

CANADA / JUDGMENT

Chua v. Jassal

2020 BCCA 283

COURT

British Columbia Court of Appeal

DECIDED

20 October 2020

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2020 BCCA 283 Chua v. Jassal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chua v. Jassal,

2020 BCCA 283

Date: 20201020

Docket: CA46391

Between:

Irene Chooi-Eng Chua, Chooi-Eong Chua and Chooi-Im Chua

Appellants

(Plaintiffs)

And

Harinder Singh Jassal and Harbinder Kainth Jassal

Respondents

(Defendants)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated August 27, 2019 (Chua v. Jassal, 2019 BCSC 1686, Vancouver Docket S164452).

Counsel for the Appellants:

D.F. Hepburn

Counsel for the Respondents:

J.E. Les

S. Flader, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

October 1, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 20, 2020

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Goepel

Summary:

This appeal arises from a dispute between neighbours. The appellants brought an action for damages in contract and trespass arising from a construction project on the adjacent lot. The trial judge dismissed the contract claim on the basis that there had been no agreement on the contractual term asserted by the appellants. The trespass claim was dismissed on the basis that the appellants had consented to the minor subsurface encroachment on their property. Held: The trial judge did not commit any reviewable error in his factual findings. The judgment is varied to award damages of \$2,000 for minor repairs. The balance of the appeal is dismissed.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] The appellants appeal from a judgment dismissing their claim for damages and other relief arising from the repair of a retaining wall between the properties of the appellants and respondents.

- [2] The appellants based their claim in contract and trespass. The theory of the contract claim was that the respondents had failed to abide by an agreement to restore, repair or remediate to its original condition damage done to a fence between the properties, to a concrete pad on the appellants' property, and to a concrete retaining wall on the respondents' property, caused by construction on the respondents' property. The principal assertion was that the respondents had committed to replace a concrete wall that was entirely on the respondents' property with a wall built with poured concrete.
- [3] The trespass claim had two components. The appellants claimed damages for various temporary incursions on their property by the respondents' workmen, and also sought a mandatory injunction requiring the respondents to remove subsurface concrete blocks that intruded from one to six inches onto their property.
- [4] The trial judge concluded that the trespass claims failed because the appellants had either consented to the trespass or led the respondents to believe that it was unnecessary to move the concrete blocks entirely onto the respondents' property. The judge also rejected the contract claim on the basis that while the respondents had agreed to replace the concrete wall that was damaged during construction, they had not committed to do so with poured concrete. The judge concluded that the respondents were prepared to repair the concrete pad and the fence that had been restored, but that it had not been feasible due to the deteriorating relationship between the parties.
- [5] Much of this appeal is based on a disagreement with the trial judge's findings of fact on disputed evidence. I can see no error in the judge's factual conclusions that would warrant appellate intervention. Similarly, it is my view that the judge was entitled on the evidence to conclude that the respondents did not have a contractual obligation to rebuild the retaining wall in concrete.
- [6] Although the conclusions of the judge as to why the concrete pad and fence were not repaired were reasonable and supported by the evidence, the respondents did commit to make those repairs, and I would vary the judgment and award damages in the amount of \$2,000 for that purpose. Subject to that variation, I would dismiss the appeal.

Background

- [7] The parties are neighbours in Burnaby. The appellants ("the Chuas") own a lot, which they purchased in 2000. The respondents ("the Jassals") own the adjacent lot, which they purchased in 2005. Toward the back of the lots, there is a difference in elevation. When the Chuas purchased their property, a low concrete retaining wall was in place between the two lots. The retaining wall is near the boundary between the two lots, but it was and remains entirely on the property of the Jassals.

