

NEW WESTMINSTER

JAN - 8 1996

CIVIL REGISTRY

New Westminster Registry
File No. C000377

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(SMALL CLAIMS DIVISION)

BETWEEN:)
)
 DENNIS RATCLIFFE AND)
 ELIZABETH RATCLIFFE)
 Claimant)
)
 AND:)
)
 DISTRICT OF COQUITLAM)
 Defendant)

REASONS FOR JUDGMENT
 OF THE HONOURABLE
 JUDGE K.D. PAGE

Appearing for the Claimants:

A.C. McQuarrie

Appearing for the Defendant:

P.M. Bond

THE FACTS

The claimants are the owners of a 35 acre parcel of property located on the side of Burke Mountain in the District of Coquitlam. The defendant's property is bordered on the south by Crouch Avenue which has a drainage ditch which extends along the southerly boundary of their property. To the west of the property is Crown land which was formerly privately owned.

In 1976 the claimants dug a ditch on the Crown property which extended for approximately 950 feet from the northern portion of the property to approximately 50 feet

north of the Crouch Avenue ditch, with no connection between the two. This was done in an attempt to drain a wet area on the property. However, the claimant testified that the ditch did not seem to have the desired effect. Subsequently, in 1988 or 1989, the ditch was extended for the final 50 feet so that it connected with the Crouch Avenue ditch at a 90 degree angle. While there is conflict in the evidence as to how this extension occurred, I am satisfied on reviewing the whole of the evidence that it was done by the claimant. He testified that there was a natural flow of water which flowed down in a wide spread out manner and he used his backhoe to clear a narrower patch and connect it to both the City ditch at one end and his existing ditch at the other end.

On November 9, 1989, there were heavy rainfalls and severe flooding occurred in the Crouch Avenue ditch, causing damage to the municipal road and private properties. An investigation revealed that the ditch culvert had been blocked by a bicycle wheel and other debris, causing the flood. Subsequent to this event, an investigation was conducted by municipal employees, one of whom was Michael Carver. He testified that he observed the claimant's ditch intersecting with the Crouch Avenue ditch and concluded that it had been recently dug, noting piles of soil on the east side of the ditch up to one metre high. He noted erosion in the Crouch Avenue ditch extending in an easterly direction from the point where the claimant's ditch joined it.

Although the claimant does not recall receiving it, the defendant, on November 21, 1989, sent him by double registered mail a letter advising him that the ditch he had

constructed was in contravention of the municipal bylaw and requested that steps be taken within 90 days to remedy the situation. Subsequent to this, in 1990 the claimant met with Mr. Kersey, a municipal employee, to discuss the situation but no remedial action was taken. On August 9, 1991, the municipal engineer, Neil Nyberg, made a report to Council outlining the events which had occurred since the flood in 1989, and recommended that Council declare the claimant's ditch a nuisance and direct that he fill it within a certain time period, failing which it would be done by the defendant with costs borne by the claimant under the provisions of s.936(1) of the *Municipal Act*. A letter enclosing a copy of that report was sent to the claimant inviting him to attend a hearing into the matter on September 6, 1991, which the claimant did attend and presented a written submission in which he claimed not to be in violation of the municipal bylaw and outlining his complaints against the defendant. In his submission, the claimant indicated that the ditch was not his responsibility, not being on his property.

The claimant testified that he heard nothing further regarding Council's decision and that he met with Mayor Sekora and Mr. Nyberg in the latter part of September to discuss the matter further. He said he was left with the impression that nothing further would be done without consulting with him. Mayor Sekora testified that he recalled meeting with the claimant and Mr. Nyberg but testified that he gave no assurances to the claimant as to how the matter would be handled. On October 7, 1991, Council received Mr. Nyberg's report authorizing the resolution to declare the claimant's ditch a nuisance and direct it be filled in.

The claimant testified that, not having heard further, he phoned Mr. Nyberg on October 8 advising him that he was leaving for England, and in that conversation Mr. Nyberg never told him that Council had accepted his report. However, the claimant was not certain of the date, admitting that he could be one day off and further there is no evidence before the court that at the time of the conversation Mr. Nyberg was aware that his report had been approved by Council.

On October 23, 1991, after obtaining consents from the owner of the property on which the ditch was located and without further contacting the claimant, the defendant filled in a portion of the claimant's ditch. They left the northern portion of the ditch unfilled, mistakenly believing it was on the claimant's property and because they could not guarantee that water from that area would not flow towards the claimant's home and cause flooding. They left 6.8 metres unfilled where the claimant's ditch intersects the Crouch Avenue ditch, again believing it to be on the claimant's property and because they didn't believe that portion would collect enough water to overburden the Crouch Avenue ditch.

In November, 1991, there were heavy rains which caused extensive flooding to the claimant's land, washing out over an acre of top soiled and seeded land and damaging the drainage system.

The claimants are claiming damages against the defendant for negligence and nuisance for filling in the ditch, causing ground water to be diverted onto the claimant's

land. They also claim that the actions of the defendant were high-handed, giving rise to punitive damages.

