

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dhaliwal v. HB Land Company Ltd.*,
2023 BCSC 1574

Date: 20230907
Docket: 61516
Registry: Kamloops

Between:

Gian Kaur Dhaliwal and Iqbal Singh Dhaliwal

Plaintiffs

And

HB Land Company Ltd.

Defendant

Before: The Honourable Justice Hori

Reasons for Judgment

Counsel for Plaintiffs:

J.G. Frame

Counsel for Defendant:

M.E. Danielson

Place and Date of Hearing:

Kamloops, B.C.
July 5, 2023

Place and Date of Judgment:

Kamloops, B.C.
September 7, 2023

Introduction

[1] The plaintiffs are the owners of land with a legal description of:

PID: 010-908-994

District Lot 2032S Similkameen Division Yale District
(the “Plaintiffs’ Property”)

[2] The defendants own the following lands:

a) PID: 012-363-545

The Surface of District Lot 1085 Similkameen Division Yale District
Surveyed as the “Western Hill” Mineral Claim;

b) PID: 012-361-216

The Surface of District Lot 1086 Similkameen Division Yale District
Surveyed as the “Flora” Mineral Claim; and

c) PID: 012-363-189

The Surface of District Lot 574 Similkameen Division Yale District
Surveyed as the “Western Girl” Mineral Claim.

(the “Defendant’s Property”)

[3] The plaintiffs hold three conditional water licences (the “Licences”) under the *Water Sustainability Act*, S.B.C. 2014, c. 15 [WSA]. Each of those Licences are appurtenant to the Plaintiffs’ Property. The Licenses authorize the plaintiffs to access water from sources that are on or adjacent to the Defendant’s Property and to divert water from those sources across the Defendant’s Property to the Plaintiffs’ Property for irrigation purposes.

[4] In this action, the plaintiffs claim an easement over the Defendant’s Property in order to facilitate the diversion of water as authorized by the Licenses. The plaintiffs rely upon s. 32 of the WSA to expropriate an easement over the

Defendant's Property for the construction, maintenance, improvement or operation of the works authorized or necessarily required under the Licenses they hold.

[5] The relief sought by the plaintiffs in this action is an order approving the terms of a draft easement and an order fixing the compensation payable by the plaintiffs to the defendant for the easement.

[6] The order sought by the plaintiffs in this summary trial application is limited to an order approving the terms of a draft easement over the Defendant's Property.

Legislative Framework

[7] Section 32(1) of the *WSA* provides:

32(1) A licensee has the right to expropriate any land reasonably required for the construction, maintenance, improvement or operation of works authorized or necessarily required under the licence.

[8] The *Water Sustainability Act Regulation*, B.C. Reg. 36/2016 [*Regulations*], establishes the process for expropriating land under the *WSA*. The plaintiffs have followed the expropriation process to the point of commencing this action pursuant to s. 28 of the *Regulations*. Section 28 of the *Regulations* provides:

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28 When the 30-day period referred to in section 27 expires, the expropriating licensee or an owner of the affected land may commence an action in the court for a determination of any matter referred to in section 24 (1) (a), (b) or (c).

[9] Section 24(1) of the *Regulations* provides:

Commencement of expropriation proceedings

24(1)A licensee, including a licensee referred to in section 23, who has a right under section 32 of the Act to expropriate land, may commence expropriation proceedings if the licensee intends to exercise the right and is unable to reach agreement with the owners of the affected land as to

- (a) the land reasonably required to be expropriated,
- (b) the amount of compensation, or
- (c) the terms of the required conveyance or other legal instrument.

Analysis

[10] The question before the court in this application is whether the expropriation proposed by the plaintiffs is “reasonably required for the construction, maintenance, improvement or operation of works authorized or necessarily required under the licence.”

[11] The defendant submits that this question cannot be decided in a summary trial application because there is conflicting and inconsistent evidence from the plaintiffs about whether they intend to use the water diverted under the Licences to irrigate the Plaintiffs’ Property.

[12] The defendant relies upon evidence from the plaintiffs that they have a well on their property that provides sufficient water to irrigate the Plaintiffs’ Property. The defendant submits that shortly after purchasing the Plaintiffs’ Property, the plaintiffs advised the defendant that once they had drilled wells on the property, the plaintiffs would no longer require the Licences they hold.

[13] The defendants also rely on evidence that the plaintiffs are seeking to use the water from the Licences to irrigate another property (District Lot 554) in which the plaintiff, Iqbal Singh Dhaliwal, holds an interest.

[14] Based on these contradictions and inconsistencies, the defendant submits that it is not appropriate to decide whether the expropriation is reasonably required under the Licences.

[15] In my view, it is not necessary to resolve the contradictions in the evidence in order to decide the central question in this application. I am able to find the facts necessary to decide this issue from the uncontroversial evidence and from the evidence tendered by the defendant.

[16] The defendant does not dispute that the plaintiffs hold the Licences in question in this action. There is also no dispute that the Licences are valid and existing authorizations to divert water across the Defendant’s Property.

[17] The works authorized or necessarily required under the Licences are the works to divert water and transport it to the Plaintiffs' Property. Whether the diverted water is reasonably necessary to irrigate the Plaintiffs' Property is not the issue for this court to decide in this application.

[18] Therefore, whether the Licences continue to be necessary for the irrigation of the Plaintiffs' Property or whether the plaintiffs are or will be authorized to divert the water to District Lot 554 is not the issue I must decide. That issue is an issue for the decision-makers under the WSA.

