Claim No: SCCH - 478661

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Isaac v. Harris*, 2018 NSSM 92

BETWEEN:

TANYA M. ISAAC

Claimant

- and -

SARAH HARRIS

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on October 25, 2018

Decision rendered on November 13, 2018

APPEARANCES

For the Claimant	Brian Church, QC Counsel
For the Defendant	Lindsay Logie Counsel

BY THE COURT:

[1] The parties are adjoining homeowners in a leafy neighbourhood of West End Halifax. It is agreed that for forty years or longer, a (mostly) barberry hedge sat on or close to the property line separating the two properties, providing a privacy screen of some aesthetic value - at least from the point of view of the Claimant.

[2] The facts concerning the origin of the hedge are lost in time. Neither of the parties has owned their property for anywhere near that long. The Claimant has been there for about 9 years, while the Defendant has been there for about 13 years. Both parties essentially inherited a mature hedge when they bought their properties, and drew their own conclusions about the ownership or origins of the hedge.

[3] Over the weekend of May 5 and 6, 2018, the Defendant and her husband took up a chainsaw and levelled about twenty five feet or more of the hedge separating the two properties, in preparation for their eventual plan to put up a wood privacy fence between the backyards. They did this without asking, let alone even informing, their neighbour (the Claimant), who looked out her window on the morning after and saw for the first time the empty space where the hedge had always been. This came as a complete shock to her.

[4] Clearly, the act of removing the hedge without so much as a “by your leave” was not a neighbourly thing to do. The question for this Court is whether it was also unlawful.

[5] In fairness, the Defendant may have been influenced by the fact that in 2015 the Claimant unilaterally removed a section of the hedge between the houses. The Claimant said that she removed it because it was falling over (towards the Defendant's property) and was unsightly. The Defendant did not take any objection to that action at the time, despite not having been consulted. It may be noted that, because it was in between the houses - which are fairly close together - it did not provide much privacy, so little was lost by its removal.

[6] A Google Street View picture from earlier in 2015 shows the hedge as it existed at that time, mere months before the Claimant took down the part between the houses. One of the striking aspects of this picture is that the line of the hedge is far from straight, which crookedness is clearly magnified by the perspective of how the picture was taken.

[7] The Defendant believed, and continues to assert, that the hedge - consisting of the barberry bushes as well as a scattering of small interspersed maple trees - was entirely on her side of the property line, and were effectively her plants to do with as she wished. The Claimant believed that this was a border hedge that likely neither party owned outright, and which could not be unilaterally chopped down by one of the adjoining property owners. According to the Claimant, the Defendant committed actionable trespass.

[8] The dispute sent both parties off to their respective surveyors who substantially agreed with where the true boundary is located. They each produced a survey plan. Thousands of dollars were spent by each party for their respective surveys.

[9] The survey prepared by the Claimant's surveyors, Civtech Engineering & Surveying Limited, helpfully sets out the location of the boundary, which is by definition a line of no width, or more accurately a one-dimensional line. It also traces the location (insofar as could be determined) of the former hedge, which is not merely a line but is a path of some thickness - a two dimensional swath nominally straddling the boundary along a slightly crooked path. The surveyor traced the location of "large stems" which he marked on his plan as a red dotted line, as if they were on a one-dimensional track. He also marked the "limit of small stems" with two blue dotted lines, with the area between them representing the two-dimensional, slightly meandering path of the hedge.

[10] Of course, the hedge (as it existed) was a three-dimensional object occupying airspace and sending roots into the ground on both properties. As seen in some older photos, as might be expected of an old hedge, it was at least several feet in width. Both the 2009 and 2015 Street View pictures graphically highlight this fact.

[11] The survey's red dotted line (in the area cut) appears to be entirely over the line on the Defendant's side, by an amount which is at most a foot and, in some areas, mere inches. However, even that can be slightly misleading as it does not take into account the roots of these trees or bushes which, in all likelihood, grew on both sides of the boundary. The small stems appear to have been growing on both sides of the line, in a pattern that was a foot or two on each side of the boundary line. The hedge, being the sum total of all of the small plants growing out of the ground, clearly straddled the property line.

[12] While one cannot know for certain who planted the hedge in the 1970's or earlier, the remaining evidence suggests that it was planted so close to the line that there is no basis to presume that one or the other of the adjoining landowners wished to claim it as entirely theirs. There are a few possibilities. It might have been a joint enterprise, or one undertaken by one neighbour with the permission of the other. It is entirely possible that the person planting the hedge only had a vague idea of where the property line actually was. Even if it had been planted by the Defendant's predecessor-in-title, the hedge - which was always a three-dimensional object casting a two-dimensional shadow on the ground - appears to have spread over the years and sent out new growth in the neighbour's yard, becoming something growing on both sides of the border.

