

S.J.M. Properties Ltd. v. Kasper, 1999 ABQB 436

Date: 19990603
Action No. 9410 001390

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF RED DEER

BETWEEN:

S.J.M. PROPERTIES LTD.

Plaintiff

- and -

Anthony Romas KASPER and
Sylvia Irene KASPER

Defendants

Anthony Romas KASPER and
Sylvia Irene KASPER

Plaintiffs by Counterclaim

- and -

Sam MacDONALD, S.J.M. PROPERTIES LTD.,
Garry Robert MacKENZIE and BEMOCO LAND SURVEYING LTD.

Defendants by Counterclaim

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE W.V. HEMBROFF

[1] This case comes before the Court by way of a Summary Trial pursuant to the new Rule in that regard.

BACKGROUND

[2] Some years ago, S.J.M. Properties Ltd., the Plaintiff created and developed a subdivision on the edge of Buffalo Lake near Stettler. The subdivision consisted of 92 separate lots of recreational

land. Of that subdivision, Lots 9 and 10 were sold to the Defendants Anthony Romas Kasper and Sylvia Irene Kasper. A company owned by the Kasper's initially tendered the purchase money to the Plaintiff S.J.M. Lot 10 is the subject matter of this litigation.

[3] Lot 10 is the subject, as are all the other lots in the subdivision, of a Restrictive Covenant. There is no question the Kaspers were aware and understanding of the nature of this Restrictive Covenant. There are two relevant sections of the Restrictive Covenant that give rise to this litigation. They are:

Section 6

No more than 50% of the existing tree coverage shall be removed from each lot.

Section 17

Any part (sic) hereto shall not alter or remove any trees, shrubs or natural features located on the municipal and environmental reserves except for cleaning up dead fall.

Lot 10 is immediately adjacent to Lot 70, an area of environmental reserve as described in Section 17 of the Restrictive Covenant.

[4] The sale and purchase of the lot was concluded on February 18th of 1994. In July of 1994, the Defendants cleared the lands for the purpose of building a house. In clearing the land, they removed, according to the Plaintiff, about 85% of the vegetation. Sam MacDonald, the representative of the Plaintiff, described Lot 10 after the clearing as looking like a parking lot. Before and after pictures would suggest this description is probably accurate.

[5] Prior to clearing the property, the Plaintiff had offered to assist the Defendants in obtaining the services of someone to do this. However there was some delay and the Defendants decided to get their own person to get on with clearing the property. A company operated by a person named Keith Worth was hired. The Defendants instructed that he was not to remove any trees.

[6] When Worth started the work, Sam MacDonald advised Worth a permit would be required. The Defendant Mr. Kasper went to the County Development Authorities and was advised no permit was required but was reminded not to remove any trees. There is no question the Kaspers were completely aware of their obligations pursuant to Section 6 of the restrictive Covenant. Upon receiving this information from the County, the Defendant Mr. Kasper put Worth back to work and told him again not to remove any trees.

[7] In August, the Plaintiff company discovered the extent of the clearing as well as an alleged encroachment onto the environmental reserve contrary to Section 17 of the Restrictive Covenant. Sam MacDonald was very upset and described Lot 10 as previously indicated as looking like a parking lot. There are a number of pictures in evidence and a view of these pictures lends some support to the view of Sam MacDonald, particularly after viewing for comparison the pre-clearing photos. As a result, the Plaintiff company instructed counsel to communicate its concern about the alleged breach of the Restrictive Covenant to the Defendants. In a strongly worded letter of August

7th, 1994, the Defendants were told they had breached two Sections of the Restrictive Covenant and that they should stop further development and restore Lot 10 to comply with the Restrictive Covenant and to clean up the alleged damage to the environmental reserve. Failing this, litigation was threatened. The Defendants responded personally and in a more conciliatory tone. They said simply they understood the Restrictive Covenant from the outset and were satisfied they had conformed with the provisions of it.

[8] After this exchange of correspondence, the Plaintiff issued a Statement of Claim seeking an injunction, damages for an alleged diminution of the value of the entire development and as well, punitive damages. They filed a Certificate of Lis Pendens on October 14th, 1994 but against Lot 10 only. A Statement of Defence and Counterclaim was filed by the Defendants in April of 1995. The Counterclaim sought damages for negligent misrepresentation, breach of contract, and punitive damages.

