BUSI 112 – Project 1

October 10, 2018

Zoe Brook

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Part A – Questions on Lessons 1 - 5

1 a) Given that battery and physical damage occurred, and assuming the incident occurred in BC, a civil suit could be filed in the Provincial Court – Small Claims Division. This is the lowest level trial court, which hears cases involving claims of $25,000 or less. It's the court with the lowest barriers to entry in terms of cost and time, as a lawyer is not required to bring the action or attend in court. While it is unlikely the damages suffered exceed the $25,000 limit, let's assume that private nuisance and trespass warrant damages in excess of $25,000, which could qualify the case to be heard in the BC Supreme Court. An appeal would bring the case to the BC Court of Appeal, which - if appealed further - would bring the case to the Supreme Court of Canada, assuming leave to appeal were granted by the Supreme Court. This case is unlikely to be heard outside of the Provincial Court System given the doctrine of *stare decisis*, that there are no apparent legal issues, and it is likely not a matter of national importance.

1 b) Given the goal is to have the neighbour pay financially for what occurred, Provincial Small Claims Court is the best choice of venue. I would bring an action of physical damage and trespass, with a claim for the damage caused, and a claim for punitive/exemplary damages given the malicious nature of the trespass that resulted in battery. The structure of the civil process allows for two satisfactory outcomes: if I am awarded damages; or the defendant and I reach a settlement during the pleadings process. Given the minimal value of damages sought, the relatively low cost and high speed of the small claims court makes it the appropriate venue. And given that I am seeking financial remedy, civil action is preferable to criminal. This is because in civil law, one individual sues another, usually for money. In criminal law, the government begins proceedings against an individual who has been accused of a crime or offence against society.

1 c) I will discuss the case of Stewart vs. Phillips[i] heard in the Supreme Court of British Columbia in 2018. The plaintiff brought an action of trespass, nuisance and assault (rocks were thrown at her car) and claimed monetary damages. While assault is considered a criminal offense, the plaintiff chose to bring it to civil court likely due to the fact that the alleged assault resulted in property damage that can be measured in a dollar value. In this case, and the case above, bringing the assault charge to a criminal court would be a waste of personal, police and court resources.

2a) Because I have not disclosed I am a realtor, and because I have made intentional and material misrepresentations regarding externalities and condition of the property in order to encourage a sale, fraudulent misrepresentation is more applicable than negligent representation in this scenario. This is also known as the tort of deceit. Any purchaser relying on the fraudulent facts could sue for damages in tort, and have a right to cancel the contract. Regardless of whether a sale occurs or not, I have not complied with professional standards on multiple levels and I am at risk of disciplinary action by the Real Estate Board which could include penalties, remedial measures, or revoking my license. However it is important to note that these standards are not binding in any court of law, although the professional standards themselves could be found negligent in court.

2b) My neighbour's best claim under tort law is private nuisance with a claim for physical damage. In order to claim damages for unreasonable interference with her use and enjoyment of the property, she would have to prove that I have used my land in a way that exceeds the boundaries of what is considered legally and socially acceptable in relation to her property. Given the screen is allowed under the building bylaws, this may not be her best claim under tort law. The claim of physical damage is simpler as it overrides these considerations of reasonable usage. I would be liable for any physical damage caused to my neighbour's property assuming she is able to prove the damage has resulted from my screen. It is worth noting that a claimant of physical damage must have an interest in the property, so if the neighbour is a tenant, her landlord would need to act as claimant.

2c) If I were to sell my ½ interest in the condominium, the joint tenancy would be severed and the new owner would be a tenant in common with my daughter. While I am entitled to unilaterally dispose of my interest in the joint tenancy, it could be very difficult to find a reasonable, well informed and arms length buyer willing to enter a co-ownership. In this case, it would be in my best interest to bring a partition action, which could result in the court forcing a sale of the whole property resulting in equal distribution of the proceeds. However if the transaction fell under family law statues (perhaps my daughter is a minor and the condominium is considered the family home), the court could refuse to make the order.

2d) The courts would need to determine if the screen were a fixture (an improvement to the property) or a chattel (personal property). This could be determined by way of its affixation, and if the screen were erected for the enjoyment of it as an object, or whether it were erected to improve the property itself. Given that my reasons for erecting the screen were to improve my use and enjoyment of the property, it's likely the court would determine that the screen is a fixture and thus it would belong to the new owner. My answer would only differ if the contract of purchase and sale included a specific addendum or clause where both parties agreed the screen was not included with the transfer of property.

PART B – QUESTION 1

1a)

i) Unclear – Address does not exist in Vancouver GIS. We will assume this is residential.
ii) Fee Simple, Joint Tenancy
iii) LOT 45 NORTH WEST 3 SECTION 35 VANCOUVER DISTRICT PLAN 20143
iv) City of Vancouver
v) Avery Rose, Whitney Rose
vi) 2009-01-05
vii) $ 2,210,500
viii) None

ix) 1) Nature: Certificate of Pending Litigation, Registration Number: CZ4097586, Registration Date and Time: 2015-01-15 14:34, Registered Owner: ROYAL BANK OF CANADA

2) Nature: Caveat, Registration Number: CZ123122343, Registration Date and Time: 2015-02-16 13:49, Registered Owner: TORONTO-DOMINION BANK

x) None Outstanding

1b) The caveat registered in 2015 by Toronto Dominion Bank (TD) represents a claim in the interest of the land. Given TD is a bank, this could be mortgage or mortgage related caveat. Caveats prevent all dealings with the land inconsistent with the interest claimed by the caveator. Assuming the caveat has remained active following the 2-month expiration period, there is a good chance a proposed sale of the land would not complete. Given the title search is dated 2018, and the caveat is dated 2015 without a CPL filed within 2 months, it can be assumed the caveat no longer applies.