- [8] In 2010, the Chuas demolished the old house on their property and built a new house. As part of their construction, they took down the wire mesh fence between the lots and replaced it with a panelled wooden fence. The new fence was built on top of the existing retaining wall.
- [9] In 2015, the Jassals decided to demolish the existing house on their property and build a new house. The trial judge described the location and construction of the retaining wall in the spring of 2015 in this way:
- [9] The retaining wall at that time consisted mostly of concrete. The concrete portion of the retaining wall extended from the southern boundary of the two properties northward, always on the Defendants' side of the common property line, to a point a little more than halfway toward the north boundary of both properties. From there, it appears that the retaining wall consisted of wooden railway ties. It ended altogether well before the north boundary of the two properties because there was no need for a retaining wall at the north end. That was because the land on both properties toward the north end was at approximately the same elevation.
- [10] In the course of building the Jassals' house, part of the concrete retaining wall came down. To repair the damage, it was necessary to take down two or three panels of the wooden fence and also to access the Chuas' property. The Jassals assumed that the retaining wall and fence were on the property line, and asked Ms. Chua for her consent to the removal of the panels of the wooden fence. Ms. Chua gave her consent, but requested a letter from the Jassals committing to repair any damage. The Jassals provided the appellants with a letter dated April 7, 2015 in the following terms:

We agree that Harry and Harbinder Jassal of [address] will replace and/or repair the fence between our homes.

As well, any damage that may occur to the concrete pad closest to the foundation wall as a result of the excavation, will be replaced or repaired during the course of construction.

- [11] As construction proceeded, the Jassals became aware that the retaining wall was on their property, not straddling the property line between the two lots, as they had assumed. The evidence was not clear as to when the Jassals realized this, but it appears to have been in mid-May. In a May 2, 2015 message to Ms. Chua, Mr. Jassal described his intention to erect and reinstate the retaining walls "on our property line." By the time of his subsequent message on May 20, 2015, it was apparent that Mr. Jassal now realized the retaining wall and fence were not on the property line, but wholly on his property. In this message, he advised Ms. Chua as follows:

Hello Irene, the fence is going back up today. That retaining wall was 100% in my property. I will attach a picture of the sight [sic] plan. Your old fence that was on the retaining wall was not on the centre of the property line. Now the fence will be on centre of the property line. The fence will go up first and then we will fix your concrete pad.

- [12] The Jassals decided it was not necessary to replace the retaining wall with poured concrete, and instead replaced a portion of the wall with interlocking concrete blocks, stacked three tiers in height, and another portion with wooden railways ties. When that work was completed, they placed the wooden fence back on the retaining wall. During the excavation, some damage had occurred to the concrete pad located on the appellants' property that abutted the retaining wall, as referenced in Mr. Jassal's May 20 message.
- [13] The trial judge described the location and construction of the retaining wall at the conclusion of the repairs in this way:
- [12] The Jassals took steps to repair the retaining wall without using poured concrete. The repaired wall now consists of the old concrete wall from the southern boundary of both properties proceeding north about a fifth of the way on the Jassals' side of the common property line. The next portion of the repaired wall, proceeding north for roughly the next fifth of the way north, consists of 4-inch by 4-inch wooden railway ties. After that, the next portion running further north is the most substantial portion of the repaired wall, consisting of stacked interlocking concrete blocks, which on the available evidence appear to measure approximately 2 feet by 2 1/2 feet, and by 4 or 5 feet horizontally. These concrete blocks are stacked three tiers in height. The more northerly portion of those blocks was initially stacked four tiers in height, but the fourth tier protruded above ground level, and the Defendants removed that fourth tier at the Plaintiffs' request. Approximately 15 feet is the length of the concrete block area, north to south, according to Exhibit 2, a survey drawing, although I also would observe that from the photograph at Exhibit 3, tab 6, page 8, the concrete blocks appear to extend further than 15 feet north to south. They appear to give support adjacent to approximately the full east side of the Plaintiffs' house.
- [13] The north end of the old concrete retaining wall had been at roughly the midpoint of where the concrete blocks are today.
- [14] The interlocking concrete blocks are entirely below the surface, but extend slightly into the appellants' property. The trial judge found that the extent of subsurface encroachment was a maximum of six inches at the north end of the blocks, tapering to a little over an inch at the south end of the blocks.
- [15] There was considerable communication between the parties during this construction process, but regrettably much miscommunication as well. The Chuas were dissatisfied with the results of the repairs and brought action against the Jassals for damages and a mandatory injunction requiring the Jassals to remove the encroaching concrete blocks from the Chuas' property.

