

CANADA / JUDGMENT

Klimek Estate v. Klimek

2014 BCSC 1204

COURT

Supreme Court of British Columbia

DECIDED

30 June 2014

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2014 BCSC 1204 Klimek Estate v. Klimek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Klimek Estate v. Klimek,

2014 BCSC 1204

Date: 20140630

Docket: S050465

Registry: Vancouver

Between:

Robert William Klimek, Administrator of the Estate of

Stanley Klimek, deceased, and

Robert William Klimek, Executor of the Will of

Henrietta Klimek, deceased

Plaintiffs

And

Richard Stanley Klimek also known as Rick Klimek,

and Richard Stanley Klimek carrying on business as

Klimek Enterprises and Klimek Enterprises Ltd.

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiffs:

C A. Millar

The Defendants:

Represented in person by R. Klimek

Place and Date of Hearing:

Vancouver, B.C.

June 23, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 30, 2014

Introduction

- [1] This is a summary trial in which the Plaintiffs seek judgment against the Defendants for trespass, conversion, restitution costs and punitive damages arising out of the Defendants' logging of timber from certain lands owned by the Plaintiffs.
- [2] The Defendants allege that they had the permission of Henrietta Klimek to log the lands and receive the proceeds from the sale of the timber, to the exclusion of the estate and the beneficiaries of the estate.

Background

- [3] Stanley Klimek ("Stanley") and Henrietta Klimek ("Henrietta") were Polish immigrants to British Columbia. They were married and had five sons. Their eldest son is the Defendant, Richard Klimek ("Richard").
- [4] Stanley owned certain lands near Creston British Columbia comprising approximately 40 acres (the "Lands"). Richard also owns land in the Creston area ("Lot 2") comprising approximately 4 acres. Lot 2 is near but not adjacent to the Lands.
- [5] Stanley died on June 30, 1999. His will named Henrietta as his executor and sole beneficiary.
- [6] In September 1999, Richard and two of his brothers commenced a claim under the Wills Variation Act, R.S.B.C. 1996, c. 490 against Stanley's estate (the "Action"). They registered certificates of pending litigation against the estate's lands, including the Lands. The Action prevented Henrietta's appointment as the executor of Stanley's estate pending its resolution.
- [7] Henrietta died on January 8, 2004 before the Action was resolved.

- [8] The Action was subsequently settled and, by Order dated October 12, 2004, the validity of Stanley's will was confirmed. Probate was issued on November 24, 2004.
- [9] The Plaintiff, Robert Klimek ("Robert"), is one of Richard's brothers and is the administrator of Stanley's estate and the executor of Henrietta's will.
- [10] Unbeknownst to Robert, after the death of Stanley but before the death of Henrietta, Richard had arranged either personally or through his company, the Defendant Klimek Enterprises Ltd. ("KEL"), to have the timber on the Lands harvested and sold. Most, if not all, of the timber was exported to the United States.
- [11] Richard had obtained a timber mark certificate from the British Columbia Ministry of Forests that entitled him to harvest time on Lot 2. The timber mark certificate was issued on August 2, 2001 and expressly provided that it was not transferrable. However, Richard used the Lot 2 timber mark for the timber harvested from the Lands. It is apparent that the third parties who actually harvested the timber had no knowledge that the timber mark had been issued in respect of other lands.
- [12] The logging activities on the Lands took place from 2001 until 2003. It is not disputed that Richard received the sum of \$189,791.12 for the harvested timber.
- [13] As indicated above, Richard maintains that Henrietta had given him permission to log the Lands. He says that this "agreement" was made orally between them. It is not documented in any writing.

Issues

- [14] The issues for determination in this summary trial are:
- did Richard's harvesting of timber from the Lands constitute a trespass?
 - did Richard commit fraud in respect of his logging activities?
 - what remedies, if any, are the Plaintiffs entitled to?
- [15] For the reasons that follow, I find that Richard did not have the right to harvest timber from the Lands and his doing so constituted a trespass. I find that he converted timber that did not belong to him to his own use. I find that the Plaintiffs are entitled to compensation in respect of that trespass and conversion. I also find that Richard committed a fraud in respect of his use of the Lot 2 timber mark.

