

CANADA / JUDGMENT

Nickel v. Takhar

2020 BCSC 1462

COURT

Supreme Court of British Columbia

DECIDED

1 October 2020

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2020 BCSC 1462 Nickel v. Takhar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nickel v. Takhar,

2020 BCSC 1462

Date: 20201001

Docket: S054802

Registry: Vancouver

Between:

Herb Nickel and Eugenie Nickel

Plaintiffs

And:

Kuldip Takhar, Harbans Takhar, Phoenix Construction Systems Ltd. and Nirmal Takhar

Defendants

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

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs, appearing by teleconference:

K.E. Ducey

Counsel for the Defendants, appearing in person September 30, 2020 and by teleconference
October 1, 2020:

L.A. Gold

Place and Date of Hearing:

Vancouver, B.C.

September 30, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 1, 2020

Introduction

- [1] The plaintiffs seek judgment for damages against the defendants, jointly and severally, pursuant to Rule 9-7 of the Supreme Court Civil Rules.

Background

- [2] The plaintiffs are and have, since 1985, been the owners and occupiers of certain lands and premises located at 14264 Trites Road, Surrey, British Columbia ("Nickel Property"). Herb Nickel now is 81 years old. Eugenie Nickel is 73 years old.
- [3] The Nickel Property is a rectangular lot 93.2 feet wide by 566.99 feet deep. The Nickel's residence is situated at the front of the Nickel Property. Behind it is a flat backyard which extends approximately 80 feet from the house, beyond which is a steep slope approximately 90 feet high.
- [4] The Metro Vancouver Regional District ("MVRD") has a right-of-way over the lower portion of the Nickel Property at the bottom of the slope over which is a road covering a large sewage line.
- [5] In June 2003, the defendant, Nirmal Takhar ("Nirmal"), entered into a contract to purchase the property (the "Pulaski Property") immediately to the west of the Nickel Property.
- [6] In October 2003, Nirmal assigned the contract to the defendants, Kuldip Takhar and Harbans Takhar, who completed the purchase of the Pulaski Property.
- [7] Like the Nickel Property, the steep slope and MVRD right of way extends through the Pulaski Property.
- [8] In the summer of 2003, apparently with the intention of subdividing and developing the Pulaski Property, the defendants commenced excavation operations at the bottom of the slope on both the Pulaski Property and the Nickel Property. Landslides and slope failures occurred as a result.

- [9] On August 29, 2005, the plaintiffs commenced this action for damages in respect of the landslides and slope failures on the Nickel Property. The action remained dormant for several years while the plaintiffs waited for direction from the City of Surrey ("City") and the MVRD regarding the steps that would be needed to repair the slope damage. As there was no progress regarding the repair of the slope failure, in 2010, the plaintiffs proceeded with the litigation. The parties conducted examinations for discovery, exchanged expert reports and set the matter for trial.
- [10] On January 23, 2012, the parties entered into a settlement agreement ("Settlement Agreement"), the material terms of which were as follows:
- a) the parties would instruct their respective engineering experts to meet within 45 days to agree upon a remediation plan;
 - b) if the engineers were unable to agree on a remediation plan, an independent engineer would be appointed to develop the remediation plan;
 - c) the defendants would pay any invoices from the plaintiffs' engineers, Golder Associates Corporation ("Golder") in respect of the remediation plan and remediation work;
 - d) the defendants would apply for any necessary permits required to carry out the remediation work as soon as possible and no later than 30 days after the remediation plan had been developed;
 - e) the defendants would carry out the remediation work at their expense;
 - f) the remediation work would be completed within 90 days of issuance of the necessary permits, or as directed by the engineers;
 - g) upon completion of the remediation work, the defendants would pay any additional taxable disbursement incurred by the plaintiffs.
- [11] On April 24, 2013, after no meaningful steps were taken by the defendants to carry out their obligations under the Settlement Agreement, the plaintiff notified them of their intention to seek an order enforcing the Settlement Agreement. The defendants responded by asking for more time to complete the remediation work.
- [12] By June 12, 2013, the parties' respective engineers (Golder on behalf of the plaintiff and GeoPacific Consultants Ltd. on behalf of the defendants) had agreed on a remediation plan ("Remediation Plan").
- [13] On June 27, 2013, counsel for the defendants advised counsel for the plaintiffs that, although his clients were "ready, willing and able to carry out the work in accordance with the plan", they required a building permit in order to do so.
- [14] On July 18, 2013, the plaintiffs provided the defendants with an authorization to obtain the necessary building permits in respect of the Nickel Property.