The Appellants' Claim

- [16] The appellants' claim was filed May 17, 2016, approximately one year after the construction and repair of the retaining wall and replacement of the fence. At that time, the claim was framed in trespass -- both temporary trespass and continuing trespass. The continuing trespass was described as the continuing encroachment of the interlocking concrete blocks onto a portion of the appellants' property. The temporary trespass was described in this way:
7. In or around April 2015, the Defendants requested permission to temporarily encroach upon the Plaintiffs' Property in order to complete the excavation work of the Construction. The Plaintiffs agreed on the condition that the Plaintiffs' Property and wooden fencing running along or near the property line be returned to their original condition promptly upon completion of the excavation.
- [17] Approximately one year later, the appellants amended their notice of civil claim to include a claim in contract. The contract claim was described in this way:
13. In addition or in the alternative, by reason of the facts alleged at paragraph 7, and subsequent oral and written representations made thereafter, the Defendants were contractually obligated to restore, replace and/or remediate, to their original condition, all damage done to the fence, to the Plaintiffs' Property, and to the concrete retaining wall along the eastern property line. Despite repeated demands, the Defendants have failed and or refused to perform the promised obligations or alternatively have failed to perform such obligations in the manner agreed upon by the parties.
- [18] In their amended response, the Jassals denied "that they made an agreement with the plaintiffs, as alleged or at all."

The Trial Judgment

- [19] Following a five-day trial, the trial judge dismissed the Chuas' claim, with reasons indexed at 2019 BCSC 1686. He dismissed the contract claim on the basis that the appellants had not established a contractual obligation on the Jassals to replace the retaining wall with poured concrete. The judge's analysis was as follows:
- [11] The Plaintiffs allege that the Jassals entered into an agreement with them that the repaired retaining wall would be made of concrete. I do not find that the parties reached such an agreement. None of the emails or texts authored by the Jassals committed them to offering or accepting a concrete retaining wall for replacing the portion of the old wall that came down. Nor did any of the conversations between the parties demonstrate such an agreement. There was never a meeting of the minds on that point, which would have been essential for there to be contractual rights in that regard.

- [20] On the trespass claim, the judge found that when the slight encroachment of the concrete blocks had been discovered, the Jassals had offered to move the blocks back six inches, but the Chuas' representative had advised it was not necessary. The judge made the following findings:
- [16] No evidence was led to show that this slight intrusion onto the Plaintiffs' property in any way diminishes either the utility or the value of the Plaintiffs' property. The Plaintiffs never built their own retaining wall on their property when they built their house in 2010. The Plaintiffs are not burdened with the shared cost, or intrusion onto their property, of a common retaining wall running the length of the common property line, which would have taken land from both sides. Furthermore, I accept the Defendants' evidence that when the slight intrusion was detected, they offered to move the concrete blocks a few inches so that no part of them was on the Plaintiffs' property, but the Plaintiffs led the Defendants at that time to reasonably believe that they did not require that so long as the fourth tier was removed, which it was. When the Defendants made the offer to relocate the blocks, the necessary equipment to adjust the blocks was standing by on the property.

The judge did not award any damages for the subsurface encroachment.

- [21] The judge further concluded that the intermittent trespass by the respondents' workmen occurred with the consent of Ms. Chua, and was not actionable.

Issues on Appeal

- [22] The Chuas' appeal is primarily focussed on the findings of fact and mixed fact and law made by the trial judge. They argue that these findings were "based on misunderstandings of the evidence" or were based on "errors of principle or misapplication of the law". They acknowledge that they must establish that the trial judge made palpable and overriding errors in the process of reaching his factual conclusions in light of the standard of appellate review set out in *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, and *Housen v. Nikolaisen*, 2002 SCC 33, and have directed us to several portions of the evidence in an effort to meet this standard.
- [23] The role of an appellate court in reviewing a decision that is based primarily on findings of fact is limited. It was described in *Manjit International Development Ltd. v. Ng*, 2009 BCCA 429, in this way:
- [10] The role of this Court is not to retry the case. This Court is a court of review and of error correction. It does not receive evidence or hear witnesses. That is the role of the trial court. Consequently, this Court will not interfere with findings of fact by a trial judge, absent palpable and overriding error "plainly seen": *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. As stated by the majority in that case:

- [22] ... [Although] it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
- [24] In my opinion, the appellants have not established that the trial judge committed any error in his fact determination. While the evidence was not always consistent, there was evidence supporting each of the material facts found by the judge. With one minor exception that I will identify, I would not interfere with his judgment.

Trespass Claims

- [25] The trespass claim has two components. The appellants say that the respondents' workmen trespassed on their land from time to time, either without permission or with permission that was conditional on the respondents repairing damage that was caused by the construction. As well, the appellants say that the encroaching subsurface concrete blocks constitute a continuing trespass on the appellants' land.
- [26] On the trespass by the respondents' workmen, the trial judge found that the appellants' "cutting of the Plaintiffs' horizontal concrete slab, and the Defendants' compacting of the new fill, and placing aggregate beside the horizontal cut slab, were all done with the Plaintiffs' consent, and therefore are not actionable."
- [27] This conclusion is consistent with the plea in the amended notice of claim that the appellants consented to the trespass by the workmen "on the condition that the Plaintiffs' Property and wooden fencing running along or near the property line be returned to their original condition promptly upon completion of the excavation." There was ample evidence to support the conclusion that the entry onto the Chuas' property was consented to by Ms. Chua, provided any damage was repaired.
- [28] I can see no basis that would justify interference by this Court with the trial judge's conclusion.
- [29] As for the continuing trespass from the subsurface concrete blocks, the judge found that "the Plaintiffs led the Defendants to reasonably believe that the blocks could remain where they were so long as the fourth tier was removed, which it was."

[29]The appellants take issue with this finding. They accept that consent to entry (or what is sometimes called "leave and licence") is a defence to a trespass claim: *Webb v. Attewell* (1993), 88 B.C.L.R. (2d) 1 (C.A.). However, they assert that the appellants did not consent to the encroachment, and that the judge's conclusion to the contrary was a palpable and overriding error.

[30] The finding of the judge was based primarily on evidence of statements made by a Mr. Loscerbo, who was assisting Ms. Chua to resolve the construction issues. Mr. Jassal testified that he discussed the minor encroachment with Mr. Loscerbo and offered to pull the blocks back six inches if Mr. Loscerbo wanted them to, but Mr. Loscerbo advised that if they removed the fourth layer of interlocking blocks, "that should be fine." There were further conversations with Ms. Chua and some evidence that she was deferring to Mr. Loscerbo. Mr. Loscerbo's evidence was that he told Mr. Jassal that the blocks could remain if it was fine with Ms. Chua. The evidence was not clear on what was said and what was intended to be communicated, but there was evidence from which the judge could conclude that the respondents were led to believe that as long as they removed the fourth tier of concrete blocks, it was not necessary to move the remaining blocks six inches off the appellants' property. It was accordingly open to the trial judge to conclude that the appellants had consented to this minor subsurface incursion of the concrete blocks.

[31] The appellants accept that at most, they would be entitled to nominal compensatory damages, but claim exemplary damages on the authority of *Austin v. Rescon Const. (1984) Ltd.*, (1989) 57 D.L.R. (4th) 591 (B.C.C.A.) and *Vancouver Block Co. v. Empire Realty Co.*, 1979 CarswellBC 1768 (B.C.C.A.). However, in both of those cases the entry had been without permission and involved actions that had either resulted in significant financial savings for a commercial builder or were found to constitute "high-handed and reckless inadvertence" to the rights of the neighbouring property owner. The case at bar has none of these characteristics.

[32] In my opinion, it was open to the trial judge on this evidence to conclude that the appellants had consented to the minor encroachment, and that the appellants were not entitled to damages for trespass arising from the subsurface encroachment.