Analysis

Did Richard Trespass on the Lands?

- [16] For the following several reasons, I find that there was no agreement between Richard and Henrietta permitting the harvesting of timber on the Lands.

[17] Richard maintains that Henrietta gave him permission to log the Lands in 2001, two years after the Action had been commenced. It defies common sense that she would have done so in the face of the Action in which Richard and his brothers were claiming that Stanley's estate should be re-apportioned. It also defies common sense that the existence of such permission would not have been disclosed, if not in the pleadings in the Action then at least to Richard's brothers. Instead, Richard harvested the timber in secret. There was no disclosure of the alleged permission or of the logging activities by Richard to any of his brothers despite those activities having obvious relevance to the value of Stanley's estate and to the Action.

[18] Second, the evidence is clear that the relationship between Henrietta and Richard was, to say the least, inconsistent with the existence of such an agreement. Henrietta and Richard were, to put it mildly, not on good terms. Indeed, during his sur-reply, Richard stated that "my Mom and me were like oil and water" and that we "had an odd relationship". The following is illustrative of that relationship:

- a) On April 25, 2002, Henrietta sent Richard a cheque in the amount of \$500 as a birthday gift. Shortly thereafter, Richard wrote Henrietta a letter returning the cheque despite stating that "God knows that we could use the \$500 gift". He also stated:

Mom I can not accept your cheque for \$500 because it does not take the place of what I have wanted and needed most, a mother's understanding, a kind word of support or encouragement, a gentle hug.

...We are very poor, but we are happy

I do not want any contact with you, or my brothers. There has been enough hurt! We can talk through our lawyers.

You told me many many times as a child that I was not to come to your funeral and that I was adopted.

bye, wish you a long life.

[Emphasis in original.]

I note that, by the date of this letter, Richard had received in excess of \$75,000 from the timber harvesting on the Lands.

- b) On June 14, 2002, Henrietta wrote to Richard replying to his letter:

I was very upset by your letter and I am still deeply hurt by what you have said. You are trying to blame me for all of the unhappiness in your life. I have news for you, only you can take responsibility for your personal happiness.

You know the truth is that Dad never promised you anything because he disapproved of your lifestyle and the choices that you made in your life. We have always wished you the best and have given you many opportunities but the truth is that we do not owe you anything. We raised you,

educated you and tried to teach you the morals and values that would help you succeed in life. Our job is done! The rest is up to you. How dare you try to claim that you should get something from Dad's estate. You have been given things your whole life, much more than you deserved based on the way that you have treated us. You are a forty six year old man, take responsibility for yourself and go to work. How dare you try to claim that you are entitled to something from your father when you have not provide [sic] for your own children Richard, Robynn or Ryan. Why would you expect your father to provide for you as a grown man?

Ricky I have been very generous to you over the year despite the way that you have treated me. I was more than fair with you when I offered to forgive your debts to me if you would drop your claim against dad's estate. Once again you were not satisfied and you made an outrageous demand through your lawyer. I am sorry but I am not going to take it any more. You have left me no choice. If you refuse to be reasonable and drop your lawsuit then I am going to take steps to collect what you owe me.

Henrietta made no mention in her letter of any alleged agreement to log the Lands.

- c) On that same day, Henrietta wrote the following letter to explain why she had excluded Richard from her will:

I am writing this letter as an attachment to my Last Will and Testament to explain why I have chosen to exclude my son Richard Stanley Klimek from my Will. For as long as I can remember my relationship with Ricky has been very difficult. Ricky has always [sic] chosen to do things his own way and to fight and argue with me when I have tried to make suggestions to him. Ricky has always been very jealous of his younger brother Stanley Jr. and he has always complained that he was not treated the same way. I have tried my best to help Ricky financially and to provide him with advice from my life of experience. No matter how much I have given him he has never been satisfied and he continues to criticize me. Ricky has never shown me any respect and he has always tried to do things intentionally that he knew would upset me. Ricky has lived a lifestyle that I do not approve of. Ricky has caused me a great deal of heart break over the years with his mean comments and cursing at me. I will never forget that on the day after my husband was buried, Ricky called me "nothing but a fucking cold hearted bitch". This broke my heart. In addition to this Ricky and his brothers Stanley and Edward commenced a lawsuit against my husband's estate and have made many false accusations against me. I have provided Ricky and his four children with a great deal of financial support during my lifetime. I feel that Ricky has received a living inheritance and I do not wish to leave him anything in my Will. Ricky continues to treat me with disrespect and resentment. I do not deserve the way that he has treated me. I have tried my very best to provide Ricky with countless opportunities but nothing has ever satisfied him. I believe that I have done my very best as a parent by raising and educating Ricky and by providing him with financial support into his forties. I wish Ricky well and hope that he finds happiness. I love him as a Mother and hope that someday that he will get past his jealousy and bitterness and realize that I have always tried by best to show him love and to make him feel included. Ricky needs to grow up and take responsibility for the way that his life has turned out. He alone is responsible for the choices that he has made in his life. I believe that I have done my