- [15] On August 26, 2013, the plaintiffs learned from the City that the defendants had still not applied for a building permit in respect of the remediation work.
- [16] On January 6, 2014, the plaintiffs obtained from Golder an estimate for the cost of the remediation work based upon the Remediation Plan. The estimate was \$1,172,735 (the "Golder Estimate").
- [17] On February 18, 2014, the plaintiffs filed a Notice of Application ("2014 NOA") seeking judgment against the defendants in the amount of the Golder Estimate. The 2014 NOA was served on the defendants the following day.
- [18] The 2014 NOA seemed to motivate the defendants to deal with the remediation. On March 5, 2014, the defendants advised the plaintiffs that a building permit application had been filed with the City.
- [19] On March 11, 2014, at the hearing of the 2014 NOA, the parties agreed to a consent order before Justice Ross ("Consent Order") on the following terms:
- a) the defendants would apply to the City of Surrey for a building permit to complete the remediation work required by the Remediation Plan by no later than March 18, 2014 and would provide confirmation of the application forthwith upon the application being filed;
 - b) the defendants would provide all information requested by the City of Surrey in support of the building permit within 7 days of any such request;
 - c) the defendants would notify the plaintiffs within two business days of the issuance of the building permit;
 - d) the defendants would commence the remediation work within 14 days of the issuance of the building permit or as soon as reasonably possible thereafter as directed by the engineers; and
 - e) the defendants would complete the remediation work within 90 days of the issuance of the building permit unless otherwise agreed by the parties, with each parties' consent to not be unreasonably withheld, or as ordered by the court;
- [20] The 2014 NOA was adjourned generally with the plaintiffs having liberty to reschedule the hearing of the 2014 NOA on five-business-days notice if the defendants failed to comply with any term of the Consent Order.
- [21] A building permit was issued by the City on April 20, 2014. The defendants failed to both notify the plaintiffs of its issuance and commence the remediation work within 14 days, as required by the terms of the Consent Order.

- [22] On May 20, 2015, the plaintiffs rescheduled the hearing of the 2014 NOA for June 10, 2015 but the hearing was adjourned because the following day, the defendants (or one or more of them) attended the Nickels Property with representatives of the City and the MVRD to discuss the work.
- [23] After the meeting, the plaintiffs were advised by the defendants that they wished to revise the Remediation Plan. The new retaining wall contemplated by the revision would result in a new location for the retaining wall such that the portion to be built on the Nickel Property would result in the plaintiffs having slightly more usable land. Although the plaintiffs indicated to the defendants that they were prepared to agree to the revision, they emphasized to the defendants the importance of the timeline agreed in the Settlement Agreement and that "the work should start no later than 30 days after a building permit is issued". They noted that the building permit was issued on April 20, 2015 and requested the defendants' advice as to when the work would be started.
- [24] The defendants took no timely steps to proceed with the remediation work despite repeated requests by the plaintiffs. The most that can be said is that the defendants made a few modest attempts to complete a revised remediation plan.
- [25] On November 27, 2015, the plaintiffs advised the defendants that, if approval for a new design was not obtained by March 30, 2016, the defendants would be expected to proceed with the previously agreed Remediation Plan.
- [26] On March 24, 2016, the defendants forwarded their proposed revised remediation plan to the plaintiffs. The plaintiffs responded with their comments in a timely manner, however, nothing further transpired.
- [27] On April 18, 2016, the plaintiffs advised the defendants that if construction did not commence within the next 14 days, the plaintiffs would reschedule the hearing of the 2014 NOA.
- [28] On April 21, 2016, the defendants advised plaintiffs' counsel that the new design was ready to be sent to the City and the MVRD for approval and a building permit, that they had paid for an extension of the previous building permit, and that they had requested the City to renew the permit.
- [29] On April 26, 2016, the plaintiffs learned from the City that neither an application to renew the building permit had been received nor any extension to the previous building permit applied for.
- [30] On June 1, 2016, the plaintiffs rescheduled the hearing of the 2014 NOA for June 21, 2016, however, newly retained counsel for the defendants, Mr. Gold, advised that a 28-day notice was required to be served. The hearing was adjourned.

