

Citation: Donald Henderson and Linda
Beryl Kyle v. Norman Porter and
The Corporation of the District
of Central Saanich
2001 BCSC 1601

Date: 20011121

Docket: 982444
Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**DONALD HENDERSON AND
LINDA BERYL KYLE**

PLAINTIFFS

AND:

**NORMAN PORTER AND
THE CORPORATION OF THE DISTRICT OF CENTRAL SAANICH**

DEFENDANTS

AND:

LINDA BERYL KYLE

DEFENDANT BY WAY OF COUNTERCLAIM

AND:

**THE CORPORATION OF THE DISTRICT OF CENTRAL SAANICH,
WILLIAM ALFRED EASTGATE,
NORMAN PORTER, AND PAUL ST.PIERRE**

THIRD PARTIES

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE W.G. GRIST

Counsel for the plaintiffs

Gregory Harney

Counsel for The Corporation of
the District of Central Saanich

Russell Brown

Norman Porter - Self-represented

Date and Place of Hearing/Trial:

October 10-14, 2000,
May 21-June 1, 2001
Victoria, BC

[1] The plaintiffs and the defendant, Norman Porter, own adjacent rural properties in the District of Central Saanich. In the fall of 1996 the defendant, Porter, constructed a two-storey garage, the south east corner of which encroached on the neighbouring property, acquired by the plaintiffs in the following year.

[2] The plaintiffs' action is for an order as may be made under S.36(2) of the **Property Law Act** R.S.B.C. 1996, c. 377, directing the defendant to remove the encroaching portion of the garage from the adjacent property. The plaintiff also brings action against the District in negligence in respect of the Municipality's participation in the events leading to the encroachment.

[3] The relevant history of this matter begins with a building permit issued September 30th, 1996 to Mr. Porter for a garage, which was to be situated at its closest point, two metres from the property line. The footings for the garage were sited without the assistance of a survey and apparently relying on an old fence located in the area of bush between the two properties. The then owner of the adjacent property suspected the footings were encroaching, or at least were within the setback distance, and inquired of the building department if the building was properly sited.

[4] On October 29, 1996 the District posted a correction notice on site requiring a surveyor's certificate locating footings. At this point much of the framing for the garage was in place and work was ongoing in preparation for a stucco application.

[5] On November 14, 1996 Mr. Porter instructed Mr. Orrico, a British Columbia Land Surveyor, to investigate the location of the garage. Field workers from Mr. Orrico's office attended the site. As a result of this survey work, Mr. Porter learned that the building was encroaching, or at the kindest, that it was highly likely that the south east corner extended over onto the adjacent land. Subsequent to this a sketch originally prepared by Mr. Orrico was altered, the name of a non-existent surveyor applied, and the document submitted to the Municipality. The Municipality accepted the document as satisfying the concern which had prompted the notice of October 29th, 1996.

[6] The garage was completed and the encroachment discovered again in February 1998 after Mr. Henderson and Ms. Kyle had acquired the adjoining property. The matter again came to light when the encroachment was discovered by a surveyor hired by Mr. Henderson to assist in locating a fence line between the properties.

[7] The encroachment itself is the overlay of the garage's southeast corner onto the plaintiffs' property. The evidence indicates that the garage extends, at its furthest, one meter onto the neighbouring property. The encroachment tapers to nothing over approximately one-half of the length of the building.

[8] The defendant, Porter, does not dispute the encroachment and asks for an accommodation under Section 36(2).

Specifically, he proposes a conveyance in respect of the affected portion of land, re-routing the property line to accommodate the encroachment and giving up equivalent area from his property to compensate.

[9] Authority recognises Section 36 as, "a basis, on equitable grounds, for resolving disputes over encroachments." *Svenson v. Hokhold*, [1993] B.C.J. No. 859 (BCCA).

[10] In *Vineberg v. Rerick*, Leggatt, J. noted three predominant considerations commonly applied to determine if an encroachment should result in an accommodation, or alternatively, if the offending structure should be ordered removed:

1. The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are three degrees of knowledge: honest belief,

negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.