[9] In July of 1995 the Defendants filed a Notice of Motion seeking summary dismissal of the Plaintiff's action. This was resisted by the Plaintiff but for the next three years, for various reasons, nothing further was done to move the process forward. Finally in October of 1998, the summary dismissal application was heard and dismissed in Master's Chambers. A further application was made for this Summary Trial and the same was ordered in January of 1999.

[10] In the meantime, the Defendants amended their Counterclaim naming Sam MacDonald personally as a Defendant by Counterclaim and as well including numerous claims for losses suffered by the Defendants as a result of the wrongful filing of the Certificate of Lis Pendens. The Defendants alleged the Certificate of Lis Pendens effectively prevented the Defendants from developing or further dealing with Lot 10.

THE ISSUES

[11] There is no question the Restrictive Covenant of itself is valid. Some supporting argument was made in this regard by the Plaintiff but the Defendants took no issue with this, properly as I would say. This issues to be decided are as follows:

1. Did the Defendants breach the Restrictive Covenant by removing more than 50% of the tree coverage?
2. Did the Defendants breach the Restrictive Covenant by having soil and other debris spill over onto the environmental reserve, Lot 70?
3. Does the Plaintiff have standing to enforce Section 17 of the Restrictive Covenant as against the Defendants when none of the damage complained of occurred on any of the property owned by the Plaintiff or included within property actually covered by the Restrictive Covenant?
4. Can the Defendants sustain their counterclaim against the Defendant by Counterclaim, Sam MacDonald, personally?

5. Are the Defendants entitled to damages for their alleged loss as a result of what they consider to be an improper filing of or retention of a Certificate of Lis Pendens?
6. If the answer to questions 1, 2 and 5 is yes, what relief is the aggrieved party entitled to?

THE CLAIMS

[12] The answer to the issues posed by the Plaintiff will be found after it is determined what a tree is, what tree coverage is, and how many trees were on Lot 10 before and after the clearing of that lot by the Defendants ie. was there a 50% tree coverage left.

[13] The Plaintiff says it never counted the trees beforehand but can say with certainty more than 50% were removed. The Plaintiff provided a number of Affidavits from other owners of lots in the subdivision each of which says the affiant "can positively state that trees of varying sizes were located on Lot 10, but since February, 1994 more than 50% of them have been removed from the lot".

[14] The Defendant Mr. Kasper swears positively no trees were removed from Lot 10, only shrubs, further he confirms in his Affidavit his instructions about tree removal to his contractor Worth. Mr. Worth in a separate Affidavit swears positively:

3. I personally operated the equipment which was utilized for the purpose of carrying out those improvements. Mr. Kasper had given me the following instructions with respect to the work which my Company was to carry out:
 - i) all trees were to be left on the lot;
 - ii) shrubs were to be cleared off suggested areas of the lot;
 - iii) top soil was to be removed and the lot contoured in the area proposed for the construction of a house and lawn;
 - iv) the top soil was then to be replaced over the contoured clay area, the top soil harrowed and seeded to grass.
4. I followed Mr. Kasper's instructions and did not remove any trees from Lot 10. I am aware of the Plaintiff's suggestion that poplar trees were removed from Lot 10 and can positively say that that is not the case. During the course of my work, only shrubs were removed from the Lot, the largest of which would have been Saskatoon berry bushes.

[15] In addition, each party hired an expert to determine what were trees and how many were on the property before the clearing and after. Reports were obtained, filed and much commented on. Each expert took a dramatically different approach to this question and came to significantly different conclusions. As an aside, I would observe it would have been useful to have those experts present in the witness box giving evidence to questions that to some extent have gone unanswered.

[16] To start with, "what is a tree?". The shorter Oxford Dictionary defines a tree as "a perennial plant having a self supporting, woody main stem or trunk (which usually develops woody branches some distance from the ground) and growing to a considerable height and size."

[17] In it's expert brief the Defendants' expert Dr. William Kerr defines a tree by referring to Trees and Shrubs of Alberta. The author of that text, Kathleen Wilkinson says "for our purposes a tree is a perennial plant, with a single, thick (usually 5 cm or more in diameter) woody stem as contrasted to a shrub, which has two or more main woody stems arising from the ground." The text also says an aspen poplar is a tree. This is the variety of tree common on the subdivision and particularly as it refers to Lot 10.

