

Citation: ☀

Date: ☀

File No: 09-2561
Registry: Sechelt

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

DR. DAVID BUTLER

CLAIMANT

AND:

TOWN OF GIBSONS

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE W. J. RODGERS**

Counsel for the Claimant:

Allan. A. Macdonald

Counsel for the Defendant:

Leslie Woo

Place of Hearing:

Sechelt, B.C.

Date of Hearing:

January 24, 2011; April 26, 2011

Date of Judgment:

June 29, 2011

[1] This Claim is brought by Dr. Butler (hereinafter referred to as “Butler”) against the Town of Gibsons (hereinafter referred to as “Gibsons”) alleging that Gibsons trespassed on a portion of Dr. Butler’s property. It is alleged this trespass was done negligently. It is further submitted that Gibsons, by its trespass, caused a nuisance.

Facts

[2] This case is about a gravel road, Courtney Road, which runs north and south approximately 400 metres in a rural area of the Sunshine Coast. There are four lots on the west side of the road each having approximately 100 metres of frontage. The first lot, owned by Butler and the second lot, owned by Y, are within the Sunshine Coast Regional District. The next two lots are owned by V and W and are within the municipality of Gibsons. Courtney Road comes to an end at the southern boundary of W’s property.

[3] Courtney Road generally follows the surveyed right of way along the eastern boundary of the four properties. It is described as a “private road”. This definition is important to the issues in this case. A private road is not maintained to the usual road standards of width, construction, drainage and other criteria as in “public highways” maintained by a municipality or the province.

[4] In 2005, Butler bought his property fronting onto Courtney Road. In 2006, he was considering applying to subdivide his property and ordered a survey. The survey disclosed that the travelled portion of Courtney Road encroached approximately 10 metres onto Butler’s property for a distance of approximately 30 metres. Butler testified

the road appeared to deviate from the right of way in order to avoid the large stumps in the middle of the right of way.

[5] Butler asked his neighbours, Y, V and W, to share the cost of relocating the travelled portion of Courtney Road onto the right of way. The neighbours declined to share that cost noting that only Butler would benefit from the expenditure.

[6] Butler directed his legal counsel to write to his neighbours. The letter, dated May 15, 2007, states, in part:

Dr. Butler is currently developing the property and intends to erect a fence one inch inside the property line. You are therefore advised to read the enclosed copy of a letter from the Ministry of Transport as it relates to this matter. Note, that since the current "road" was not serviced by the Department of Transport the prescriptive right to use it under ss. 4 (1) of the Highway Act is null and void. ... You are advised that you have three months, from the date of this letter, to establish access properly on the right of way entirely off the Butler property. After three months a fence will be installed along the eastern boundary of the property. ...

[7] Understandably, the neighbours of Butler were concerned by this threatening letter. W contacted Gibsons and spoke to employees in the engineering department about the situation. On June 2007, David Newman, an engineering technologist with Gibsons wrote to W:

As discussed with you, the Town has completed fairly minimal maintenance on Courtney Road in the past few years as most of the road is within the SCR D and the section within the Town boundaries is comprised mainly of driveway(s). ... Due to a staff error concerning the extent of Courtney Road under the Town's jurisdiction, the 2001 to 2004 road grading and ditching included the north south section of Courtney Road within the SCR D up to the point where the road turns in an east west direction and links to Chamberlain Road.

Please note that, in the past, we have not kept written records on relatively minor routine road maintenance; the above listed maintenance is based on recollections of our public work staff.

In our conversation, mention was made of a culvert installation completed on Courtney Road; these improvements were not completed by the Town.

...

[8] W shared the letter from Mr. Newman with his neighbours and on June 25, 2007, Y wrote to Butler's lawyers setting out his opinion that the expenditure of public funds by Gibsons changed Courtney Road from a "private road" to a "public highway". Since Courtney Road was now a "public highway" Y stated that Butler had no right to block his neighbours' access.

[9] Butler was determined to proceed with his subdivision plans which required that he relocate Courtney Road within the surveyed right of way. He hired contractors to cut the trees in the right of way and then grade and gravel the relocated portion of Courtney Road. On August 19, 2008, Butler wrote to Gibsons requesting that Gibsons pay the cost of relocating Courtney Road in the amount of \$15,512.43. After considering the matter further, Gibsons declined to pay for Butler's road improvements.

[10] On June 22, 2009, Butler commenced the within lawsuit against Gibsons. Butler alleges:

1. Gibsons was negligent and trespassed upon Butler's property;
2. Gibsons "breached the requisite standard and duty of care by performing maintenance upon" the portion of Courtney Road encroaching onto Butler's property "without any legal authority";
3. Gibsons created a "public highway" by performing the maintenance work and thereby created a nuisance;
4. He suffered damages in the amount of \$25,000.

[11] There was some difference between the evidence of Gregory Foss and David Newman, who are employees of Gibsons, concerning the amount of work carried out by Gibsons on the portion of Courtney Road which encroached onto Butler's property.

