a survey, or the survey does not show the 4 felled trees were on Kidd's property.

17. Second, this is not a case where the trees were on or very close to the line dividing the properties. Mr. Olesen says municipal staff told him the property lines on the website aerial photos are accurate to within 1 meter. While that evidence is inadmissible hearsay, I find it unlikely that the lines shown on the aerial photos are out by as much as 14 feet. I accept the aerial photos as reasonably accurate depictions of the property lines and tree locations.

18. I also accept Mr. Olesen's unchallenged photos of the stumps and the property line. I find these photos and the aerial photos together are sufficient to establish on a balance of probabilities that the felled trees were located on 5026. For that reason, I find a survey is not necessary.

19. Trespass to land occurs when one enters onto land in the possession of another without lawful justification (see *Glashutter v. Bell*, 2001 BCSC 1581). Mistake is not a defence to trespass. Given my finding that the trees were on Mr. Olesen's land, I find a trespass occurred.

20. All persons who assist or join in a trespass are deemed to be joint trespassers. Thus, court decisions involving tree-cutting trespass have consistently found the person who hired the tree-cutter responsible (see, e.g., *Ovens v. Kirkman et al*, 2006 BCSC 394, and *Gibson v F.K. Developments Ltd*., 2017 BCSC 2153, and *Glashutter*). Consistent with those decisions and my findings above, I find Kidd trespassed on Mr. Olesen's land and is responsible for any proven damages.

Damages

21. Turning to damages, Mr. Olesen claims $5,000 without putting a specific value on the trees themselves, replacement costs, lost privacy or other factors. He also does not specifically claim punitive damages, which are sometimes awarded in tree-cutting trespass cases to deter and denounce similar conduct in the future.

22. Mr. Olesen says the 4 trees had esthetic value, supplied shade, and were an abatement to the wind. He says spending time outside is less pleasant now as cold winds blow over the property. He says the trees provided homes for birds and pollinating insects that benefit his fruit trees, vegetables, flowers and berries.

23. Mr. Olesen also says the trees provided privacy, which will be even more important when Kidd's lot is developed. He says the loss of privacy reduces the resale value of 5026, although he did not attempt to quantify this, nor did he provide evidence in support.

24. Several BC Supreme Court decisions rely on the "Trunk Formula Method" to assess tree value, but this requires expert evidence from an arborist, which Mr. Olesen did not provide. In the circumstances, I rely on the principle stated in *Glashutter* that compensatory damages serve to provide 2 things: 1) a sum sufficient to pay for the remedial work that a reasonable person with sufficient resources would do to address the loss of the trees had it occurred without fault, and 2) an amount that will compensate fairly for the loss of use and enjoyment of the trees to the extent the remedial work does not completely replace what has been lost.

25. Mr. Olesen's undisputed evidence is that spruce trees have a shallow, wide root system and would struggle to survive transplantation. I accept that special care would have to be taken to avoid damage to the existing trees when digging and planting. I find it would be a significant expense to bring in new, established spruce trees. A less expensive approach might be to plant seedlings, but I do not consider that approach appropriate, given Mr. Olesen says he does not have another 50 years to wait for the seedlings to grow.

26. In *Glashutter*, the court awarded $4,216 for the cost of replanting four fir trees from a "large stand of mature evergreen and deciduous trees" marking a property border. The court added $4,000 for the removal of the 30-foot trees and the corresponding loss of privacy and aesthetic value. The court also awarded punitive damages of $7,000.

27. In *Gibson*, the court awarded $10,000 in general damages for the loss of a single but substantial tree. It was 1 of 4 mature fir trees that provided privacy and shade. The court also awarded $4,500 for the cost of monitoring the nearby surviving trees, and $10,000 in punitive damages.

28. Here, the felled spruce trees are 4 of several, perhaps a dozen or more similar spruce trees on 5026. In that sense, the facts are similar to those in *Glashutter.* However, Mr. Olesen intentionally planted these trees 50 years ago to form a corridor connecting the 2 properties, which is a unique feature. Now, there is a noticeable clearing, creating a gap in the windbreak and privacy screening. I find the privacy impact is less than it would have been had the trees been felled on 5044, where Mr. Olesen's dwelling is. But I find the impact is still significant. These trees are also 50 feet, compared to 30 feet in *Glashutter*. In the circumstances, I find Mr. Olesen is entitled to $5,000 for the removal of the trees and the loss of privacy and aesthetic value. It is not necessary to consider the cost of remedial work or punitive damages because $5,000 is the CRT's small claims monetary limit, and by bringing this claim here, Mr. Olesen has abandoned his claim to anything more.

29. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Olesen is entitled to pre-judgment interest on the $5,000 from December 21, 2019, when I find the tree felling occurred, to the date of this decision. This equals $95.26.

30. 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. I find Mr. Olesen is entitled to reimbursement of $175 in CRT fees. Neither participating party claimed any dispute-related expenses.

31. CRT fees and dispute-related expenses, along with COIA interest, are excluded from the CRT's $5,000 small claims monetary limit.

Third party claim

32. As for Kidd's third party claim against Slew Foot, I am satisfied on the evidence that Slew Foot received the Dispute Notice but did not respond by the deadline set out in the CRT's rules. So, I find Slew Foot is in default.

33. In the Dispute Notice, Kidd said that Slew Foot is responsible for the damage, which I find is a claim for indemnity. Liability is generally assumed in default decisions. As Slew Foot has not participated in this dispute, I find that Slew Foot is responsible to indemnify Kidd for the damages, interest, and CRT fees Kidd is ordered to pay in this dispute. I also find Slew Foot must reimburse Kidd $125 for CRT fees Kidd paid to file the third party claim.

ORDERS

34. Within 21 days of the date of this order, I order Kidd to pay Mr. Olesen a total of $5,270.26, broken down as follows:

    a. $5,000.00 in damages,

    b. $95.26 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175.00 in CRT fees.

35. Within 30 days of the date of this order, I order Slew Foot to pay Kidd a total of $5,395.26, broken down as follows:

    a. $5,270.26 in indemnity for Kidd's obligations to Mr. Olesen, and

    b. 125.00 in CRT fees.

36. Mr. Olesen and Kidd are each entitled to post-judgment interest, as applicable.

37. 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.

38. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. 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 British Columbia. However, under section 56.1(2.1) of the CRTA, a party in default (here, Slew Foot) has no right to file a notice of objection.

Micah Carmody, Tribunal Member