[18] The Plaintiff's expert, Ken Glover a professional forester, takes issue with the Defendants definition saying Ms. Wilkinson's book is acceptable as defining "shrub" but not "tree". Glover says it is not scientifically accurate because a tree is a tree regardless of diameter or height. Glover says the simple Wilkinson definition is fine for the novel plant enthusiast but it is not suitable for scientific or even industrial application.

[19] While that may be so, we are not here dealing with scientific or industrial applications. We are trying to determine what was meant by tree coverage in Section 6 of the Restrictive Covenant. Glover said a tree is considered a tree from it's germination to maturity whether a germinate or seedling/sapling etc. He says it is an analogous to the terms baby, toddler, juvenile, teen, adult, all of which classify a human being.

[20] At first blush, that analogy seems appropriate. Here I find it is not. Surely the purpose of Section 6 of the Restrictive Covenant would not require a microscopic examination of the property to determine if there were germinating trees or seedlings or even saplings some of which might have been barely visible above the ground or totally intermingled with the brush. If this were so, and keeping in mind the amount of bush or shrubs covering the Lot which were not included in the Restrictive Covenant, it may have been practically impossible to clear a sufficient portion of the lot for the purpose of building a house. That could not have been the intention of the drafters of the Restrictive Covenant.

[21] In defining tree for the purpose of the Restrictive Covenant and this litigation, it seems to me the definition found in the Wilkinson book is appropriate ie. "a perennial plant with a single thick woody stem". I won't put any measurement on the thickness except to find the plant should be observable to the ordinary person as something that the reasonable man if you will, would describe as a tree. A modicum of common sense needs to be applied here in divining what the intention of the Restrictive Covenant was.

[22] Such a reasonable observer surely would be the land clearer, Keith Worth who was told specifically to clear the land but to avoid the trees. He swears he did so. He swears he had experience in doing this work. I don't expect he was counting germinating trees, seedlings or little saplings mixed in with the heavy brush. I find that was not the intention of Section 6 of the Restrictive Covenant and if it was, such intention was not clearly expressed to those who would be obligated to observe the restriction.

[23] Having concluded for these purposes what is a tree, I still need to determine if any trees were removed and if so, was the removal more than 50% of the coverage. The Defendants had the trees counted by the expert Dr. Kerr. He reviewed and compared Government of Alberta aerial photographs taken in 1992, prior to the sale of the property to the Defendants. He then counted on the ground, the number of trees left in 1996, after the clearing. He describes his methodology carefully and at some length. It would appear a common method to count trees. He also described carefully how he determined the extent of the actual boundaries of Lot 10. No one takes particular issue with this methodology. He concludes after making his comparisons the Defendants came no where near breaching the 50% restriction.

[24] The Plaintiff's expert comes to the conclusion 70.8% of the tree cover was removed. He has the difficulty of having cleared land to deal with. He does not use the aerial photos. What he does, as simply as I can state it, is to sample the neighbouring Lot 11, a similar piece of landscape as Lot 10. He divides it into three areas each having a different degree of foliage on it. In each of the three areas he takes two sample areas and actually counts the trees. This is depicted in Figure 2 of Mr. Glover's report found at Tab 6 of the Plaintiff's submissions.

[25] After doing this he simply extrapolates this information from Lot 11 onto its neighbor Lot 10, the subject of this litigation. By this analysis he says, there should have been 48 trees in Lot 10. He counts seven trees actually remaining for a loss of 34 trees and thus a 70.8% reduction in the tree coverage. It would appear, in counting Lot 11 that he has counted everything he defines as a tree regardless of size or the effect that it has on the aesthetics of the property or the purpose for which the Restrictive Covenant was imposed. While his method may be scientifically acceptable, that is not, as I have found, what was intended here. If it was, such was not, or was not clearly expressed in the Restrictive Covenant.

[26] As I have already observed, for the purposes of the Restrictive Covenant it could not possibly mean any such small germinate, seedling, sapling or sucker were not to be removed otherwise no one could have developed the property in question for fear of clearing numbers of these very small beginning trees. Clearly shrubs or brush were not contemplated in Clause 6 of the Restrictive Covenant. The term "shrub" is used in Clause 17 along with "tree". The general term "ground cover" is nowhere used.

[27] Thus, keeping in mind the positive assertions under oath of the Defendant Mr. Kasper and his contractor Worth, I prefer the opinion of Dr. Kerr. His methods have not been criticized in fact, Dr. Allan J. McConnell in reviewing both expert reports at the request of the Defendants, finds the Defendants' expert methodology acceptable and criticizes the methods of Mr. Glover, the Defendants' expert. I accept as well, the affidavit evidencing of Keith Worth swearing he did not remove any trees.