part and I do not wish to leave anything to Ricky in my Will.

[19] During his submissions, Richard conceded that "there was no excuse" for what he had said to Henrietta on the day after Stanley's burial.

[20] In my view, it is incomprehensible that Henrietta would have given Richard permission to harvest the timber from the Lands given what was stated in these letters. If such permission had been given, there is no doubt that it would have been mentioned in the letters or otherwise documented in some fashion. The documentary evidence that does exist is completely inconsistent with the alleged agreement or permission having been given to Richard.

[21] It is equally incomprehensible that if Richard believed he was entitled to harvest timber from the Lands he would not have applied for the appropriate timber mark certificate, which he plainly knew how to do. Instead, he used a timber mark he knew had been issued in respect of Lot 2 only.

[22] He insists that a representative of the B.C. Forest Service frequently attended the Lands during the harvesting operations and checked the paperwork. If the B.C. Forest Service had allowed Richard to harvest timber using a non-transferrable timber mark that had been issued in respect of unrelated lands, evidence to that effect from the B. C. Forest Service should have been tendered.

[23] Most telling of the lack of any agreement entitling Richard to harvest timber from the Lands is his own evidence. Despite his oral submission that Henrietta had given him "full permission to log the Lands", the best and only evidence he put forward in support of the alleged agreement is found in paragraph 31 of his Affidavit sworn June 2, 2014:

31. In 2001 my mother, suggested that I selectively log my fathers' land .She told me on the phone to do jobs that I had done on my father's land in Prince George area, my mother also told me that my father had been very pleased with the job I had done on the land in Prince George, British Columbia.

[Emphasis added.]

Richard did not depose that his mother had agreed he could log the Lands, only that she had suggested he selectively log the Lands.

[24] Richard also deposed in connection with the transfer of Stanley's 1979 Mercedes Benz automobile to one of his brothers that he was aware that Henrietta had been instructed by her lawyer in 2000 not to dispose of any of Stanley's assets. If that is so, it makes it even less likely that Henrietta would allow the harvesting of the timber from the Lands.

- [25] Richard tendered the affidavit evidence of Felicja Zurawik, sworn in June 2005, in support of the existence of the alleged agreement entitling him to log the Lands. Mrs. Zurawik was a family friend of Stanley and Henrietta who lived with Richard and his wife. Her evidence was to the effect that Henrietta advised her she was aware of Richard's logging activities on the Lands. Not only is that evidence inadmissible hearsay, Mrs. Zurawik passed away in 2008 and her evidence was not capable of being tested.
- [26] Moreover, there is evidence that, in 2006, Richard had been investigated by the Public Guardian and Trustee of British Columbia regarding certain irregularities in the handling by Richard and his wife of Mrs. Zurawik's financial affairs while they were acting as her Power of Attorney. A letter dated March 3, 2006 from the Public Guardian and Trustee of British Columbia to Richard and his wife states that there were examples of "clear financial abuse" as well as other examples where "on the balance of probabilities the Public Guardian and Trustee of British Columbia believes there was financial abuse". The letter concludes as follows:

The PGT, as Committee of Estate for Felicja Zurawik, is required to act as a fiduciary. As such, it is our duty to manage her legal and financial affairs in her best interest. Despite the aforementioned findings of financial abuse, the PGT has decided not to proceed with legal action against you at this time as it does not appear to be in our client's best interest.

