

CANADA / JUDGMENT

## Haigh v. Kent

2013 BCSC 298

COURT

Supreme Court of British Columbia

DECIDED

26 February 2013

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2013 BCSC 298 Haigh v. Kent

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Haigh v. Kent,

2013 BCSC 298

Date: 20130226

Docket: S1993

Registry: Powell River

Between:

Randolph Lawrence Haigh

Plaintiff

And

Leonard Clive Kent and Dee Alexander Kent

Defendants

- and -

Docket: S2300

Registry: Powell River

Between:

Leonard Clive Kent and Dee Alexander Kent

Plaintiffs

And

Randolph Lawrence Haigh and Darlene Haigh

Defendants

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment as to Costs

Counsel for Randolph and Darlene Haigh:

I. Fleming

Counsel for Clive Kent and Dee Kent:

S. Kovacs

Date of Written Submissions:

November 13, 20 and 26, 2012

Place and Date of Judgment:

Powell River

## February 26, 2013

- [1] By way of reasons for judgment dated September 17, 2012, indexed as 2012 BCSC 1361, I found Randolph Lawrence Haigh, plaintiff in the "Haigh Action", to be beneficially entitled to a 25% ownership share in a parcel of land south of Powell River of approximately 95 acres (the "Property") owned by Leonard Clive Kent and Dee Alexander Kent. I found against Mr. Haigh on the issue of whether there was an express trust claim for an acre of waterfront, but awarded a constructive trust in respect of the Property as a whole, as a remedy for unjust enrichment. I dismissed the claims brought by the Kents against Mr. Haigh and his wife Darlene Haigh in the "Kent Action", which included, inter alia, a claim for a declaration of their sole ownership in fee simple of the Property, and an order for possession of an A-frame cabin on the premises occupied by the Haighs. I awarded Mr. Haigh costs at Scale B with liberty to apply.
- [2] Mr. Haigh now applies, in respect of the Haigh Action, for double costs of all steps taken after delivery of a settlement offer on May 5, 2010, and special costs, as well as ordinary costs in the Kent Action. The offer to settle was in the amount of \$395,000 plus costs and disbursements.

## Double Costs

[3] In reaching my conclusion as to the extent of Mr. Haigh's interest in the Property, I considered, among other things, evidence as to the value of the Property, and evidence as to the value of the use of an acre of waterfront on the Property, which I found had been promised to Mr. Haigh and his then-wife Christina Haigh by Leonard Kent in 1980, as set out in an appraisal report prepared by Mr. David Kirk (the "Kirk Appraisal"):

[118] In valuing Mr. Haigh's interest, I have considered the following:

- a) I accept the evidence of Mr. Haigh's appraiser, that the most appropriate valuation of the Property for appraisal purposes is on the basis of its highest and best use being continued operation of the Resort; that the Direct Comparison approach is the best means of valuing the Property; and that the value under that approach is approximately \$1.6 Million, with \$1.23 Million representing the value of the bare land, and the balance of \$370,000 being the current value of the improvements;
- b) I further accept the appraiser's evidence that a hypothetical one acre waterfront lot within the Property would have a value of approximately \$400,000;
- c) The value of the use of an acre of waterfront property would be less than the value of ownership...

[4] The value of the 25% interest is approximately \$400,000 according to the Kirk Appraisal's valuation of the Property. That value (\$400,000) exceeds the amount of the offer (\$395,000 plus disbursements and costs). According to the Haighs, the offer ought to reasonably have been accepted; therefore an award of double costs ought to follow.

[5] Subule 9-1(5) grants powers to the court which include the following:

(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

...

(b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle...

