
CANADA / JUDGMENT

Englehart v. Holt

2015 BCSC 156

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 156 Englehart v. Holt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Englehart v. Holt,

2015 BCSC 156

Date: 20150205

Docket: 48055

Registry: Vernon

Between:

Jeffrey Mark Louis Englehart

Plaintiff

And

Mark Gene Holt, Tara Lynn Holt and

Advance Backhoe Ltd.

Defendants

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:

R.M. Moffat

Counsel for the Defendants:

R. Burke

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 15, 2015

Place and Date of Judgment:

Vernon, B.C.

February 5, 2015

Introduction

- [1] This is a decision in respect of costs, following a trial. Reasons for Judgment on the trial are indexed at 2014 BCSC 1969.
- [2] The trial related to the defendants' construction of a road surface on an easement that crosses the plaintiff's property. In the simplest of summaries, the decision requires that the defendants remove those works.
- [3] The plaintiff argues that it should be entitled to its costs at Scale C. In addition, the plaintiff argues that the unit value of those costs should be 1.5 times the value that would otherwise apply to a unit in that scale.
- [4] The defendants say that in the circumstances each party should bear their own costs.

Background

- [5] To provide context for this decision, I will refer to several paragraphs from the decision following the trial, as follows:
- [1] The plaintiff Jeffrey Mark Louis Englehart and the defendants Mark Gene Holt and Tara Lynn Holt are owners of adjacent properties in Vernon, B.C. Advanced Backhoe Ltd. is a private company controlled by the Holts. Prior to any of these parties becoming owners, easements were registered on the properties and these easements affect and attach to the areas known as Parcel "A", "B", "C" and "D".
- [2] This case arises out of a dispute between the parties regarding the defendants' use of an area of land on the plaintiff's property which includes Parcel D. For the purpose of constructing an elevated road, the defendants arranged for a large quantity of fill to be placed on the plaintiff's land, both inside and outside the boundaries of Parcel D.
- [3] This case focusses on the proper interpretation of the easements and whether there was a separate contract between the parties relating to the construction. If the construction was not permitted under the easements or a contract, then the plaintiff claims compensation on the basis of trespass, nuisance, and his property rights.

- [50] Although various remedies are claimed relying on a range of causes of action, the central issue in this litigation is the determination of the limits (particularly limits on the right to raise the terrain) and construction standards on the road work the defendants are able to carry out both outside of and within Parcel D.
- [51] The plaintiff argues those limits are defined by two separate agreements that bind the parties. The first agreement alleged by the plaintiff is an oral contract. He argues that the dialogue with Mr. Holt in September 2009 resulted in a contract that specifically addressed elevation of the proposed road. He says that contract incorporated the terms of Easement 149 in respect of quality and standards of construction. This requires a determination of whether a binding contract was indeed entered into and, if so, what its terms are.
- [52] The second relevant agreement is Easement 149. Obviously it is necessary to interpret Easement 149 to determine what limitations and obligations it creates in respect of elevation and construction standards.
- [57] The plaintiff asserts that the correct interpretation of Easement 149 must take into account the "factual matrix" in existence at the time the contracting parties created the easement. The plaintiff argues that Easements 148 and 149 created identical "in common" rights benefitting both Lot 1 and Lot 4, meaning that the rights conveyed by the easements were to be held in common by both the servient tenement and the dominant tenement and their transferees and assigns. The plaintiff argues that these easements were made to facilitate possible future subdivision and development of either or both Lots 1 and 4. The plaintiff says that clause 3.2 of Easement 149 was created in contemplation of such subdivision and that clause necessarily constrains the height to which any road surface could be raised.
- [58] The plaintiff also says that clause 3.2 requires that any road construction be completed according to public road standards.
- [59] The defendants argue that the terms of Easement 149 are clear and unambiguous and that there is no need to look beyond the language of the easement itself for its interpretation. They say that reading clause 9.3 in conjunction with clause 3.1 makes it clear that there is no constraint on the plaintiff as to the height of the road surface within Parcel D.
- [60] They also argue there is no requirement that the road be built to public road standards.
- [61] Further, the defendants say that the plaintiff's reliance on the "in common" language is flawed. Specifically, the defendants argue that even if the rights and obligations under the easement could be interpreted in the fashion argued by the plaintiff, that interpretation would have only bound the original parties to the easements, not any subsequent parties, including the parties to this litigation
- [163] The defendants Mark Holt and Tara Holt, as the owners of Lot 4 are responsible for remediation of Lot 1 so that any works remaining within Parcel D are in compliance with the interpretation of Easement 149 set out in this judgment.

[164] The area of Lot 1 outside of [Parcel D] is to be returned as nearly as practicable to its condition before the work that is the subject of this litigation. I specifically exclude the plaintiff's driveway from the scope of such remediation work.

Issues and Positions of the Parties

- [6] The plaintiff maintains that he was successful in the litigation. Further, he argues that the case was of "more than ordinary difficulty", as that term is used in Appendix B of the Supreme Court Civil Rules.
- [7] In addition, he references the conduct of the defence in the case as the "unusual circumstances" required to justify the unit value of the tariff items being increased by 50% as permitted by s. 2(5) of Appendix B.
- [8] The defendants argue that the plaintiff lost on essentially all of their arguments, as set out in the notice of civil claim. The defendants acknowledge that the issue of the interpretation of the easement became the central issue during the course of the case, but because it was not the basis upon which the plaintiff pursued its remedies he should be deprived of his costs and each party should bear their own costs.
- [9] Alternatively, the defendants argue that if the plaintiff is entitled to any costs it should be 1/5th of his costs and they should be at Scale B, not Scale C, and there should be no multiplier applied to the unit value.