- [27] In light of the foregoing, I do not give the evidence of Mrs. Zurawik any weight.
- [28] I find that, after the logging activities on the Lands were discovered by Robert in 2005, Richard fabricated a story of a fictitious agreement between he and Henrietta in an attempt to justify his conduct.
- [29] Regardless, at no time did Henrietta have authority to grant Richard permission to log the Lands because her interest in the Lands had never crystalized. Upon Stanley's death, the Lands became an asset of his estate. Although Stanley's will named Henrietta as the sole executor and beneficiary of the estate, the Action suspended her appointment as executor. The Action was not resolved until after Henrietta's death in 2004. Henrietta was never appointed as the executor of Stanley's estate.
- [30] There is a further flaw in Richard's position that he had an agreement with Henrietta entitling him to log the Lands. Such an agreement would have been an agreement respecting the Lands. An agreement respecting land is not enforceable unless there is, in writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter, or the party to be charged has done an act, or acquiesced in an act of the party alleging the agreement that indicates that an agreement not inconsistent with that alleged has been made or the person alleging an agreement has, in reasonable reliance on it, so changed his position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the agreement: Law and Equity Act, R.S.B.C. 1996 c. 253 s. 59. In the case of the agreement alleged by Richard, there was no "writing", nothing signed by Stanley's estate and no

admissible evidence of an act, acquiescence or detrimental reliance.

[31] Richard argued that the logging funds were received by KEL and that KEL is owned by Richard's former wife, Jolanta Klimek. Although there is evidence that, by agreement dated November 1, 2002, Richard transferred the shares of KEL to his wife, it is clear that Richard was, at all material times, the directing mind of KEL. He does not deny that fact. Moreover, he has admitted that he received the proceeds from the timber harvest on the Lands "directly or indirectly" by him.

[32] On January 29, 2005, Richard wrote and signed a letter stating:

I Rick Klimek of Klimek Enterprises take full responsibility for logging on the 40 acre parcel on 36th Ave. in Creston B.C. between 2001 and 2003.

I hired Merv Goddard to do the logging for me. He is not responsible for for [sic] any family disputes regarding the aforementioned property.

[33] I find that Richard and KEL, without permission or any right, trespassed upon the Lands, caused the timber on the Lands to be harvested and sold and received proceeds from his trespass totalling \$189,791.12, and thereby converted the Plaintiffs' assets to their own use.

Did Richard Commit Fraud?

[34] On January 5, 2011, counsel for the Plaintiffs served a Notice to Admit upon the Defendants. Paragraph 19 of the Notice to Admit requested that the Defendants admit the following facts:

19. In order to facilitate the cutting of the timber on the Creston Lands and the subsequent removal and sale of the said timber, the Defendant, Richard Stanley Klimek, fraudulently used the timber mark and timber mark certificate he had obtained in respect of Lot 2.

[35] The Defendants' Reply to the Notice to Admit stated merely that:

#19. BC Forestry visited the 40 acre parcell [sic] and the 3 ½ acre parcell [sic] on many occasion [sic] and inspected the work area and paper work. Val Galley of B.C. Forestry attended.

[36] Although Richard did not explicitly deny that he used the timber mark fraudulently, he did so impliedly by asserting that the B.C. Forest Service had implicitly approved the "paper work". I am prepared to give him the benefit of the doubt on the question of whether he admitted his fraud.

[37] However, I have no hesitation concluding that Richard fraudulently used the Lot 2 timber mark to effect the harvesting and export of timber from the Lands. The evidence is such that Richard has been involved in forestry for many years. He admitted as much during his submissions. It is inconceivable that, if he thought he had any right to harvest the timber on the Lands, he would not have obtained a timber mark for those lands, just as he had done for Lot 2. His attempts during submissions to suggest that the B.C. Forest Service had approved the use of the Lot 2 timber mark simply did not ring true.

[38] The Lot 2 timber mark was issued to Richard, not to KEL. However, to the extent KEL was involved in the fraudulent conduct, the Court will have no difficulty making an award against Richard as its guiding hand and KEL as joint tortfeasors: *Craig v. North Shore Heli Logging Ltd.*, 1997 CanLII 2067 at paras. 58 - 65 (B.C.S.C.).