[13] The Defendant's view that the hedge was entirely on her property is not borne out by this or any other evidence. The most that can be said is that the remaining part of the hedge after the 2015 cutting by the Claimant, was slightly more on her side than on the Claimant's side, but as a living thing with multiple stems and roots, tracing a path and casting a shadow of as much as five feet in width, it was <u>not</u> the Defendant's hedge. I believe it is best described as a border hedge or, more accurately, a multitude of small border trees planted close together to form a hedge. In such a case, it was jointly owned property.

[14] In *Anderson v. Skender*, 1993 CanLII 2772 (BC CA), the concept of joint ownership of border trees is described. While large trees are somewhat different than hedges, I believe the same principles apply:

> By 'border trees' in this context I refer to trees whose trunks at ground level stand either on or beside the property line, and which have roots or branches extending into adjoining properties. While in argument in this

case something was made of the status of trees whose trunks straddle the property line, rather than being entirely on one side, I do not understand such trees to be in any special position for the present purpose, that is to say so far as the law of trespass is concerned. I do not believe that anything said in *A.G.B.C. v. Corporation of Saanich* (1921), 29 B.C.L.R. 268 (C.A.) is to the contrary. Plainly such trees cannot be felled by one landholder without the consent of the other landholder for they cannot be cut at ground level without the cut being at least in part on the other's property. So far as the right of either to cut branches, roots or leaning stems wholly over or under their own land is concerned, that cannot, in my view, be affected by the fact that the trunk is partly on each side of the line, rather than being wholly on the other side. The authorities suggest that for the purpose of ownership, and the rights and obligations which flow from ownership, there is a difference between trees whose trunks straddle property lines at the point where they emerge from the ground and trees whose trunks do not, but whose trunks at a higher level, or whose roots or branches, cross the property line. There may even be a refinement of that difference where the trunk has started out at one side of the line but its expanding girth later extends over the property line. But as I say, those differences do not affect the present claim, which is confined to trespass. I will revert to this point later.

[15] Passages from the trial decision in *Anderson*[1] are also helpful.

The plaintiffs rely on the dissenting judgment of Martin, J.A. in *Attorney General for British Columbia, Watt and Watt v. The Corporation of Saanich* (1921), 29 B.C.L.R. 268. The majority of the Court of Appeal held that the trees were cut with the owner's consent and dismissed the appeal on that ground. Martin J.A. alone dealt with the law concerning boundary trees. He noted that a land surveyor testified that the boundary line passed through the centre of the stump and then continued:

> ... because it is admitted that the trunk of the tree stands partly upon both properties and it is therefore a line or border or boundary tree, as such trees are termed. The defendant seeks to justify this cutting by the authority of *Holder v. Coates* (1827), M. & M. 112 (31 R.R. 724), but, in my opinion, that case has no application, because there the trunk of the tree stood wholly upon the land of one party and the question was as to the extension of the roots into the land of the other party and priority of sowing and planting. But here as it is admitted that the trunk stands partly upon

[1] *Anderson v. Skender*, 1991 CanLII 260 (BC SC)

> each property then the two landowners are tenants in common of the tree, and it was held in *Waterman v. Soper* (1698), 1 Ld. Raym. 737:
>
> Two tenants in common of a tree, and one cuts the whole tree; though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons."
>
> The decisions on the point are conveniently collected in Gray's Cases on Property, Vol. 1, p. 543, sub. tit. "Border Trees", and after an examination thereof I am of opinion that the law is well stated at p. 552 in *Griffin v. Bixby* (1841), 12 N.H. 454 [37 Am. Dec. 225 at p. 227], wherein it is stated:
>
> Without going to the extent of the ruling in Lord Raymond; we are of the opinion that a tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other.

I hold that this passage expresses the applicable law in British Columbia. Cutting overhanging boughs is quite a different thing from severing one of two trunks and damaging fifty percent of the root system. One has to look at it, as it were, from the tree's point of view. It is an assault on the general health of the whole tree, affecting as it does the energy creating foliage and the energy storing roots. If the assault is carried far enough it can be fatal to the tree.

The defendants had an interest as a tenants-in-common of the main double tree. Their interest in the other two trees is tenuous but nevertheless they had some interest because of the root penetration under their land. The incontrovertible fact, with respect to the two double trees, is that the defendants had no legal right to effectively destroy them and no absolute right to damage the third tree.