2. The nature of the encroachment: Was the encroachment a lasting improvement? What is the effect and cost involved in moving the improvement? What was its effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more these considerations will be weighed in favour of the petitioner.

3. The size of the encroachment: How does the encroachment affect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.

[11] The first requirement (applicable in considering both an easement and a compensating conveyance) is that the party seeking the easement should have acted honestly and without negligence. Here I judge it likely Mr. Porter thought he was locating his garage on his property when he began construction, but the fact is that he acted without proper investigation, apparently relying on an old fence and perhaps a buried piece of pipe as indicating the property line and south east corner of his land. The plans submitted for a building permit showed his intention to place the garage two meters from the property line in an area of brush between the two rural properties. Previous survey evidence was available

fixing other points on the perimeter of Mr. Porter's property and it would have been a simple matter for a surveyor to mark the south east corner, as in fact was done by the two surveyors who noted the encroachment.

[12] Mr. Porter was formerly the District Building Inspector and subsequently has been self-employed as a property developer. He should have been aware of the danger of a mistake and his lack of care amounts to negligence.

[13] Mr. Porter's evidence was that the garage footings were set by the framer he hired for the project. I reject his evidence in this regard. The framer's evidence was that he was told by Mr. Porter where to site the building.

Specifically, to be in line with a shed further to the rear of the property, as indicated in the site plan prepared by Mr. Porter.

[14] The contract with the framer made no reference to fixing the building site. Mr. Porter had knowledge of the property and was experienced in construction and the framer had no technical skill as a surveyor. These factors lead me to conclude Mr. Porter fixed the site. Further, Mr. Porter's subsequent actions give no assurance his testimony is reliable.

[15] More significant to this case, however, is the fact that faced with the prospect that the building was constructed onto the neighbouring property, Mr. Porter undertook to conceal the mistake with fraudulent assurances the garage was property sited. When required to provide proof of compliance he instructed Mr. Orrico, who prepared a sketch and advised him he was encroaching. Mr. Porter then instructed Mr. Orrico and his Office Manager not to go further in preparing a formal survey document and not to give information concerning the finding. Subsequently the sketch prepared by Mr. Orrico was altered and submitted to the Municipality as proof of compliance.

[16] The equitable relief under Section 36 is not available to a party who has attempted his own remedy through fraud. Subsequent to these events Mr. Porter has been convicted of criminal offences related to the false document and sentenced to jail.

[17] The plaintiffs are entitled to the order requiring removal of the encroachment. The balance of the plaintiffs' case, however, is of a different character. The statement of claim alleges the Municipality acted negligently by failing to take steps to assure the building site conformed to the lot line through its permitting and inspection process and in

accepting the fraudulent plan, which did not conform with the stated requirement of a surveyor's certificate. The statement of claim further states that as a result of these omissions the plaintiffs suffered, "further aggravation and damages", and loss of use of property, continued trespass and diminution of property value.

[18] I am satisfied that neither the Municipal by-law nor the policy procedures of the Municipality at the time indicate that the Municipality undertook a duty to take steps to assure that structures such as Mr. Porter's garage would not encroach. The permitting and inspection process did not mandate surveys fixing the footings for such structures unless the site plan showed their intended location as being within two feet of the set back. Further, notwithstanding the stated requirement of a surveyor's certificate in the October 29th notice, there was no formal requirement for such a document and the Municipality was free to accept the level of proof inherent in the sketch, which had an appearance of validity. Lastly, I do not accept that a cause of action for negligence can be made out in this case extending liability to the Municipality for the defendant's encroachment. An encroachment of itself may interfere with the enjoyment of land, but can be made subject to a specific legal remedy and

will not likely lead to physical damage or unsafe premises.

The cause of action proposed in this case has few of the compelling policy features supporting Municipal liability for negligent inspection for breaches of the building code.

Additionally, the evidence in this case does not indicate any substantial impairment of the use of the land or diminution of value. The action against the Municipality is dismissed and the third party claim by Porter is also without substance.

"W.G. Grist, J."
The Honourable Mr. Justice W.G. Grist

These Reasons for Judgment were released from the Victoria Registry on November 23, 2001 and are date stamped accordingly.