Contractual Claims

[33] The appellants submit that the trial judge mischaracterized their contract claim and failed to resolve the issue of whether the parties had agreed to restore the retaining wall, fence and concrete pad to their original condition. I do not agree.

[34] The central point of disagreement between the parties was whether the Jassals had committed themselves to rebuilding the retaining wall using poured concrete. The judge concluded that the appellants had not made out that case. The evidence was that Ms. Chua wanted a concrete wall, but whether the Jassals had committed to the retaining wall being rebuilt with poured concrete was contested. It was for the trial judge to weigh this evidence

and determine whether the communications between the parties supported the contractual claim being advanced. He concluded that they did not, and it was open to him to come to that conclusion. I see no basis on which this Court could interfere.

- [35] The appellants submit that the judge framed the contract issue too narrowly by focussing solely on the question whether the parties agreed to rebuilding the retaining wall in concrete. It is correct that the claim alleged a contract to replace the fence and repair the damage to the concrete pad, as well as to restore the concrete retaining wall to its original condition. These obligations, however, whether expressed in contractual terms or as conditions for the consent to entry onto the Chuas' property, were never in dispute.
- [36] The trial judge explained how Ms. Chua's insistence on a concrete retaining wall impacted the repairs to the fence and pad:
- [15] The parties agreed that a portion of the horizontal concrete slabs would be cut, parallel to the common property line, in order to properly fill dirt in the area where dirt had fallen away. As the area stands today, the Jassals completed the infill, compacted the soil there, and covered it with aggregate matching pre-existing aggregate further north on the Plaintiffs' property between the horizontal concrete slabs and the wooden fence. The Jassals offered to pour cement where the aggregate is now, but they could never coordinate that work being done with a time that suited the Plaintiffs.
- [18] There are some small deficiencies in the fence today. The Jassals had to leave those deficiencies without repairing them because the Plaintiffs did not want the Jassals' subtrades to be working on the fence at the times when those subtrades were available. For much of the time, the Plaintiffs did not want any further fence repairs until the Defendants installed a concrete retaining wall, which the Defendants never did and never were obliged to do.
- [37] The appellants take issue with this assessment of the evidence, but there was evidence that Mr. Jassal had difficulty complying with Ms. Chua's requirement of a week's notice before work was done on her property. By the time the Jassals were prepared to do the repairs, the relationship between the parties had unfortunately deteriorated. As late as October 2015 Ms. Chua was insisting that a concrete retaining wall be built on the Jassals' property, although no evidence was ever presented that a concrete wall was necessary to protect the Chuas' property.
- [38] The evidence fully supports the judge's conclusion that the Jassals acted reasonably throughout, but that Ms. Chua's insistence that they reconstruct a concrete wall, which they were not obligated to do, created an environment in which further entry onto the Chuas' property to repair the concrete pad was not feasible. The fact remains, however, that damage was done to the concrete pad on the Chua property, and that the Jassals agreed to repair it as well as some minor deficiencies in the fence.

[39] In my view, the judge's findings support the conclusion that the appellants are entitled to damages sufficient to repair the concrete pad and some minor damages for deficiencies in the fence. It is unnecessary to decide whether the obligation accepted by the respondents arose from a contractual obligation or the conditions for entry on the Chuas' property. The evidence at trial was that the concrete pad repairs would cost \$1,530. I would vary the judge's order to award damages in the amount of \$2,000 for the repairs to the concrete pad and the minor deficiencies in the fence. Apart from that, I would dismiss the appeal.

Costs

[40] Although the appellants have achieved some marginal success, they have been unsuccessful on the two more significant issues, the retaining wall and the subsurface encroachment. I would order that each party bear their own costs of the appeal. I would not interfere with the costs order at trial.

Disposition

[41] For these reasons, I would order as follows:

1. The trial judgment is varied and the appellants are awarded damages in the amount of \$2,000.00 representing the cost of repairs to the concrete pad on their property and the deficiencies in the fence on the respondents' property.
2. Subject to this variation, I would dismiss the appeal.
3. Each party should bear their own costs of this appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Goepel"

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