[12] Mr. Foss has been employed by Gibsons for 22 years and for the past three years he has been director of public works. He is responsible for the maintenance of roads, sidewalks, waterworks and other engineering systems within Gibsons. He was familiar with Courtney Road. He testified that the practice of Gibsons was to employ a private contractor to perform grading and brush cutting on the portion of Courtney Road within the municipal boundaries of Gibsons. Gibsons did not maintain records of the work that was done on Courtney Road. Mr. Foss believed that a backhoe, under contract to Gibsons, had performed work on Courtney Road perhaps two or three times. There had been some brush cutting at an estimated cost of \$100 to \$150 a year and also calcium chloride had been spread on the road to control dust at a further cost of \$100 to \$150. Mr. Foss testified that, in his opinion, no work had been done on Courtney Road by the contractors retained by Gibsons. He was certain that Gibsons had not directed the contractors to perform any work on the portion of Courtney Road within the boundaries of the Sunshine Coast Regional District.

[13] David Newman has been employed by Gibsons since 2006 and since 2008 he has been the director of engineering. He is not responsible for routine maintenance of roads such as the ditching, grading and bush cutting which took place on Courtney Road. In 2007, Mr. Newman was contacted by W concerning the dispute with Butler. Mr. Newman investigated and found there were no records concerning any work being

done on Courtney Road. He then spoke to various work's crew employees to obtain anecdotal evidence.

[14] As a result of his conversations, Mr. Newman learned that contractors employed by Gibsons may have done some grading and ditching on the portion of Courtney Road lying outside the boundaries of Gibsons. Accordingly, he wrote the letter date June 7, 2007, stating, "Due to a staff error concerning the extent of Courtney Road under the Town's jurisdiction, the 2001 to 2004 road grading ditching included the north south section of Courtney Road within the SCRD up to the point where the road turns in an east west direction and links to Chamberlain Road".

[15] I accept the evidence of Mr. Newman and find that the contractors employed by Gibsons did inadvertently provide some grading, bush cutting and ditching on the portion of Courtney Road which encroached onto Butler's property. I find that the "public money" spent amounted to no more than \$200. I arrive at that figure by considering the estimates given by Mr. Foss and apportioning that to the 20 metres of the Butler encroachment along the approximately 400 metre length of Courtney Road.

[16] I also find that any work done by Gibsons occurred in 2001 to 2004 which was before the property was purchased by Butler. I do not find there was any work done by Gibsons on the portion of Courtney Road within the Sunshine Coast Regional District after Butler purchased his lot.

Transportation Act s. 42

[17] The first submission of Butler is that the expenditure of public money by Gibsons changed Courtney Road from a “private road” to a “public highway” pursuant to s. 42 of the **Transportation Act** which states:

1. ... if public money is spent on a travelled road that is not a highway, the travelled road is deemed and declared to be a highway.

[18] At trial, there was some discussion by counsel as to whether this Court had the jurisdiction to make a “declaration” pursuant to s. 42 (1) of the **Transportation Act**. Without deciding this question, I have assumed such jurisdiction in order to resolve the outstanding issues between the parties. I leave the question of jurisdiction for the entertainment of some future forum.

[19] In the case of *Okanagan Similkameen Cooperative Growers Association v. Osoyoos (Town)* [1994] B.C.J. 1957 (B.C.S.C.) it was held that the expenditure of public funds must be significant as opposed to casual or trifling. As previously set out, I find that the amount of “public money” spent by Gibsons on Courtney Road is indeed casual or trifling. I further find that in order to transform a “private road” into a “public highway” there must be a deliberate decision on the part of the government entity to effect such a change. An inadvertent expenditure of public money on a private road does not automatically trigger the provisions of s. 42 of the **Transportation Act**.

[20] I therefore dismiss that portion of Butler’s claim alleging that Gibsons created a “nuisance” by transforming Courtney Road from a “private road” into a “public highway”.

Trespass

[21] The next submission of Butler is that Gibsons created a nuisance by having its contractors trespass upon Butler's property.

[22] The character of nuisance was recently described in *St. Lawrence Cement Inc. v. Barrette* [2008] 3 S.C.R. 392 at para 77:

At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct. ... Nuisance is defined as unreasonable interference with the use of land ... whether the interference results from intentional, negligent or non faulty conduct is of no consequence provided that the harm can be characterized as a nuisance. ... the interference must be intolerable to an ordinary person. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.

[23] Applying the principles as set out in *St. Lawrence Cement*, I find that Butler has failed to prove on the balance of probabilities that the conduct of Gibsons amounted to a nuisance. The trespass of Gibsons upon the encroaching portion of Courtney Road was trivial and of no consequence.

[24] Secondly, I reject Butler's submission concerning a nuisance as the encroaching portion of Courtney Road was not created by any act of Gibsons. It appears that the road deviated from the right of way to avoid stumps which hindered the easy construction of the gravel road. This event occurred at a time beyond the memory of the Gibsons, the Sunshine Coast Regional District or the owners of properties abutting onto Courtney Road.

[25] Thirdly, I reject Butler's submission concerning the alleged nuisance as the encroachment of Courtney Road onto Butler's property existed prior to the purchase of the property by Butler and could have been discovered at that time.

Decision

[26] The Claim of Butler against Gibsons is dismissed with Costs. As the issue of Costs was not argued by the parties, either party may apply for further Directions in the event an agreement cannot be reached concerning this issue.

The Honourable Judge W. J. Rodgers
Provincial Court of British Columbia