

CANADA / JUDGMENT

Ludwig v. Bos

2009 BCSC 293

COURT

Supreme Court of British Columbia

DECIDED

6 March 2009

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2009 BCSC 293 Ludwig v. Bos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ludwig v. Bos,

2009 BCSC 293

Date: 20090306

Docket: 0716197

Registry: Williams Lake

Between:

David Sylvester Ludwig and Sigrid Dieck,

Aka Sigrid-Ludwig-Dieck

Plaintiffs

And

Michael John Bos and

Allison Michelle Hocking Bos

Defendants

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the plaintiffs:

C.M. Sauter

Counsel for the defendants:

K.J. O'Brien

Date and Place of Trial/Hearing:

October 21-24, 2008

Williams Lake, B.C.

- [1] The plaintiffs David Ludwig and Sigrid Dieck claim against the defendants Michael and Allison Bos for damages for loss of lateral support to their property as well as a mandatory injunction compelling the defendants to protect the plaintiffs' property from ongoing subsidence by carrying out preservative or restorative work or by constructing a retaining wall.
- [2] The plaintiffs claim that in or about 2005 during the construction of the defendants' residence, the defendants excavated a portion of their land down slope of the plaintiffs' property causing a portion of the slope on the defendants' land to subside and causing the plaintiffs loss of use of their driveway for access by vehicle to the south portion of their property.
- [3] The defendants deny that construction of their residence resulted in any loss of support to the plaintiffs' land or any subsidence of that land.
- [4] Further, the defendants say that while an owner of land has against a neighbour the right to have his or her soil supported in its natural state by the soil of the neighbour, that does not extend to any right of an owner to have his or her building or any other artificially imposed structure put on their land supported as well.
- [5] The defendants say that the plaintiffs' land is not in its natural state to be entitled to this right to have their land supported by the soil of the defendants, both because of the construction of the plaintiffs' residence on their land and also because a large area of soil along the boundary between the plaintiffs' land and defendants' land, some of which is on the plaintiffs' land, is not soil in its natural state but is rather fill material.
- [6] The plaintiffs and defendants are adjoining landowners. Their properties are situated on the north side of Williams Lake with both having water frontage on Williams Lake.
- [7] I have had the benefit of a site visit to the two properties during the course of the trial and was able to clearly observe that the two residences are on entirely different elevations. The Ludwig residence is on a much higher elevation than the Bos residence. The property line between the two as staked by the professional surveyor Mr. Goodrich is on the upper level of the Ludwig residence rather than on the lower level of the Bos residence. This has left the defendants with a strip of land at the Ludwig property elevation which is practically unusable by the defendants but belongs to them.

- [8] This strip of Bos land at the Ludwig elevation cuts off a portion of the rough road surface that the Ludwigs had been using to access the rear or south end of their property at the lake, by way of vehicle. In order to continue using that road or trail access and remain on their own property, the Ludwigs would have to run the right side wheels of their vehicle on a slope that inclines to the east side of the Ludwig residence, at least to the point where the road passes by the south end of the Ludwig residence.
- [9] The rough road itself is quite steep and has a slight concave appearance to it with the easterly border of the road built up with a soil berm and the westerly border on the incline slope to the Ludwig residence.
- [10] At a point south of the Ludwig residence as the road approaches a large bush, the road turns to the west into the main part of the Ludwig property, and then switches back again down to the waterfront.

The law on the right to lateral support

- [11] The parties appear to agree that the law is as set out in *Bullock Holdings Ltd. v. Jerema and Jerema*, [1998] B.C.J. No. 142 (S.C.), where Mr. Justice Ralph quoted *Dalton v. Angus* (1881), 6 A.C. 740, a decision of the House of Lords, as stating the principle that the owner of land has against the neighbour the right to have his or her soil supported in its natural state by the soil of the neighbour.
- [12] Both *Dalton* and *Bullock* were cited with approval by Mr. Justice Goepel in *Lee v. Shalom Branch #178 Building Society*, 2001 BCSC 1760.
- [13] The only possible caveat to this established principle is the finding made by the trial judge in *Cole and Muir v. Spicer and Doucet*, [1996] B.C.J. No. 1586 (S.C.). In that case the trial judge cited the case of *Hunt v. Peake* (1860) 70 E.R. 603 (Q.B.), where the same principle was set out by the Lord Chancellor, and cited as well the decision of *Boyd v. Toronto (City)*, [1911] O.J. 143, a decision of the Ontario High Court approving the principle espoused in *Hunt v. Peake*.
- [14] Regardless of the recognition of this principle of law the trial judge found that the plaintiff was entitled to damages arising from the loss of lateral support and consequent erosion caused by the excavation of the defendant in circumstances where she said that neither of the plaintiff's properties was in their natural state at the time of excavation as both had added fill.
- [15] Counsel for the defendants here seeks to distinguish this case but I am not able to distinguish it on the basis offered by defence counsel.
- [16] I decline to follow *Cole v. Spicer* if it was the plaintiff's fill that eroded there. There the trial judge expressed the right principle but came to a conclusion that the plaintiff's land, with added fill, was still entitled to have its soil laterally supported by the land of the defendant.