The defendants counterclaim for the cost of filling in the claimant's ditch and the cost of repairing erosion damage to the Crouch Avenue ditch.

THE LAW

The law applicable to the issues in this case is contained in Loring et al v. Brightwood Golf and Country Club Ltd. (1974), 44 D.L.R. (3rd) 161 (N.S.C.A.) and Caplin et al v. Gill and Kaur (1978), 5 B.C.L.R. 115 and Woolner v. Dyck (1950) O.W.N. 779.

These cases are authority for the proposition that while a lower land owner may prevent surface water from an upper land owner from flowing onto his land, he may not do so in a manner which causes it to flow to another's property in an unnatural manner.

THE ISSUES

The issues to be decided are:

- 1) Has it been proved on a balance of probabilities that the defendant was negligent and created a nuisance which caused flooding to the claimant's land?

- 2) Has it been proved on a balance of probabilities that the claimant created a nuisance which caused erosion damage to the Crouch Avenue ditch?

- 3) If the answers to the above are affirmative, what are the damages to be assessed?

FINDINGS

COUNTERCLAIM

I heard a great deal of evidence concerning the manner in which surface water flows onto and off of the claimant's land and a variety of conflicting topographical maps were presented to the court. I am satisfied from reviewing all of the evidence that surface water flows onto the claimant's property from the west to the east and that surface water was intercepted by the claimant's ditch and caused to flow in a southerly direction. I do not accept the claimant's contention that the water has always flowed in a north/south direction towards Crouch Avenue. There is clear evidence that the Crouch Avenue ditch has been seriously eroded at the intersection of the ditches and to the east of that location. That situation did not exist until the claimant's ditch was extended to allow large volumes of water to flow into it at a 90 degree angle. I have therefore concluded that the erosion was caused by the unnatural diversion of surface water from the western boundary of the claimant's property into the Crouch Avenue ditch for which he is liable in damages.

THE CLAIM

The claimant says that the defendant, in filling in his ditch, created a berm which caused surface water to be diverted onto his land causing flooding and that the defendant, in seeking to remedy the water problem, did not use reasonable care to ensure that damage was not caused to the claimant's property.

The defendant's position is that they simply filled in the ditch constructed by the claimant which they had a right to do and that they gave the claimant ample warning of their intention. They say further that the flooding which occurred on the claimant's property was caused by the natural flow of water over the property in a west to east direction and was not caused by the filling of the ditch.

I agree that the defendant had the right to remedy the erosion in the Crouch Avenue ditch. However, in exercising that right there was an onus upon them to take reasonable steps to ensure that their actions did not cause damage to the claimant's property. Due to conflicts in the evidence, it is not possible to conclude that the defendants, in filling the ditch, created a berm or raised portion which in fact directed water onto the claimant's land. However, all of the evidence is consistent with the fact that the claimant's ditch created no problem whatsoever for the Crouch Avenue ditch until the last 50 feet extension was done in 1988 or 1989. It appears obvious then that the remedy for the erosion problem would be to refill that 50 foot extension. This was done save for a 6.8 metre portion at the

intersecting point. However, the defendant went further, filling in the main part of the ditch save for the northern portion. It is noted that part of the reason for not filling in that portion was concern that flooding may occur, causing damage to the claimant's home. It appears that similar concerns did not arise with respect to possible flooding of the lower portion of the claimant's property by filling in the middle portion of the ditch and this, in fact, was what occurred. There is no evidence before the court to indicate that the defendant took any steps whatsoever to ensure that their actions would not cause damage to the claimant's property and I find them to have been negligent in this regard and liable for damage caused by the flooding.

DAMAGES

Respecting damages, the claimant is seeking the sum of \$18,832, together with an award for punitive damages in the sum of \$1,000. He has abandoned the excess of \$10,000 to come within this court's jurisdiction. He produced estimates to support this claim. The defendant takes issue with the amount claimed, submitting that the repair work has not in fact been carried out and further that the claimant could, in fact, perform such work himself as he has done in the past at much less expense. I do not accept these submissions. Damage having been caused, the claimant has the right to have the restoration work done by others at a reasonable cost. The only real evidence before the court as to the cost are the estimates which have been filed, which I accept as being reasonable.

Respecting the claim for punitive damages, I would not allow this, since it has not been shown on a balance of probabilities on the whole of the evidence that the defendant acted in a high-handed manner as alleged.

I therefore award damages to the claimant in the sum of \$10,000.

With respect to damages on the counterclaim, the defendant has filed estimates claiming the sum of \$11,474 representing the cost of filling in the ditch and the cost of restoring the ditch to its original condition. The claim has been reduced to \$10,000 to come within the court's jurisdiction. The claimant disagrees with this amount, submitting that the amount claimed is not reasonable. Once again the only real evidence before the court on the issue of damages is the estimate of the defendant, which I accept.

Accordingly, there will be judgment on the counterclaim in the amount of \$10,000, both awards to be set off one against the other.

Dated this 4th day of January, 1996



K.D. Page, Judge
Provincial Court of British Columbia