Analysis

Is the plaintiff entitled to any costs?

[10] Before dealing with the plaintiff's arguments for increased costs, I must first address the defendants' argument that, in the circumstances, each party should bear their own costs. Mr. Burke put it this way in the course of his submissions:

This is a case where the plaintiff has succeeded on a point; the court was asked to construe the easement and did so. We can't quarrel with that but it [the plaintiff] did not succeed on any of the pleadings or arguments that it itself made.

[11] In a general sense, there can be no doubt that the plaintiff was successful. The case was about the defendants' construction of the road surface in the easement area and whether the defendants were permitted to elevate the road surface as had occurred. The allegations by the plaintiff that there was an oral contract that defined how work was to be carried out and the substance of its other arguments all depended on there being an interpretation of the easement itself.

[12] The plaintiff framed its claims in negligence, trespass and breach of contract, but underlying all of those arguments was its allegation that the defendants were not permitted to carry out the work that they did. Both parties argued thoroughly the underlying issue of the interpretation of the easement.

[13] In my view, the plaintiff was substantially successful and should be entitled to recover his costs from the defendants.

Is the plaintiff entitled to costs at Scale C?

[14] Section 2(2)(c) of Appendix B allows for costs to be awarded at Scale C if the proceedings have been of "more than ordinary difficulty". Section 2(3) of Appendix B provides a non-exhaustive list of considerations relevant to assessing difficulty.

[15] The plaintiff says that this case involved difficult issues of fact, law or construction (s. 2(3)(a)) and is of importance to a class or body of persons or is of general interest (s. 2(3)(b)).

[16] Various cases have identified, and more recently applied, a set of considerations to assist in a determination of what scale of costs is appropriate. Counsel referred to *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494 as a relatively recent reference to those principles, which include the following:

- (a) length of trial;
- (b) complexity of issues;
- (c) number and complexity of pre-trial applications;
- (d) whether or not the action was hard-fought with little or nothing conceded along the way;
- (e) the number and length of examinations for discovery;
- (f) the number and complexity of expert reports;
- (g) the extent of the effort required in the collection of and proof of the facts.

[17] I will not review each of those considerations in detail. The plaintiff's submissions touched on each of them, but stressed that the issues were complex, both in fact and in law.

[18] There is no question that the legal issues were challenging. This was in part as a result of the various claims advanced by the plaintiff. The plaintiff, in effect, created a level of complexity.

[19] In my view, the facts were not particularly complex. Certainly, the case took eight days for the evidence to be presented and there were credibility issues, but factually the case was not, in my view, unusually difficult.

[20] Similarly, in my view, the issues themselves were somewhat unique, but ultimately it was a question of interpretation of an easement agreement; again, not of unusual difficulty.

- [21] In the context of the consideration of the number and complexity of pre-trial applications, the plaintiff refers to steps taken to deal with a separate action arising out of the same dispute commenced by the defendants. The parties brought competing applications in respect of that action on July 8, 2013. The defendants sought to have the actions joined for trial, and the plaintiff sought to have it struck as an abuse of process. In my view, the parties have the ability to address the merits and what, if any, costs orders should be made in the context of that case. It is not relevant to costs here.
- [22] The expert reports were referred to in the context of the decision. There were several. In my view, it certainly added to the complexity and no doubt the expense of the case, but they were not unusually difficult in content or number.
- [23] Considering all of the relevant factors in the context of this case this is not a case, in my view, which warrants costs at Scale C. Instead, costs should be at Scale B.

Should there be an increase in the costs, pursuant to s. 2(5) of Appendix B?

- [24] The plaintiff acknowledges that there must be unusual circumstances. In his argument as to costs, he puts it as follows:
57. However, in this matter it is submitted there are "unusual circumstances" which is: (1) the high-handed position taken by Mr. Holt during construction of the embankment (to wit that he had unlimited rights to construct on Lot 1 and Parcel D), and (2) the position taken by Mr. Holt at trial (that he reversed from the essence of his examination for discovery evidence taken in May, 2013). Mr. Holt has been found to be unreliable on any issue.
- [25] The later point is a reference to Mr. Holt's evidence at discovery suggesting that there was an agreement in terms of the parameters of the construction and the road surface, which he denied at trial.
- [26] In my view, the very basis for the law suit is not a justification for increased costs. In other words, Mr. Holt constructed the road surface and that is why the law suit was started. It is not in and of itself a basis to award increased costs. The fact of an inconsistency between evidence at discovery and evidence at trial or an adverse finding of credibility is, again, not, in my view, an unusual circumstance warranting increased costs.

Conclusion

- [27] The plaintiff is entitled to his costs at Scale B, having been successful at trial. Those costs should not be increased, pursuant to s. 2(5) of Appendix B.

"D.A. Betton J."

The Honourable Mr. Justice Betton

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