- [31] On July 4, 2016, the MVRD advised that it was no longer consenting to any work involving the right-of-way. As I understand it, the MVRD was concerned about the weight of construction equipment on the road over the sewer line.
- [32] In October 2016, the MVRD revised its position such that it consented to the used of the right-of-way provided the remediation work was performed by a professional third party approved of by the MVRD.
- [33] On October 20, 2016, the plaintiffs obtained an appraisal of the Nickel Property as well as an expert opinion as to its marketability without remediation.
- [34] On March 6, 2017, the plaintiffs filed a new Notice of Application ("2017 NOA") in substantially the same form as the 2014 NOA but updated to include the events that had transpired in the meantime. The defendants filed their Application Response on March 28, 2017.
- [35] The 2017 NOA was heard on April 7, 2017 by Justice Holmes who made the following orders:
- a) the plaintiffs will amend the 2017 NOA to include a claim for damages based on the loss in value of the Nickel Property;
 - b) by consent, the defendants admit that their actions caused the damage to the Nickel Property;
 - c) the hearing of the 2017 NOA would be adjourned to allow the defendants an opportunity to obtain an appraisal of the Nickel Property and that the plaintiffs would cooperate in respect of providing access;
 - d) the defendants would serve their appraisal within 75 days;
 - e) the plaintiffs would serve any supplementary appraisal within 30 days of receipt of the defendants' appraisal; and
 - f) the parties would be entitled to cross examine the appraisers prior to the continuation of the hearing.
- [36] In June 2017, the defendants served the expert report of their appraiser.
- [37] In November 2017, the parties conducted cross-examinations of the respective appraisers.
- [38] No steps were taken by the defendants to remediate the property.
- [39] On June 15, 2019, the plaintiffs served the defendants with a remediation plan for the Nickel Property that had been prepared by Golder on September 18, 2018, together with an estimate of the cost of the remediation.
- [40] On September 11, 2019, the plaintiffs served the defendants with an updated appraisal of the Nickel Property.

- [41] On September 26, 2019, the plaintiffs served an updated Notice of Application ("2019 NOA") and scheduled the hearing for October 30, 2019. The defendants did not file an Application Response.
- [42] On October 22, 2019, the defendants applied for an adjournment of the hearing of the 2019 NOA on the basis that they had not yet received their expert report in response to that of the plaintiffs' appraiser. Justice Dley, who heard the defendants' application, adjourned the hearing and ordered that a new hearing date be set for March 2020 on the following terms:
- a) the defendants pay the sum of \$15,000 to the plaintiffs forthwith; and
 - b) the defendants will serve any expert reports they intend to rely upon by no later than January 3, 2020.
- [43] The defendants did not serve their expert reports until well after the January 3, 2020 court ordered deadline. The first of the defendants' two expert reports is that of Kevin Bodnar of GeoPacific Consultants Ltd. It is dated November 14, 2019. It was not served until January 20, 2020. The second of the two expert reports is that of Neil Hahn, a real estate appraiser with the firm of Garnett Wilson Realty Advisors Ltd. That report is dated February 20, 2020 and was served on February 21, 2020. Mr. Gold's explanation for why these two expert reports were served after the January 3, 2020 deadline imposed by Justice Dley was that it was due to inadvertence on his part. He advised that he was inexplicably not cognizant of the January 3, 2020 deadline.
- [44] The 2019 NOA was not heard in March 2020 because no hearing dates were available from the Registry. The hearing was scheduled for April 6, 2020. However, the courts were closed due to the COVID-19 pandemic. Ultimately, the hearing was rescheduled to September 30, 2020.
- [45] At the opening of the hearing, counsel for the defendants sought another adjournment on the basis that:
- a) on September 27, 2020, three days earlier, his client Mr. Nirmal Takhar, swore an affidavit deposing that, in January 2020, he personally delivered to the City documents entitled "Pre Damage Inspection Reports" as required by the City for a building permit, that he had been trying for weeks to find out why there was a hold on the building permit and that he was still awaiting a response. Mr. Gold advised the court that he learned only the day before this hearing that his client's affidavit was false and that the reports had not been delivered to the City;
 - b) he, Mr. Gold, has an elderly brother with dementia who has care needs;
 - c) his law practice is burdensome and he does not have his assistant available to him due to her having to care for her husband, all of which has resulted in him not having had sufficient time to prepare for the hearing; and

- d) his clients are now close to being in a position to obtain a building permit from the City.