- [17] As the principle remained the same I intend to apply the principle as set out in all the other cases cited for the purpose of my decision here.

The evidence

- [18] Without reviewing all of the lay evidence in detail on the construction of the Bos residence, there appears to be no doubt that in the construction of that residence a portion of the toe of the slope between the two properties was cut away at the northwest corner of the Bos residence either in the excavation of its foundation or in the creation of a roadway around the northwest corner of the residence to the south end of the Bos property.
- [19] There is agreement between the two geotechnical engineers, Mr. Powell for the plaintiffs and Mr. Wilson for the defendants, that the slope between the two properties is unstable and must be shored up with a retaining wall placed against the toe of the slope at the Bos residence elevation and perhaps as well at the crest of the slope at the Ludwig residence elevation.
- [20] The difference between the two appears to be whether the unstable soil on the slope is natural soil or is fill soil put there at some time in the past that is subsiding over top of the natural soil and eroding the Ludwig road above or creating a danger of eroding the Ludwig road above by moving the crest of the slope further west towards the Ludwig residence.
- [21] Mr. Wilson expresses the opinion that the Ludwig road was constructed using fill soil that extends well into the Bos property. He says his GPS survey places the Ludwig road over the property line for as much as 2.5 metres into the Bos property.
- [22] A 1986 aerial photograph he reviewed indicated to him that fill material from the Ludwig construction in 1986 extended south and east of the Ludwig structure and extended into the Bos property near the Bos residence.
- [23] A 1990 aerial photograph also confirmed this area of fill extending into the area of the Bos residence.
- [24] Mr. Wilson investigated the soils on the slope and at the crest of the slope with hand dug test holes and steel probes and says that it is fill soil that is subsiding on the slope and eroding the fill prism supporting the Ludwig road above. The ongoing sloughing of the loose fill on the slope has caused the crest of the slope to migrate westward towards the Ludwig road and towards the Ludwig residence.
- [25] Mr. Wilson is of the opinion that what is sloughing on the bank is fill material over top of the natural soil underneath and is not sloughing of the natural soil underneath.

- [26] His conclusion is that the portion of the embankment that is contained within the original slope and evidenced by undisturbed soils remains stable for the building construction activities done on the Bos property. The portion of the embankment that has been placed as fill for the Ludwig road has a history of slope instability that pre-dates building construction activities done on the Bos property and remains unstable.
- [27] Mr. Wilson infers that the loose sand fill in the Ludwig road prism that extends into the Bos property was done to raise the grade on the Ludwig property to the level of the third storey of the Ludwig residence and to provide the Ludwigs with an access road from that level to the south end of their property.
- [28] He recommends that the fill on the Bos property supporting the Ludwig road be removed and an engineered retaining wall be constructed near the property line to support the remaining fill on the Ludwig property and as well as a retaining wall constructed along the toe of the slope.
- [29] Mr. Ludwig in his evidence strongly denies that any fill material from the construction of his residence was placed in the area of his road or anywhere near the Bos residence. He says that back in time when the Bos property was owned by someone else, with the approval of that owner he placed fill on the Bos property further downhill or south of the Bos residence, and not in the area of the Bos residence itself.
- [30] Mr. Powell does not appear to offer any opinion whether the soil on the Ludwig road or in the slope is or is not fill material. He only investigated the stability of the slope and determined it to be unstable and needing a retaining wall at the toe. He did not do any probes as Mr. Wilson did, nor review any aerial photographs.
- [31] He did review Mr. Wilson's opinions and he disagrees with Mr. Wilson's method of using a probe to determine the nature of the soil. He is of the view that the probing proves nothing about the nature of the soil as it could be naturally lying soil.
- [32] When shown photographs taken of the toe of the slope in the area of the northwest corner of the Bos residence he does allow that it may show some fill as it does not look natural in the photograph to him. However, he was only interested in the stability of the slope.

Conclusion

- [33] I accept the opinions of Mr. Wilson that it is fill in the slope and in the Ludwig road that is unstable and is undermining the slope, and it is not the underlying natural soil in the slope on the Bos property or on the Ludwig property that is sloughing and causing the slope to erode.

- [34] I am satisfied Mr. Wilson has done a very thorough investigation of the soil conditions and has proven by his site testing and his review of aerial photographs that it is the fill material at the crest and in the slope that is unstable and subsiding and not the underlying natural soil.
- [35] Applying the law as set out in the cases I have cited I find that the plaintiffs have not established any right to maintenance by the defendants of lateral support of the slope on the defendants' land that is subsiding because the only obligation the defendants have to the plaintiffs at law is to sustain the plaintiffs' soil in its natural state and there is no evidence that the natural soil on the plaintiffs' land is subsiding and eroding through loss of any lateral support from the defendants' land.
- [36] I reject the evidence of Mr. Ludwig that the fill did not come from his land in the first place and I find it proven by Mr. Wilson that this is likely where the fill originated.
- [37] The plaintiffs' action is dismissed. The defendants will have their costs at Scale B.

"Truscott J."

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