[19] It is clear on the evidence that the plaintiffs require the use of the Defendant's Property to divert and transport water under the Licences. The plans attached to the Licences show that the diversion route for the water crosses the Defendant's Property. The evidence of the defendant is that there were works authorized by the Licences on the Defendant's Property when the defendant purchased it. The defendant deposes that over time, those works fell into disrepair or were removed by the defendant and the previous owner of the Plaintiffs' Property.

[20] It is also clear that without an expropriation, the defendant is not willing to allow the plaintiffs to access the Defendant's Property for the construction, maintenance, improvement or operation of the works authorized by the Licences. Since 2006, because the defendant believed that the Licences were no longer being used by the holder, the defendant demanded that the plaintiffs and the previous owner of the Plaintiffs' Property remove the works or negotiate the terms of an easement.

[21] Therefore, I find that the plaintiffs have the right to expropriate an easement across the Defendant's Property for the construction, maintenance, improvement and operation of the works authorized by the Licences.

[22] The terms of the easement will be as set out in the Notice of Intention to Acquire an Interest in Land registered in the Land Title Office under number CB105442 with the following revisions:

- a) In the pre-amble, paragraph C, the term “pertinent” will be changed to “appurtenant”;
- b) Paragraph numbered 1 will be deleted and replaced with the following:

GRANT OF EASEMENT - The Grantor does hereby grant, convey and confirm unto the Grantees and for the benefit of the Dominant Tenement for the use and enjoyment of the Grantees, their servants, agents, tenants, invitees, licensees, from time to time and all those claiming through them the full, free and uninterrupted right, license, liberty easement, privilege and permission at all times and from time to time, with or without vehicles and equipment, subject to the terms of this agreement to place, replace, monitor and maintain the works authorized or necessarily required under Conditional Water Licenses 116928, 117373, and 118733 within that portion of the Servient Tenement shown in heavy black outline on Plan EPP _____ (the “Easement Area”) reasonably necessary to divert and convey water through, under, over or across the Servient Tenement to the Dominant Tenement (the “Works”). The Grantor and Grantees mutually covenant to respect and recognize each others' rights within the Easement Area.

[23] One issue raised by the defendant is whether the Easement Area conforms to the area depicted in the plans attached to the Licences. The plaintiffs have submitted a proposed plan of the Easement Area dated July 26, 2021. The defendant raises a concern about the area depicted in the proposed plan but presented no survey of its own to support its concern.

[24] The court in *Arbutus Investment Management Ltd. v. Russell*, 2022 BCSC 72, restated the principle that a summary trial is a trial and the parties must treat it as such. Each party must marshal the evidence required to establish their position. The defendant has not done so with respect to establishing an Easement Area different from that established by the survey tendered by the plaintiffs.

[25] On that basis, I could simply accept the survey tendered by the plaintiffs as the Easement Area. However, I am prepared to allow the defendant 60 days to consult their own surveyor and, if the plaintiffs’ survey is not accurate, to present its survey of the Easement Area to the plaintiffs. If the parties cannot agree on an appropriate survey to establish the Easement Area, that issue will be referred back to me for determination.

Suitability for Summary Trial

[26] On a summary trial application the court may dismiss the summary trial application under Rule 9-7(11) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] if:

- a) The issues raised by the summary trial application are not suitable for disposition by summary trial; or
- b) The summary trial application will not assist the efficient resolution of the proceeding.

[27] Pursuant to Rule 9-7(15) of the *Rules*, the court may grant judgment in favour of any party, either on an issue or generally, unless:

- a) The court is unable, on the evidence before it on the application, to find the facts necessary to decide the issues of fact or law; or
- b) The court is of the opinion that it would be unjust to decide the issues on the application.

[28] The defendant submits that this action is not suitable for determination by summary trial. In support of this submission, the defendant argues that;

- a) There is conflicting evidence between the parties about the need for an easement and inconsistencies in the plaintiffs' evidence that the court cannot resolve without a trial;
- b) The plaintiffs rely on evidence that is inadmissible on a summary trial; and
- c) The summary trial application will not assist the efficient resolution of the proceeding because the plaintiffs seek only an order approving the terms of the easement which will leave the issue of compensation unresolved and subject to further court process.

[29] As is evident from my reasons above, I find that this application is suitable for disposition by summary trial. I have decided the main issue in this application without the need to resolve conflicts or inconsistencies in the evidence and without the need to rely on inadmissible evidence.

[30] The only remaining issue on the suitability of the application for summary trial is whether the plaintiffs are litigating this action in slices. The defendant submits that I should dismiss the application because a decision on this application will not dispose of the all of the issues. The parties will be required to continue with the action to decide the Easement Area and the compensation if the parties cannot agree.

[31] Rule 9-7(15)(a) provides that on a summary trial application, the court may grant judgment on an issue or generally. The reluctance of the court to decide cases issue by issue arises under Rule 9-7(11)(b)(ii), which provides that the court may dismiss a summary trial application if it will not assist the efficient resolution of the proceeding.

[32] In this case, a decision establishing the plaintiffs' entitlement to an easement over the Defendant's Property will overcome the most contentious issue in the action. Once the court has established an easement in favour of the plaintiffs, the parties ought to be able to agree upon the Easement Area and the compensation with the assistance of experts. If the parties cannot agree, then determination of these remaining issues by the court should be a relatively straightforward exercise.

[33] Accordingly, this application will have the effect of enhancing the efficient resolution of the proceeding.

Costs

[34] Section 30 of the *Regulations* provide that the owner of the expropriated property is entitled to "costs necessarily incurred by the owner for the purpose of asserting the owner's claim for compensation or damages". However, the

quantification of those costs is dependant upon the compensation or damages awarded to the owner.

[35] Therefore, the issue of costs will be deferred until the issue of compensation is agreed upon or decided by the court.

“D.K. Hori J.”

HORI J.