[28] The Defendants method of counting trees both before and after the clearing of the land provides as I find, the best evidence as to how much tree cover was removed. An examination of the varying pictures is helpful. Picture VI of Tab 3 of the Defendants' Rebuttal Brief shows Lots 9, 10 and 11 side by side as they are now. Near the road in what is identified in that picture as Lot 9,

one can see a stand of trees. The road end of the same picture shows Lot 10 and 11 as being both bare of easily observable trees. The end of the same Lots nearest the lake also shows readily observable trees.

[29] If I then look at Figure 4 and 5 of Tab 6 of the Plaintiff's binder, the first being a 1992 aerial before the clearing and the second being in 1998, I can easily see the same stand of trees at the southerly end of Lot 9 in each of those pictures. Similarly, the southerly end of both Lots 10 and 11 appear the same in both pictures.

[30] I then turn to the Plaintiff's expert's analysis or extrapolation by which he suggests there were prior to the clearing, 48 trees on Lot 10. He makes this extrapolation in a way that does not seem logical to me as I look at the pictures. Firstly he says (Page 2 of his report) Lots 10 and 11 were ecologically similar in 1992. A cursory examination of Figure 4 would confirm this. Then he finds of the 48 trees that should have been on Lot 10, 13 would have been in the northerly, more dense end of Lot 10 and 35 would have been in the less dense southerly end of Lot 10. Surely if I can easily see the trees on Lot 9 in the 1992 and the 1998 photos in Tab 6, Figure 4 and 5, if there were 35 such trees on the southerly end of Lot 10 when the 1992 photo was taken I should be able to see them and with proper magnification count them. They are not to be seen in the 1992 photo. In fact, the southerly end of Lot 10 appears much the same in each of the two photos, 1992 and 1998.

[31] I find that the Defendants were not in breach of the Restrictive Covenant. While they cleared off almost all of the brush as they were entitled to do, and while there may (and I emphasize may) have been seedlings, germinating trees or saplings of aspen in the brush, I cannot find this was proscribed in the Restrictive Covenant. I am not satisfied that the Plaintiffs have in any way proven that 50% of the tree coverage was removed from Lot 10.

[32] In considering the Plaintiff's claim concerning the breach of Section 17 of the Restrictive Covenant I will deal with that shortly. I dismiss their allegations as to the breach of that Section on three grounds:

1. The Plaintiff does not have the standing to bring this action. The Plaintiff is not aggrieved in the manner laid out in *The Green Peace v. Minister of Environment of B.C.* [1981] 4 W.W.R. Page 587 at Page 593. There is no public right here whether of the Plaintiff's own or because of peculiar damage to the Plaintiff as a result of the interference with a public right.
2. In any event, if there is a breach of contract, there is no damage proven by the Plaintiff. The minimal spill was onto the County's environmental reserve and the County has said in writing it has no concern with that.
3. In all events, the damage has not been proven or at most is so minimal as to encourage me not to concern myself with that. (de minimus non curat lex)

THE COUNTERCLAIMS

[33] The Defendants filed a Counterclaim. The basis of the Defendants' Counterclaim is that the filing of the Certificate of Lis Pendens by the Plaintiff was improper and thus the Defendants were unable to use or sell their property. They rely on the provisions of Section 146.1 of the *Land Titles Act* of Alberta chapter L5 R.S.A. 1980 and amendments. Alternatively, the Defendants by Counterclaim, says the Plaintiffs by Counterclaim, acted unreasonably and their actions in filing the Statement of Claim and Certificate of Lis Pendens was an abuse of process. Thus, say the Plaintiffs by Counterclaim they have been damaged and should be compensated. Section 146.1 of the *Land Titles Act* reads as follows:

A person filing or continuing a certificate of lis pendens without reasonable cause is liable to make compensation to any person who may have sustained damage thereby.

[34] Counsel could not find an Alberta case that had invoked these provision of the Act. In British Columbia there is a somewhat similar provision regarding caveats. It reads as follows:

273.(1) Where a caveator wrongfully and without reasonable cause lodges or causes to be lodged with the registrar a caveat, the caveator is liable to pay the person who sustains damage by it such compensation as the Supreme Court considers just.