Adjournment Application

- [46] No defensible explanation has been provided by the defendants for why it has taken them more than five years, after the May 21, 2015 meeting on the Nickel Property, to obtain approval of the revised remediation plan. If there was a genuine reason for this delay, I would have heard it.
- [47] The previous hearing was adjourned at the request of the defendants for the sole reason of allowing them time to obtain expert reports. Those reports were obtained and served over seven months ago. There is no legitimate reason why the defendants and their counsel not having had sufficient time to prepare for this hearing.
- [48] The defendants' strategy is clear. It is to delay the hearing of the plaintiffs' summary trial in the hopes of obtaining a building permit for remediation work that suits them.
- [49] The plaintiffs have, for many years, made every reasonable effort to have the damage to their property repaired by the defendants. They have been patient in the extreme. There comes a point in time in every litigation when the delay of a party becomes unacceptable and the matter must be heard and resolved. In this case, by any measure, the delay is at the extreme end of the range.
- [50] The defendants have admitted liability for the damage caused to the Nickel Property in 2003. The plaintiffs seek a summary trial solely on the assessment of damages.
- [51] The defendants' application for an adjournment is dismissed.

Analysis

Appropriateness for Summary Trial

- [52] The application before me is precisely the kind of application for which our summary trial rule was created. The sole issue requiring determination is the quantum of damages to which the plaintiffs are entitled. All parties have served the reports of experts on that issue after having had ample time to do so. Although the defendants' experts have criticized various of the approaches taken by the plaintiffs' experts, I find that I am able on the whole of the evidence to find the facts necessary to decide the issue before me. I also find that in the circumstances of this case, it is just that I do so.
- [53] In my view, the issue before me is suitable for determination by way of summary trial.

Damages

- [54] The plaintiffs rely on the expert report of Richard Butler, PEng dated September 18, 2018. Mr. Butler is a Senior Geotechnical Consultant at Golder. Both Mr. Butler's qualifications and the quality of his report are impressive and I have no hesitation accepting his opinions in their entirety.
- [55] Mr. Butler opined that his "Class 4" estimate of the cost of remediating the damage caused to the Nickel Property by the defendants is \$1,340,220, including a contingency of \$223,370, and that this estimate is generally expected to be accurate within the range of -30% to +60% of the actual contract award for new construction, after the application of the contingency.
- [56] The plaintiffs also provided a quotation dated June 3, 2019 of Cory Yacyshyn, a Project Manager with Matcon Construction Company for the same cost of remediation. Although not submitted in evidence as an expert report, Mr. Yacyshyn's estimate of the cost as at that date was \$1,340,000. Despite Mr. Yacyshyn's estimate being remarkably close to that of Mr. Butler, I give it little weight because it was not properly tendered as an expert opinion.
- [57] The expert report of the defendants' geotechnical expert, Mr. Bodnar, was not served until after the January 3, 2020 deadline imposed by Justice Dley as a condition of the previous adjournment. However, despite that inexcusable delay, I have decided to allow it to be admitted in evidence so as to ensure justice is done in this case.
- [58] Mr. Bodnar does not provide his own estimate of the remediation cost of the Nickel Property. Rather, his report is merely a critique of Mr. Butler's opinion. He opines that to his knowledge, Mr. Butler's estimate of cost is based on a new design by Golder, rather than on the Remediation Plan agreed to in June 2013. That is not surprising, given that the June 12, 2013 Remediation Plan encompassed both the Nickel Property and the Pulaski Property. Mr. Bodnar opines further that Mr. Butler's design drawings depict a retaining wall system that "extends well beyond the 2003 slide area" and consists of a "secant pile wall" system that, in his experience, is not commonly used for single family lots:

"due to the high cost of mobilizing large drilling equipment to install this type of wall and the costs of the wall itself".