[6] Subrule 9-1(6) states:

(6) In making an order under sub-rule (5), the court may consider the following:

- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
- (b) the relationship between the terms of settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;

- (d) any other factor the court considers appropriate.
- [7] In respect of the reasonableness of the settlement offer, the Kents rightly rely on *Hartshorne v. Hartshorne*, 2011 BCCA 29, for the proposition that the reasonableness of the offer is to be assessed during the period of time in which it was open for acceptance, and not by reference to the date of judgment. The Kents point to the fact that at the time the offer was made, the Haighs' appraisal report had not been served, and was not served until late 2011; hence, they argue, they "did not have the full benefit of that opinion at the time of the May 2010 offer." While a plaintiff bears the burden of proof at trial, it does not bear the burden of persuading a defendant of the reasonableness of a settlement offer before costs consequences can attach: *Coutakis v. Lean*, 2012 BCSC 1447 at para. 23. The Kents were free to make their own determination of the reasonableness of the offer. There is no evidence that they could not have done so once the offer was received.
- [8] Next, the Kents cite *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1497, wherein Mr. Justice McEwan said at para. 19:
- [19] The reintroduction of judicial discretion in costs certainly serves the ends of justice. Costs should be a penalty for unreasonable conduct in the litigation, not a penalty for failing to guess the outcome. In this regard, Courts must, I think, extend some leeway to litigants holding honest but, ultimately, mistaken views of their claims. It is generally better that such expectations be disposed of at law, rather than discouraged. The public should not be given the impression that there is no reasonable access to a legal resolution. It must be recognized that some people will only be comfortable if they "hear it from the judge." This should be a valid option for those who seek it, not a form of deemed unreasonableness. As such, inducements to settle, and to avail oneself of alternate dispute resolution, ought to complement rather than obstruct judicial determinations.
- [9] Following that passage, however, Justice McEwen then went on to quote from *A.E. v. D.W.J.*, 2009 BCSC 505, where Mr. Justice Goepel said:
- [61] I appreciate and accept that notwithstanding the differences between Rule 37B and its predecessors, the underlying legislative policy behind Rule 37B is to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer: *MacKenzie v. Brooks* 1999 BCCA 623; *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.); *Radke v. Parry*, 2008 BCSC 1397. Parties should not however be unduly deterred from bringing a meritorious, albeit uncertain claim, because of the fear that a punishing cost order could potentially wipe out their award of damage award. In that regard I note the comments of McLachlin J.A., as she then was, in *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25, 49 D.L.R. (4th) 205 (C.A.)

Costs in our system of litigation serve the purpose, not only of indemnifying the successful litigant to a greater or lesser degree, but of deterring frivolous actions or defences. Parties, in calculating the risks of proceeding with a particular action or defence, should be able to forecast with some degree of precision what penalty they face should they be unsuccessful. Moreover, there is a sound reason for keeping costs within relatively modest limits. The possibility of high costs may unduly deter a party from bringing an uncertain but meritorious claim or defence.

[62] Regardless of the merits of the plaintiff's case the defendant's offer to settle cannot be ignored, because to do so would undermine the purpose of the Rule. Having decided to proceed in face of a not insignificant and ultimately successful offer to settle, the plaintiff cannot avoid some consequences.

[Emphasis added]

[10] Fan was a case in which a plaintiff's mother, acting as litigation guardian, had turned down a defence offer of \$75,000 plus costs, and the plaintiff was ultimately awarded a little more than \$30,000. Justice McEwen noted the litigation guardian relied on medical reports that were premised on incorrect assumptions of fact, and expressed concern as to the unfairness of visiting on the plaintiff the consequences of the mother's decision to proceed to trial. His above-cited remarks at para. 19 must be seen in the context of those facts: see Coutakis at para 21. I would also note that the concern expressed by Madam Justice McLachlin, in Houweling Nurseries as to a party being unduly deterred from advancing meritorious claims or defences, has been addressed through the considerations now enumerated in subrule (6).

