
CANADA / JUDGMENT

Grant v. Lowres

2017 BCSC 301

COURT

Supreme Court of British Columbia

DECIDED

24 February 2017

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2017 BCSC 301 Grant v. Lowres

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grant v. Lowres,

2017 BCSC 301

Date: 20170224

Docket: S143795

Registry: Victoria

Between:

Robert Bradley Grant and Maureen Anne Grant

Plaintiffs

And

Doreen Susan Lowres and The Owners, Strata Plan No. VIS3901

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment on Costs

Counsel for the Plaintiffs:

K. Doerksen

J. Lee

Counsel for the Defendants:

L.R. LeBlanc

E. Skey

Written Submissions of Plaintiffs and Defendants:

Victoria, B.C.

September 30, 2016

Place and Date of Judgment:

Victoria, B.C.

February 24, 2017

- [1] Following a summary trial application heard in May of 2016, I granted an order in favour of plaintiffs declaring that they were entitled to an easement over lands owned by the defendant Owners of Strata Plan VIS3901, that the defendants had wrongfully interfered with the right of the plaintiffs to enjoy the full and uninterrupted use of the Easement Area, an injunction prohibiting the defendants from interfering with the plaintiffs' use of the Easement Area and further incidental relief directing the defendants to remove at their expense all structures, articles or other items that could interfere with use of the Easement Area.
- [1] A detailed summary of the facts is included in my reasons for judgment issued September 7, 2016 indexed under 2016 BCSC 1654.
- [2] The judgment essentially granted all of the relief sought by the plaintiffs save for an assessment of the damages suffered by the plaintiff for the interference with their free and uninterrupted use and right of access over the easement. The reasons also invited submissions in writing on the assessment of damages.
- [3] Regarding costs, I stated:
- [40] The plaintiffs have been substantially successful and are entitled to their costs. I will also receive submissions in writing on the appropriate scale of costs no later than September 30, 2016.
- [4] Having received submissions in writing, these are my reasons on the assessment of damages and the scale of costs to which the plaintiffs are entitled.

Assessment of Damages

- [5] In the reasons for judgment, I made the following statements regarding the conduct of the defendant, Ms. Lowres:

- [19] Based upon all of the affidavit material including email exchanges between the parties it is apparent that Ms. Lowres has, since purchasing Strata Lot 1 in 2011, aggressively and repeatedly attempted to restrict use of the easement by the plaintiffs and their tenants by erecting structures and placing plants and trees on and around the easement.
- [6] Having purchased her strata lot after being advised of the easement, Ms. Lowres was able to assess the inconvenience the easement would or could cause her by the fact that her residence was built immediately adjacent to the east boundary of strata lot 1, especially since a door exiting the ground floor of her home was located on that side of the strata lot. If one were to exit Ms. Lowres' strata lot through that door, one would immediately be trespassing on the easement.
- [7] Nevertheless, Ms. Lowres methodically began to block access to the easement by erecting a fence/trellis, planting trees and placing patio furniture and potted plants in several locations on the easement. She refused to remove the same after the plaintiffs made attempts to discuss their concerns with her. Eventually, the plaintiffs' lawyers sent a letter to the defendants demanding that interference with the easement cease. The defendants were both advised by the plaintiffs' lawyers that if the defendants continued to obstruct the plaintiffs' access to the easement, litigation would follow and that plaintiffs would be seeking costs on a solicitor and client basis. In response, the defendants remained defiant and continued to block access. The actions of the defendants continued to obstruct access over the easement even after the plaintiffs' tenant, who had rented the garage on the plaintiffs' lot near the easement, approached Ms. Lowres, seeking a resolution. The efforts of the tenant followed similar efforts on the part of the plaintiffs to resolve the dispute with Ms. Lowres and the strata corporation. As a result of the defendants' actions, the tenant firstly negotiated a reduction in rent and eventually discontinued his relationship with the plaintiffs due to the lack of cooperation or any form of reasonableness from the defendants, whose obstructions erected on the easement impeded access to the garage.
- [8] The strata corporation supported Ms. Lowres' actions throughout this unfortunate and unnecessary dispute.
- [9] Regarding the quantum of damages, the plaintiffs seek financial damages to compensate for the loss of income from rental of the garage due to the defendants' actions and damages for loss of amenity resulting from the infringement. Regarding both heads of damage, the quantum the Grants are seeking, and to which they are entitled, is modest. The plaintiffs advise that although they believe an award of aggravated damages would be justified in the circumstances, they are not seeking aggravated damages since they are seeking special costs, which would be duplicative of aggravated damages.
- [10] Regarding financial loss, the plaintiffs refer to the rental agreement for the garage they had negotiated with Mr. Lavallee. Mr. Lavallee had rented the garage, which he could no longer access due to the defendants' interference, for \$350 per month. The amount of rent was renegotiated in January 2014 to \$175 per month due to the defendants' interference and

eventually Mr. Lavallee terminated the lease in January 2015. In his affidavit sworn April 29, 2016, Mr. Lavallee deposed, after describing his frustrations in dealing with Ms. Lowres regarding access:

9. I would not have terminated the rental agreement when I did, if it were not for the interference with my access to the garage by the Defendant Lowres.
- [11] The plaintiffs seek damages of \$3,500 for 20 months of rent at \$175 per month from February 2015, after Mr. Lavallee terminated his lease, to September 2016, when the reasons for judgment were issued. They seek compensation for less than the full amount of the rent they could have received from Mr. Lavallee since they could not rent it out due to Ms. Lowres' interference and reduced the claim as they used a portion of the garage for their own storage. I find the plaintiff is entitled to damages in that amount for lost rental income. I also find that due to Ms. Lowres' actions, it would have been impractical for the plaintiffs to seek a new tenant until the dispute was resolved.
- [12] Regarding damages for the loss of amenity, which, according to the authorities, consists of damages for inconvenience, the plaintiffs seek damages of \$10,000. Although the plaintiffs acknowledge the authorities support a relatively modest amount of damages for loss of amenity, they do not support an award in the range claimed by the plaintiffs.
- [13] The plaintiff referred to three authorities, *Chester v. Roch*, 20 N.S.R. (3d) 536 [Chester], *Sharma v. Mallet*, 2004 NSSC 258 [Sharma] and *Lafferty v. Brindley* (2001), 119 A.C.W.S. 93d 1034 (Ont. S.C.J.), var'd on other grounds (2003), 13 R.P.R. (4th) 181 [Lafferty].
- [14] In *Chester*, Jones J. awarded damages to the plaintiff for interference with her right-of-way to her farm. The interference with her use of a road lasted seven months. The court awarded her \$900 in damages.
- [15] In *Sharma*, unlike the case before me, the defendant had a bona fide belief that he was entitled to block the plaintiff's access to the driveway. The court discussed damages, assessed at \$1,000 at para. 30:

With regard to damages, Ms. Sharma has claimed general damages and aggravated or punitive damages because of the actions of Mr. Mallet. No specific damages have been proven; however, Ms. Sharma and her tenants have been put to serious inconvenience and frustration because of the blocked driveway. Moreover, on several occasion, Ms. Sharma has had to personally remove snow banks placed by Mr. Mallet so as to obstruct the use of the turning circle. However, Mr. Mallet appears to have had a bona fide belief that he could curtail the use of the driveway. I also note that an interlocutory injunction was not sought by the plaintiff at any time. In the circumstances, damages for the trespass, bordering on nominal damages only, appear appropriate. I therefore award Ms. Sharma \$1,000 in general damages.

- [16] In Lafferty, the Ontario court was more generous in awarding general damages, granting awards of \$13,000 to the plaintiffs regarding interference with parking on an easement for residents of summer cottages for a period of six years. The court found also found that the plaintiffs Lafferty and Jutzi were not only unable to access the parking but the plaintiff was, as a result, unable to complete construction of their cottage. In para. 79, when declining to award punitive damages, the court stated:
79. I do not regard the defendant's actions as meeting the extreme level of conduct which calls for punitive damages. He honestly believed that parking and various other uses on the right of way were subject to his control. He was more misguided than malicious.
- [17] In the case at hand, Ms. Lowres was fully aware of the easement when she purchased her strata lot and chose to simply ignore the plaintiffs' right to access to the rear of their property over the easement. No doubt the easement was an inconvenience to her, but she was not entitled to gradually and methodically attempt to annex portions of the easement for her own use and to interfere with the plaintiff's access over the easement.
- [18] In their submissions, the defendants did not make submissions on the quantum of damages to which the plaintiffs are entitled.
- [19] In the case before me, the defendants' interference with the plaintiffs' easement was lengthy; from the fall of 2011 until September 2016, when the reasons for judgment were issued, the defendant Lowres inconvenienced the plaintiffs by erecting structures and enclosing areas on the easement. Additionally, the defendant Lowres did not hold a bona fide belief that she was entitled to interfere with the plaintiffs' easement. Considering the circumstances in this case and the authorities before me, I award general damages of \$6,000 to the plaintiffs for loss of amenity.
- [20] The defendants argued that the plaintiffs are not entitled to damages since they trespassed on their land. Since I found that the plaintiffs were entitled to an easement over the defendants' land in my earlier reasons, this argument must fail.

Costs

- [21] The plaintiffs submit that special costs are warranted in the circumstances of this case or, alternatively, that costs be awarded at Scale B. The defendants submit Scale B costs are appropriate.
- [22] Special costs can be awarded where there is a finding of "reprehensible conduct" either arising from the factual circumstances giving rise to the litigation or from the conduct of the litigation: *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183. If such an award is to be made, its purpose must be to rebuke the defendants' conduct and decision to deliberately deny the plaintiffs' access over the easement over a period of several years. The leading case in British Columbia regarding special costs is *Garcia v. Crestbrook Forest Industries Ltd.*, (1994), 9 B.C.L.R. (3d) 242 (C.A.) [Garcia] in which the defendant in a

wrongful dismissal case exerted its financial strength, especially on appeal, in an effort to thwart the plaintiff's continued pursuit of his claim. In that decision, Lambert J.A. drew attention to McLachlin J. (as she then was)'s decision in the Supreme Court of Canada decision *Young v. Young*, [1993] 4 S.C.R. 4 in which she stated at p. 134:

Solicitor-client costs are generally awarded only when there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

[23] Lambert J.A. also attempted to introduce clarity into the law of special costs at para. 17 of *Garcia* by stating:

Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui* (District), and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof and rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[24] After careful consideration of all of the facts and the law and the word "reprehensible", I find that the conduct of the defendants can be described as such. In response to attempts on the part of the plaintiffs and their tenant to negotiate a solution, the defendants continued to add obstructions on the easement to discourage or block any passage by the plaintiffs or their tenant. The defendants were also advised that the plaintiffs would seek special costs but still failed to back down from their encroachment onto the easement. In effect, the defendants stated that it was going to be "their way or else" and were determined to have this matter resolved in court at the risk of a finding of special costs.

[25] I so order and refer the assessment of special costs to the Registrar.

"Jenkins J."

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