[16] I acknowledge that many of the larger stumps sit on the Defendant's side of the line, but the evidence suggests that these were mostly, if not all, maples which over the years had seeded and found their way into the barberry hedge as likely volunteers. The barberry bushes, as represented by the smaller stumps,

are found on both sides of the boundary. In all cases, it is an irresistible inference that there were at least roots growing on both sides of the centre line of the hedge.

[17] The facts of this case distinguish it from others where the original boundary is in dispute, and a new boundary is arguably created by adverse possession. The Nova Scotia Small Claims Court does not have jurisdiction to declare the boundary to have been changed by one party's exclusive possession of the property, as this is one of the excluded areas of jurisdiction carved out by s. 10(a) of the *Small Claims Court Act*:

> 10 Notwithstanding Section 9, no claim may be made under this Act
>
> (a) for the recovery of land or an estate or interest therein;

[18] Had this matter been brought in the Supreme Court, a compelling argument could have been made that the centre point of the hedge, or the line through the majority of the trunks, represented the best evidence of the border, as the owners on both sides have accepted that as their common border for decades. Such an exercise is unnecessary here. The border is mapped out on both surveys, which independently came to the same conclusion within an inch of each other, which difference is immaterial.

[19] A finding that the hedge consisted of many "border trees" does not depend upon any finding of adverse possession. Based on the whereabouts of all of the stems, it was a jointly owned hedge that the Defendant did not have the unilateral right to destroy. Her actions therefore constituted trespass.

[20] The BC case of *Whitmore v. Chaster*, 2013 BCPC 364 (CanLII) in the Provincial Court - which is the equivalent of the Small Claims Court in Nova Scotia - offers a striking parallel to the case here. Applying the *Anderson* case relating to jointly owned shrubs or hedges, the court concluded:

> (a) An award of damages for trespass should restore the Claimant as closely as possible to the position he would have been in had the trespass not occurred. Damages may provide compensation for loss of value of the land or the cost of restoring it to its previous condition.
>
> (b) If a person sues for trespass without proving that damage has occurred, only a nominal amount will be awarded. Mr. Rief submits that Mr. Whitmore has not proven he suffered damage as a result of the hedge being removed. However, the evidence establishes that the Whitmores placed a high value on the privacy and security the hedge had given them for thirty years. Their back garden has been 'their domain," the place where they spent a great deal of time, tending both flower and vegetable gardens, relaxing over afternoon tea, and wearing whatever they choose. Their use of the garden changed, and their privacy and enjoyment in it lessened, after the hedge was reduced and removed. Moreover, a hedge has aesthetic advantages over a chain link fence. I find that the evidence does establish that Mr. Whitmore suffered loss of enjoyment and privacy as a result of Ms. Chaster's trespass.

[21] In the case here, the Claimant seeks damages under several heads:

a. The estimated cost of a new hedge,
b. General damages,
c. The estimated cost of a temporary fence, and
d. The cost of her survey.

[22] The Claimant also seeks costs, which include the cost of having her surveyor come to court to testify.

[23] I will consider the damage heads in turn.

Cost of new hedge

[24] The Claimant was clear in her testimony that her main concern was not having been consulted, and she admitted that she might well have consented had she known in advance that the Defendant was planning to build a privacy fence. The end result is that privacy has been restored. The fence is a nice one and the Claimant does not have to plant a new hedge in order to restore privacy.

[25] While she may wish to do some shrub or tree planting on her side of the fence, she will almost surely not plant a full hedge on her side of the fence, which would have cost $4,368.00 plus HST, according to an estimate from the landscaping company Edmonds.

[26] I am only prepared to award $1,000.00 under this head. While this is somewhat arbitrary, I believe this amount would be sufficient to purchase a few shrubs and/or small trees that would, if strategically placed, soften the view from her side of the fence.

General damages

[27] I believe that general damages of $100.00 are appropriate. The Defendant's act of trespass created significant distress for the Claimant.

Temporary fence

[28] The Claimant has no need for a temporary fence at a cost of $1,207.50, as the Defendant put up a nice permanent fence. Nothing is allowed under this head of damages.

Cost of survey

[29] In a more friendly world, the Claimant and Defendant would have agreed to have one proper survey done. Instead, they each hired their own surveyors.

[30] Nevertheless, I am satisfied that the Claimant would never have incurred the expense of a formal survey if not for the unlawful trespass committed by the Defendant. That cost was $5,313.00, and ought to be borne by the Defendant.

Conclusion

[31] In the result, I award the Claimant the sum total of $5,468.00 in damages.

[32] I also allow her costs of $199.35 to issue the claim plus $500.00 for the expert testimony of her surveyor.

[33] The total allowed is therefore $6,167.35.

Eric K. Slone, Adjudicator