[11] In their submissions, the Kents cite Brooks-Martin v. Martin, 2011 BCSC 497 para. 38, for the proposition that "an offer may be safely ignored if the questions to be answered at trial are questions about which reasonable lawyers could disagree." In that case, the particulars of the plaintiff's negligence claim were characterized by the trial judge as having been "in a state of flux up until the time of trial"; this appears to have been the basis for Halfyard J.'s statement that "[t]he strength of the plaintiff's case ... and the likelihood of a trial judge finding some liability ... were, in my opinion, questions about which reasonable lawyers could disagree", and his conclusion that the defendant's offer to settle for the sum of one dollar, delivered on the eve of trial, might reasonably have been seen as falling short of providing "a genuine incentive to settle".

[12] There was no comparable degree of uncertainty in the present case. Indeed, the Kents say that throughout, they have never denied that Mr. Haigh made contributions to the Property, but say that each of their successive counsel throughout the litigation argued - wrongly, as I decided - that Mr. Haigh's claim was only for a share in the business of the beach resort operated on the Property, as distinct from a share in the Property itself. Leonard Kent's position, as he expressed it on his examination for discovery, was that the business was worth nothing. Mr. Haigh cannot be deprived of any costs to which he would otherwise be entitled, simply through the Kents having taken an unreasonable position.

- [13] Next, the Kents argue that the offer did not provide finality, as it did not address whether the Haighs would continue to reside on the Property. There is no evidence from the Kents that any such uncertainty on their part was a factor in their decision not to accept the offer. The thrust of Mr. Haigh's claim at that time was there had been an express promise of ownership of an acre of land. In the circumstances, I do not think there could have been any doubt on the part of the Kents that the offer implicitly required the Haighs to vacate.
- [14] Lastly, with respect to reasonableness, the Kents assert that the offer of settlement could not have been satisfied without selling the Property, which would not have benefited either party. Whether the Haighs actually perceived of a sale as necessary to advance their interests could have been tested through continued negotiations, of which there is no evidence. Had I not found a basis to award a constructive trust, the Kents could have faced a monetary judgment in the range of the settlement offer. It is not suggested, and there is no evidence, that the Property could not have been sold. This is not a basis for depriving a party of costs.
- [15] I find that the offer was well within the range of outcomes that could reasonably have been expected, and was one which ought reasonably to have been accepted.
- [16] As to the next factor, the relationship between the offer and the final judgment, the Kents tender an appraisal report of Mr. Eugene Steckley dated November 19, 2012. Mr. Steckley expresses his opinion that it would be inappropriate to rely on the appraisal tendered in evidence at trial, to estimate the current value of the Property. The Steckley Appraisal focuses on the Kirk Appraisal's valuation of hypothetical 1.0-acre and 2.5-acre lots. It notes Powell River Real Estate Board MLS data indicating a 6.3% decline in the average sales price of all Powell River residential property in the calendar year 2011, and a 2.9% decline in 2012 up to the effective date of the opinion, November 19, 2012. The data does not discriminate between waterfront and non-waterfront properties. A review of sales prices of specific waterfront properties indicates an overall decline from 2008 to 2012. Active listings for two smaller lots - 0.72 acres and 1.87 acres - at sales prices, respectively, of \$299,000 and \$269,000, are said to be "strong evidence" that the current market value of a hypothetical 1.0-acre waterfront lot within the bounds of the Property would be less than \$300,000.
- [17] The Steckley Appraisal states that sales of larger waterfront properties appropriate for use as comparables could not be identified, but that the statistics supporting lower overall values for smaller waterfront properties suggests that the overall value of the Property has declined as well.
- [18] Therefore, the Kents argue, the  $\frac{1}{4}$  share awarded to Mr. Haigh has a value less than the settlement offer.
- [19] While the Steckley Appraisal concludes that the value of the Property has declined, it does not state a figure or amount by which it has declined.