Remedies

Compensation for the Value of the Harvested Timber

[39] The Plaintiffs seek an order that the Defendants are jointly and severally liable to compensate them for the monies received from the harvesting and sale of the timber from the Lands, namely \$189,791.12. Richard has admitted that he received these monies by virtue of his failure to respond to paragraph 22 of the Notice to Admit, which requested admission of the following facts:

22. The monies due by the Defendant, Richard Stanley Klimek, to the Plaintiffs were received by the Defendant, Richard Stanley Klimek, in US dollars. The particulars of the monies received directly or indirectly by the Defendant, Richard Stanley Klimek, converted to Canadian dollars are as follows

[Particulars omitted.]

[40] Richard did not deny receiving this money during his submissions.

[41] I find that the Defendants are jointly and severally liable to pay the Plaintiffs the sum of \$189,791.12.

[42] The Plaintiffs are entitled to Court Order Interest on this amount from January 31, 2004 to June 23, 2014 in the amount of \$37,514.76 and thereafter in the amount of \$5.20 per day to the date of this judgment.

Compensation for the Cost of Remediation of the Lands

[43] In addition, the Plaintiffs seek an order that the Defendants are jointly and severally liable to them for the costs of remediating the Lands.

[44] In support of this claim, the Plaintiffs relied upon a report prepared by Gary Boyden, an independent forestry consultant with over 30 years of experience in the forestry industry. He opined regarding the cost of various options for cleaning up the Lands. The Plaintiffs are seeking to recover the lowest of those cost options, namely the cost of cleaning up the Lands for resale. Mr. Boyden estimates the cost of that option will be approximately \$8,000.

[45] No evidence was proffered by the Defendants to contradict that estimate. Richard made submissions, based upon his experience, that Mr. Boyden's estimate was too high but did not offer any other amount as being reasonable.

[46] The difficulty I have with the Boyden report is that it was not tendered in compliance with Rule 11-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. It does not contain the mandatory certification required by Rule 11-2(2), or set out other mandatory information including the instructions that were provided or the issues in the proceeding to which the opinion relates. Although the Boyden report is annexed as an exhibit to the Affidavit No. 2 of Robert Klimek, sworn March 14, 2014, there is no evidence as to when that affidavit was served on the Defendants. If it was served at any time after March 31, 2014, the Boyden report would have been served less than the required 84 days prior to the trial date. There is also no evidence that written notice was provided to the Defendants that the Boyden report was being served under Rule 11-6.

[47] I am not prepared to accept the Boyden report in evidence as an expert report.

[48] There being no evidence upon which I can determine reasonable remediation cost and since there is no evidence that the Plaintiffs have incurred any remediation cost, the claim in this regard is dismissed.

Punitive Damages

[49] The Plaintiffs also seek punitive damages against Richard.

[50] I have found that Richard trespassed upon the Lands, caused timber thereon to be harvested and sold and received substantial remuneration therefrom. Where an unlawful trespass is wilful and in disregard of the rights of others with the object of making a gain, punitive damages may be awarded: *Bawa v. Noton*, 1994 CanLII 762 at 6 (B.C.S.C.); *Austin v. Rescon Const. (1984) Ltd.*, 1989 CanLII 2715 (B.C.C.A.).

[51] I have also found that Richard perpetrated a fraud when he used the Lot 2 timber mark for the logging activities on the Lands. I conclude that this conduct was a malicious and high-handed way of exacting vengeance for being excluded as a beneficiary of his father's estate. I find that his deliberate conduct in this regard as well as his conduct in fabricating a story that Henrietta gave him permission to log the Lands is deserving of an award of punitive damages of \$25,000.

Conclusion

[52] The Plaintiffs are entitled to judgment against the Defendants, jointly and severally, in the following amounts:

a) Damages for trespass and conversion:

\$189,791.12

b) Court Order interest to June 23, 2014:

\$37,514.76

c) Remediation costs:

\$0.00

d) Punitive damages:

\$25,000.00

[53] The Plaintiffs are entitled to their costs of this proceeding at Scale B.

___ "G.C. Weatherill J." ___

G.C. Weatherill J.

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