

CANADA / JUDGMENT

Phillips v. Keefe

2009 BCCA 523

COURT

British Columbia Court of Appeal

DECIDED

13 November 2009

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2009 BCCA 523 Phillips v. Keefe COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Phillips v. Keefe, 2009 BCCA 523 Date: 20091113 Docket: CA037045 Between: Lester G. Phillips and Colleen Burke Appellants (Plaintiffs) And Brad Keefe and Marlene Keefe Respondents (Defendants) Before: The Honourable Chief Justice Finch The Honourable Madam Justice Levine The Honourable Mr. Justice K. Smith On appeal from: Supreme Court of British Columbia, March 19, 2009 (Phillips v. Keefe, Vancouver Registry S081200) Oral Reasons for Judgment Counsel for the Appellant: R.S. Anderson, Q.C. D.D. McWhinnie Counsel for the Respondent: F. Lamer Place and Date of Hearing: Vancouver, British Columbia November 13, 2009 Place and Date of Judgment: Vancouver, British Columbia November 13, 2009

- [1] FINCH C.J.B.C.: The plaintiffs appeal from the dismissal of their action for damages, for nuisance, trespass and trespass of chattels. The claim arises from a dispute as to whether a fence which previously separated the parties' two backyards accurately marked a boundary line between their two properties.
- [2] The defendants, relying on the advice of a property surveyor, took the position that the fence was misplaced and was, in fact, located some 12 feet inside their property. On February 15, 2008, the defendants tore down the fence and removed or damaged trees, bushes and plants which the plaintiffs believe were located on their property.
- [3] The plaintiffs retained their own land surveyor. He prepared an opinion stating that the location of the fence was the boundary line between the two properties.
- [4] For purposes of trial, the parties prepared an agreed statement of facts as to all matters except as to the true location of the boundary line. The conflicting reports of the two B.C. Land Surveyors were adduced in evidence and both surveyors testified. In brief oral reasons dismissing the action the learned trial judge said this:
- [4] Both parties called expert witnesses, B.C. Land Surveyors, both were conceded to be experts and able to give opinion evidence, and I so found. I listened with care to the evidence given by the two experts. In my view, the defendants' expert was the more persuasive witness by a substantial margin. I was, frankly, doubtful of the plaintiffs' expert's evidence while I was hearing it. I found the defendants' expert to be a better witness, and I found that the

evidence he gave to be factual. From my perspective, the evidence before me establishes that the boundary line is probably, that is more likely than not, to be where the defendants' expert says it is. Of course, there is a possibility that the plaintiffs' expert is right. Such a possibility does not satisfy the burden of proof that the plaintiffs need to establish. Consequently, I find that the boundary line is as Mr. Barnard states it to be.

- [5] Dealing with an alternate claim for the application of s. 36 of the Property Law Act, R.S.B.C. 1996, c. 377, the judge said:
- [7] ... But from my study of the plans that have been placed before me, I am satisfied that if the boundary is established on the Barnard line, both properties will be of equal dimensions - 165 feet or two and a half chains by surveyor's measure. The Barnard approach not only reconciles the historical evidence and appears to do equity between the parties in this case, but also is a practical and sensible solution in today's situation, in the sense that each party has an equal amount of property facing in opposite directions on two different streets in Delta, British Columbia.
- [6] The plaintiffs' first ground of appeal is that the reasons for judgment are inadequate or are no reasons at all. The defendants maintain that the reasons are adequate. They say it is sufficient for the judge to adopt the reasoning of one expert, that the issues of fact were defined in the experts' reports and that it was unnecessary for the judge to do more than to prefer one opinion over the other.
- [7] In my respectful view, the judge's reasons are insufficient to meet the standard set out in the authorities. The judge says the defendants' expert was "the more persuasive witness by a substantial margin". He says that he was "doubtful of the plaintiffs' expert evidence" while he was hearing it. However, the reasons do not explain why he was led to either of those conclusions. The trial judge's reasons do not need to set out what the judge thought in a "watch me think" fashion: *R. v. M* (R.C.), [2008] 3 S.C.R. 3, but they do need to set out "what he or she has decided and why he or she made that decision": *R. v. Morrissey* (1995), 22 O.R. (3d) 514.
- [8] In *Gibson v. Insurance Corporation of British Columbia*, 2008 BCCA 217, this Court stated:
- [25] We have the benefit of the trial judge's conclusory findings on each of these issues, but we do not enjoy an indication of the reasoning process, the evidentiary analysis, or a discussion of the acceptance and rejection of the evidence of the numerous experts, in which the trial judge had to engage in arriving at these conclusions.
- [9] Such statements are apposite here. The trial judge has provided his conclusory findings but he has not provided any indication of his reasoning process, the evidentiary analysis or a discussion of the acceptance and rejection of the evidence of the experts except to say that he found one expert "more persuasive by a substantial margin than the other." Further, there are no reasons setting out the basis for this special costs award.

- [10] The reasons leave the plaintiffs unable to identify or challenge any errors the judge may have made in reaching his conclusion. Nothing of his reasoning process is disclosed. As this Court said in Gibson at para. 34: The gravamen in the reasons debate is their adequacy to permit proper appellate review.
- [11] I find the reasons in this case do not permit of a proper appellate review. I would allow the appeal and order a new trial. The judge to be assigned to the new trial is an administrative matter for the Chief Justice of the Supreme Court. The parties should bear their own costs of the appeal. Costs of the first trial will be costs in the cause of the new trial.
- [12] LEVINE J.A.: I agree.
- [13] K. SMITH J.A.: I agree.
- [14] FINCH C.J.B.C.: So ordered. "The Honourable Chief Justice Finch"

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