[35] It is to be noted the B.C. Legislation adds the words "wrongfully" to "without reasonable cause". As well the B.C. Legislation does not use the word "continuing" as in the Alberta Legislation. In *First Canadian Land Corporation Ltd. v. Rosinante Holdings Ltd. and Fane* 62 B.C.L.R. p. 262, the B.C. Court of Appeal dealt with an allegedly wrongfully filed lis pendens. The decision is instructive and sets out the principle it followed at page 265:

In the decision of *Marshall v. Heidi* it is set out as the basis for the cause of action for the wrongful filing of a lis pendens that the root of the action lies in abuse of civil process and, like other actions for abuse of civil process, the ingredients of the action require the plaintiff establish malice on the part of the defendant who filed the lis pendens and that damages flow from the malicious filing and malicious abuse of process.

As Hutcheon J.A. says in *Marshall v. Heidi, Crowston v. Cove Dev. Ltd.* is also authority for the proposition that the action for wrongful filing of the lis pendens would not lie unless the process was invoked for improper purposes collateral to the ostensible purpose of the proceeding.

[36] As I reviewed the evidence filed and then listened to the arguments made, I could not find the Plaintiffs acted maliciously or capriciously. The Plaintiff company had reasonable cause to file their Certificate of Lis Pendens after a legitimate law suite was commenced. Certainly the initial appearance of the property in question would have given them pause at the very least to consider whether the Restrictive Covenant had been abused. I find the Plaintiff company acted in an earnest attempt to protect the development. Interestingly enough, and even up to late 1998, an application for summary dismissal was dismissed it being presumed the Plaintiffs had an action that could properly be tried.

[37] Further, if malice were to have been intended by the Plaintiffs, surely they would have filed a Certificate of Lis Pendens against Lot 9 as well. They had no complaint of the manner in which that Lot was dealt with and thus simply filed their Certificate of Lis Pendens against one of the two properties purchased by the Defendants, the one the Plaintiff deemed offensive to the Restrictive Covenant.

[38] So far as continuing the Lis Pendens on the title, neither the Plaintiff nor the Defendants took any vigorous steps to cause the action to go forward. It is suggested from the material the Defendant Mr. Kasper may have been ill for a time. In all events when the matter was pressed, the application for summary dismissal of the Plaintiff's claim was attended to and dismissed and immediately thereafter the parties continued the process of getting to trial. On the evidence I can find no wrongful or even inappropriate intention on the part of the Plaintiff company in placing and maintaining the Certificate of Lis Pendens.

[39] In dealing with the question of abuse of process, Bielby, J. discussed that in *Illic v. The Calgary Sun*. The case is found in 1999 1 W.W.R. and at page 547 of that case Bielby, J. says as follows:

Two elements must be pled in order to found a claim for abuse of process, improper purpose and a definite act or threat in advance of that purpose.

Furman, J. discusses this two-pronged requirement in *Rocky Mountain Rail Society v. H & D Hobby Distributing Ltd.* (1995), 24 C.C.L.T. (2d) 97 (Alta. Q.B.), AT 101:

The tort of abuse of process clearly exists in our law, but as I read the case law, most of which derives from Ontario, it is narrow in scope. The process of the court must be used for an improper purpose and there must be a definite act or threat in furtherance of such purpose ... in *Teledata Communications Inc. v. Westburn Industrial Enterprises Ltd.* (1990), 71 O.R. (2d) 466 (H.C.) At p. 469 Eberle, J. states:

What lies at the heart of the cause of action is an act, or threat of an act, outside the ambit of the action. The essence of the action therefore is the use of legal process to gain an end which the legal process does not entitle the plaintiff to obtain.

Furman, J. goes on to state at 103:

Based on my analysis of the case law, two elements must be pleaded: first, there must be an improper purpose which is outside the ambit of the litigation; secondly, there must be a definite act or threat in furtherance of that purpose. If one or both of these elements is absent, it is then beyond doubt that the Counterclaim is doomed to failure.

[40] Again as the parties chose this form of trial, I cannot find any evidence to indicate the Plaintiff had an improper purpose outside the ambit of the litigation, nor can I see a definite act or threat in furtherance of that purpose. One might speculate as to the Plaintiff's motives but it is not for me to speculate but rather to apply the evidence before me as I see it.