- [20] As noted above, I accepted the evidence tendered at trial as to the Property's current value of approximately \$1.6 Million. If there has been any decline in the value of the Property, the relevant time period would be from the date of trial (mid-January, 2012) to the date of judgment (mid-September, 2012), i.e. approx. 8 months. If residential property values declined between January 1 and November 19, 2012 by 2.9%, it stands to reason that any decline from mid-January to mid-September would have been even smaller.
- [21] I am not persuaded by the Steckley Appraisal that there is not at least a rough equivalence between the amount of the settlement offer and the value of the judgment.
- [22] As to the relative financial circumstances of the parties, I reject Mr. Haigh's assertion that the Kents used their financial advantages to pressure the Haighs. Other than ownership of the Property, I have no reason to conclude that there is any great disparity between the parties' financial positions.
- [23] Mr. Haigh also points to the commencement of the Kent Action and the commencement by the Kents of eviction proceedings as "other factors" appropriate for consideration under subrule 9-1(6)(d). I will consider these factors under the claim for special costs.
- [24] I conclude that this is an appropriate case for the imposition of double costs.

### Special Costs

- [25] Mr. Haigh argues that the conduct of the Kents, and in particular Leonard Kent, prior to trial and after trial, was reprehensible in several respects.
- [26] First, Mr. Haigh points to the defendants' attempts to evict the Haighs from the A-frame prior to trial. Given the deterioration of the relationship between Randy Haigh and Leonard Kent, and given that occupation of the A-frame specifically had never been promised, the Kents cannot be faulted for attempting to force the issue of the Haighs' residency. I cannot find this was reprehensible.
- [27] With respect to conduct during the litigation, Mr. Haigh submits that there was a failure on the part of the Kents to "honour or decline" an agreement in principle which had purportedly been reached at a Judicial Settlement Conference, subject to the Kents satisfying themselves of certain valuations. Proceedings at settlement conferences are confidential and without prejudice, as are all settlement negotiations. There is no evidence that a binding settlement was concluded. To refer to the details of the settlement discussions is improper. Negotiations are also voluntary; with respect to their rights in the underlying action, a party to settlement discussions cannot be compelled to take any particular course of action, to treat or to respond (aside from circumstances in which there is a duty to bargain in good faith, which is not the case here). Even if, as Mr. Haigh contends, the Kents terminated negotiations without explanation when a settlement was apparently near conclusion, Mr. Haigh's recourse was to proceed to trial. While the conduct attributed to the Kents might have been frustrating, and discourteous, it was not reprehensible.

- [28] The same comments apply to Mr. Haigh's next points, the Kents' failure to accept the settlement offer, and failure to make a reasonable proposal of their own. The Kents were entitled to have the action tried. I cannot find this was reprehensible conduct.
- [29] Lastly, Mr. Haigh refers to the Kents' commencement of the Kent Action, 84 days prior to trial, and the commencement of eviction proceedings by way of delivery of a Landlord's Notice to End Tenancy, one week prior to trial. Mr. Haigh submits that these steps were vindictive and malicious, and were designed to intimidate them and distract, delay and discourage them from proceeding to trial.
- [30] I accept the Kents' submission that the commencement of the Kent Action was reasonable in the circumstances, as the Haighs' occupation of the premises needed to be resolved. Without complying with the notice requirements under the Residential Tenancy Act, S.B.C. 2002, c. 78, s. 44, the Kents would not be in a position to obtain assistance of the Court to have the Haighs vacate the Property; *Charest v. Poch*, 2011 BCSC 1165 para 88. Further, I note that before trial the Kents consented to a stay of the tenancy proceedings, and abandoned their claim for lost rents.
- [31] I find no basis for an award of special costs.

## Conclusion

- [32] Randolph Haigh is awarded costs in the Haigh Action at Scale B for all steps taken up to May 5, 2010, and, with the exception of costs respecting the present costs applications, is awarded double costs of all steps taken thereafter.
- [33] With respect to the costs applications, the Haighs have had only mixed success. Each party will bear their own costs in respect of the costs applications.
- [34] The Haighs are also awarded costs in the Kent Action, at Scale B.

"A. Saunders J."

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