- [59] Mr. Bodnar goes on to state that:

In my opinion, the extent of retaining walls can be greatly reduced from that shown in the Golder design.

- [60] The difficulty I have with Mr. Bodnar's report is that he does not provide the court with any alternative design or cost estimate for it. The Court is left with no other basis upon which to assess the damages in this case. My conclusion is that this omission is deliberate. The defendants do not want to be faced with having to pay for a remediation of the Nickel Property independent of a complete remediation of both properties. That is common sense. However, the defendants have demonstrated beyond any doubt that they are only prepared

to repair the damage they caused in 2003 on a timetable that suits them.

[61] The only other evidence presented by the defendants as to the cost of the remediation is the following:

- a) a letter dated March 28, 2017 from B&B Contracting (2012) Ltd. quoting the cost of "slope reconstruction" at \$268,600.

This quotation excludes a significant amount of the work and materials that would obviously be necessary for the work such as clearing/demolition of the bottom of the slope containing the debris from the 2003 landslide, supply of the "lock blocks" for the retaining wall, permits, slope protection, to name only a few of the exclusions. The quotation does not provide any information regarding the cost of this additional work and materials so as to enable the Court to compare it to Mr. Butler's comprehensive estimate. I do not find it of any assistance in assessing the cost of remediation;

- b) a letter dated March 28, 2017 from Mountain Coast Civil Contractors Inc. providing a quotation of \$262,000 to "excavate and place shot-rock below wall, build and backfill lock-block wall. Create slope from top of wall to existing grade".

This letter, too, excludes significant items of the necessary work and materials and suffers from the same defects as does the B&B Contracting quotation. I also do not find it of any assistance in assessing the cost of remediation;

[62] Mr. Butler's cost estimate is over two years old. It is unfortunate that the Court was not provided with a more current estimate. However, the fact that damages are difficult to assess does not mean the court should not do so and relieve the wrongdoers of the necessity to pay damages: *Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada*, [1976] 1 S.C.R. 267 at 289. In some cases, the best that can be achieved is a rough estimate as to the amount of damages that have been suffered: *British Columbia v. Canadian Forest Products Ltd.*, 2002 BCCA 217 at para. 74; *Kakavelakis v. Boutsakis*, 2014 BCSC 1145 at para. 75, *aff'd* 2017 BCCA 396.

[63] The best evidence available to the Court regarding the cost of remediation is the opinion of Mr. Butler. His estimate is that the necessary repair will cost \$1,340,220. This figure includes a contingency allowance of 20% (\$223,370). It does not include the cost of permits, environmental considerations, settlement monitoring, weather delays, quality assurance costs, final design or engineering costs, insurance costs or GST. Mr. Butler's opinion is that this cost estimate can be expected to vary from a low of \$938,154 (-30%) to a high of \$2,144,352 (+60%).

[64] As noted, Mr. Butler's figures are over two years out-of-date.

[65] After having considered all of the foregoing, and recognizing that I am only able to make a rough assessment on the evidence, I conclude that the plaintiffs' claim of \$1,340,220 is fair and just in the circumstances.

[66] In view of my assessment of damages regarding the costs of remediation, there is no need to deal with the plaintiff's alternative claim for judgment based upon the loss of value of land.

Conclusion

[67] The plaintiffs are entitled to judgment against the defendants, jointly and severally, in the amount of \$1,340,220.

Costs

[68] After having delivered these Oral Reason for Judgment, counsel confirmed that, on June 27, 2019, the plaintiffs delivered to the defendants a formal offer to settle their claim in this action for payment of the sum of \$850,000.

[69] The plaintiffs are also entitled to their costs of this action to and including June 27, 2019 at Scale B, with the exception of the hearing before Justice Holmes on April 7, 2017 in respect of which there was an order that each party would bear their own costs.

[70] The plaintiffs are entitled to double their costs (at Scale B) after June 27, 2019.

[71] The sum of \$15,000 that was paid by the defendants pursuant to the order of Justice Dley on October 22, 2019 will be set off against the plaintiffs' taxable disbursements in this action.

"G.C. Weatherill J."

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Prepared on 28 October 2026 · Esheria