[41] The Plaintiffs by Counterclaim have also added Sam MacDonald, one of the principles of the Plaintiff company as a Defendant by Counterclaim. If I cannot find any impropriety in the actions of the company, certainly the director or officer of that company, Sam MacDonald, who carried out the actions on behalf of the company cannot be found to have acted maliciously or capriciously. I do not find that such actions were in any inappropriate. He acted as an officer, director or employee of a company should in the best interests of the company. In the head note of a case referred to me by Defence being *Craig v. Northshore Heli Logging Ltd.* 384 B.C.L.R. (3d) 330, the Court observes where the conduct of a sole officer director and shareholder of a corporate defendant is intentional, willful and deliberate, both the individual and the company are joint tortfeasors. In these circumstances I find completely to the contrary and thus the action against Sam MacDonald is dismissed.

[42] In their Counterclaim, the Kaspers also allege all of the Defendants by Counterclaim have committed a trespass to their property, Lot 10. When it became apparent there would be some need to determine if there was encroachment from Lot 10 onto Lot 70, the Environmental Preserve, the exact boundaries of Lot 10 had to be identified. S.J.M. hired the Defendant by Counterclaim Bemoko Land Surveying Ltd., a surveying company, to establish the boundaries and determine if a spill or encroachment had occurred. In so doing, there is no doubt the surveyor Mr. Floyd Stochinski and his assistant would have been on the Kaspers' property. Also, a minimal amount of brush clearing was done to establish a survey line and a tree on the Kaspers' property was damaged to the extent a large branch was removed. In his Affidavit, Stochinski swears he is a certified land surveyor employed by Bemoko Land Surveying Ltd. He says as well the company, Bemoko, was retained for the purposes indicated above, that some vegetation between Lot 10 and Lot 70 had to be cut along the property line as it had overgrown since the original survey, and that the removal was minimal and in accord with industry practice. This narrow line, he swears, was at most one half a meter wide and was cut to create a narrow line to allow visibility from corner to corner of the property line between the two properties. The minimal encroachment I have described above was verified and measured.

[43] In a recent decision, *Costello v. City of Calgary* [1995] A.J. No. 27 D.R.S. - 95 - 15745 Rooke, J., at some length, reviews the law as it had developed regarding trespass. During the course of his review he refers to Halsbury's Laws of England in defining trespass. He says at page 50:

"Trespass to land consists of entering upon the land of another without lawful justification ... such interference must be direct rather than consequential. To constitute trespass the defendant must in some direct way interfere with land possessed by the plaintiffs."

[44] I don't intend to review the matter further. For these purposes I am prepared to find there was a trespass but one authorized to a limited extent by statute. At page 58 of *Costello*, Rooke, J. says:

What would otherwise amount to a trespass to land may be lawful under powers conferred by statute. The right to commit such trespass will depend upon the language and effect to the particular statute that is relevant as well as upon the proper formalities or requirements of the statute, if any, have been met.

The provisions of the *Land Surveyors Act*, 1981 Revised Statutes of Alberta - Chapter - 4.1 in my view support the Defendants' by Counterclaim position. The relevant provision of the Act are as follows:

In this Act

- (a) 'Alberta land surveyor' means an individual who holds a certificate of registration and an annual certificate to engage in the practice of surveying under this Act;
- (i) 'practice of land surveying' means
 - (i) the survey of land to determine or establish boundaries;

[45] The Act goes on as follows:

69(1) No action lies against

- (a)
- (b) any member, officer or employee of the Association

for anything done by him in good faith and in purporting to act under this Act, the regulations or the by-laws.

[46] As I see the plain meaning of those provisions, and accepting the Affidavit of Floyd Stochinski, the surveyors were doing precisely what they were retained to do as authorized by the Act. In conducting their survey, in the manner allowed by the Act, action could not then be commenced against them.

[47] As I have found the actions of the Defendant by Counterclaim company were not malicious or capricious or in bad faith, neither could the actions of it's officer Sam MacDonald who simply acted as such ie. an officer, director or employee. In my view and while he may have been angry at what he saw on the property, that does not amount to the kind of conduct that would suggest to me that he should be held personally responsible for the activities of the company. Thus the action against Mr. MacDonald is dismissed.

[48] Similarly, the action against the other Defendants is dismissed. The alleged trespass was conducted by the independent contractor hired by the Defendant by Statement of Claim S.J.M. and if, as I have found, the surveyor was protected by the Act, the same protection must be available to the person hiring the surveyor presuming the hiring was in good faith and again I have found that it was. So far as the Defendant Gary Robert MacKenzie is concerned, it would appear as if he was a 50% owner of the subdivided properties along with the S.J.M. Properties Ltd. Throughout the material, there appears to be no reference to him as being personally involved in any of the decisions complained of by the Defendant, Plaintiff by Counterclaim. In all events, I infer he would be in the same position of the Plaintiff company and the Defendant by Counterclaim Sam MacKenzie and the claim against him is also dismissed.

DAMAGES

[49] In the event that I am mistaken with regard to the question of liability it seemed appropriate that I might give some view as to damages, to the extent I can, based on the evidence before me. The Plaintiff has basically abandoned its claim for monetary damages and has sought an injunction to restrain further action by the Defendants in terms of breaching the two provisions of the Restrictive Covenant mentioned herein. In addition the Plaintiff has asked for a mandatory direction that the Defendants restore the property to its previous state prior to the alleged breach of the Restrictive Covenant. Effectively the Plaintiff's position was the Defendants should replace about 25 trees. I would agree that is the extent of the redress to the Defendants would be required to make. The damage to Lot 70 by the encroachment would be so minimal as to require no further action. Nature will soon attend to this modest disturbance.

[50] The Defendants, Plaintiffs by Counterclaim have asked for damages under a number of heads. I do not intend to review them exhaustively. The evidence supporting the claims is by affidavit and in some cases is not sufficiently satisfactory to enable me to make a finding on damages. A number of the claims should be considered when costs are considered eg. items in Paragraph 6(a) and (f) in the Statement of Claim. Some of the claims advanced by the Plaintiffs by Counterclaim would also be attributed to Lot 9 this Lot was not intended to be used as anything but a buffer. Thus claims for "carrying costs" and taxes as in Paragraph 6(b) and (h) would not have been allowed. Those related to Lot 10 may have been. As well, it appears the Plaintiffs by Counterclaim mitigated any losses on the hangar by renting it except to the extent of \$27.11 which might have been allowed as claimed in Paragraph 6(g). Taxes on the hangar site claimed in 6(h) would not.

[51] The Plaintiffs by Counterclaim seek general damages. I would not be prepared to express a view as to damages under this head. The evidence of the Plaintiffs by Counterclaim comes from affidavits, examinations on those affidavits and as well argument by counsel and falls short of providing a foundation for general damages. This is one allegation that would have been better supported by viva voce evidence in an ordinary trial setting.

[52] The Plaintiffs by Counterclaim seek damages in trespass, they allege damages to replace and plant a poplar tree in the amount of \$3,000.00 as claimed in Paragraph 7(a) and (b). The Plaintiffs by Counterclaim attempt to prove this loss based on the estimates or opinion of Anthony Kasper as

found in his Affidavit filed March 3rd, 1999. I am not prepared to accept these estimates without some verification more than the opinion of Kasper who was not put forth as an expert. Thus I could not make a damage finding here.

[53] The Plaintiffs by Counterclaim seek punitive damages. Had I found the action of the Defendants by Counterclaim were wanton, reckless and malicious, the award for punitive damages would have been something in the order of \$3,000.00.

SUMMARY

- [54] 1. The Plaintiffs action against the Defendants is dismissed.
2. All of the Defendants Counterclaims against the Plaintiffs are dismissed. As well, the Defendant Bemoko Land Surveying Ltd. named as a Defendant by Counterclaim is dismissed. At my request, the Trial Coordinator made inquiries of Counsel concerning the status of this Defendant by Counterclaim and was advised no action beyond the issuance of the Statement of Claim was taken nor intended.

COSTS

[55] As both claim and counterclaim were dismissed and as each of the Defendants and the Defendants by Counterclaim were successful there will be no fee costs. In the event Counsel wish to speak to the question of costs whether it be fee costs or disbursements, they shall be free to make application to have that matter heard provided such application is made within 30 days of the signing of this Judgment.

DATED at Red Deer, Alberta this 03 day of June, 1999.

J.C.Q.B.A.

APPEARANCES:

Sisson Warren Sinclair;

ATTN: Ms. Rhonda M. Elder

Counsel for the Plaintiff/Defendants by Counterclaim

Burstall Ward

ATTN: Mr. Alan J. McConnell

Counsel for the Defendants/Plaintiffs by Counterclaim