The Certificate of Pending Litigation (CPL) filed registered by Royal Bank of Canada on January 15th 2015 would not prevent transfer of title should the registered owners sell, however it may deter potential purchasers and third parties from dealing with the land. Given the registered owners can be assumed to be family, an action to partition could result in section 216.6 of the BC Land Title Act being applicable in that *"a party to a proceeding for an order under the Family Law Act respecting the division of property may register under this section a certificate of pending litigation in the form approved by the director in respect of any estate or interest in land the title to which could change as an outcome of the proceeding."*

1c) A contract has seven essential elements: offer, acceptance, consideration, intention to enter a binding contract, legal and mental capacity of the parties to enter a contract, lawful objective or subjective matter, genuine consent. Below is a draft purchase and sale agreement for a residential property.

Assumptions. For simplicity, I have omitted provisions/clauses for:

- Agency Disclosure
- Warranties and Representations
- Termination and Cancellation Rights and Dates
- Deposit Terms and Payments
- Covenants
- Subject To Clauses
- Adjustments to the Purchase Price
- Defaults and Remedies

SAMPLE PURCHASE AGREEMENT

THIS AGREEMENT made as of the ___ day of _____, 2018

BETWEEN:

DONALD N. O. PANTS (the "Vendor")

AND:

MR. AND MRS. SOCKS (collectively, the "Purchaser")

WHEREAS:

The vendor is the registered fee-simple owner of the property known as "The Mouse House" located at 1000 Shorts Street, North Vancouver, British Columbia ("the property")

Purchaser desires to purchase, and Vendor desires to sell, the Property, upon the terms and conditions set forth in this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the parties hereto covenant and agree as follows:

"Purchase Price" means the sum of: _____ DOLLARS; and
"Closing Date" means: _____ 2018

IN WITNESS WHEREOF, the parties have executed this Agreement on the respective dates set forth below, to be effective as of the Effective Date.

VENDOR: DONALD N.O. PANTS

Signature: _____

Date: _____

PURCHASER: MR. AND MRS. SOCKS

Signature: _____ _____

Date: _____ _____

1d)

i) The agreement would specify a life estate and remaindership with benefit "to our daughter Betty for life, with remainder to [name of half sibling]"
ii) Betty is obligated to pay the operational costs of the property, which includes the heating bill. The remainderman would be responsible for ownership-related costs including the insurance bill and remaining portion of the mortgage.
iii) The types of waste allowed by a life tenant are dependent on the agreed terms of the contract. Given the question specifies that the life tenant shall not be liable for any waste, the contract language would have to specify that the tenant is liable for no type of waste, including equitable (malicious/wanton) waste.

QUESTION 3 – PRIVATE NUISANCE

Case Brief #1 – Angerer v. Cuthbert[ii]

Facts:
Ms. Cuthbert (defendant) operated a dog rescue enterprise in a rural residential neighbourhood in the unincorporated community of Tagish, Yukon. Several of her immediately adjoining neighbours (plaintiffs) brought an action in nuisance claiming a permanent injunction to restrain Ms. Cuthbert from operating a dog rescue. The plaintiffs claimed that their use and enjoyment of their respective properties was negatively affected by the incessant noise from Ms. Cuthbert's barking dogs, the smell of dog feces, and the sound of a power generator, all which constituted a substantial and non-trivial interference with their enjoyment of their properties. Ms. Cuthbert testified that she attempted to remediate these problems by building a fence, and that the barking was not constant because it would stop and start. Ms. Cuthbert also sought to defend the action by stating she has no control over the dogs while she is not on the property. Ms. Cuthbert was self-represented on trial and appeal.

Issue:
Should the defendant be liable to several of her neighbours in nuisance based on interference with the use and enjoyment of their respective properties?

Held:
Yes, the defendant is liable based on the statute of Anderson v. Jeffries, 2008 BCSC 1410. A permanent prohibitive injunction is granted in favour of damages.

Reasoning: The relevant factors to consider in granting an injunction is: the inadequacy of damages; the nature of the plaintiff's injuries; the balance of convenience. It was deemed clear that the nuisance would not stop without a permanent injunction, and that the defendant was unable to pay damages based on her financial situation. It was determined that the plaintiff's injuries are significant, non-trivial and repetitive. In terms of the balance of convenience, it was determined that the defendant altered the status quo

when she opened the operation, and that the plaintiffs had made significant investments to improve their properties years before the operation opened.

Ratio: The interference must be found to be substantial (not trivial) and unreasonable. There is statute that the New Brunswick Court of Appeal has previously found that the loss of even one night's rest is no trivial matter.

Discussion: The state of the law as a result of this case shows that existing statute has been upheld in the Provincial Supreme Court. This case was appealed to the Supreme Court of Appeal by the defendant based on claims of unfairness[iii]*. The appeal was dismissed after further analysis and statute, thus maintaining the state of law as a result of the Provincial Supreme Court decision.*

Case Brief #2 – Baker v. Rendle[iv]

Facts: The defendants obtained a composting facility licence to import and compost post-consumer food waste on a property in Central Saanich, BC. Multiple complaints about odours from the composting activities began soon after the operation opened and became more frequent over time. The composting facility licence eventually was surrendered. The plaintiff, Raymond Baker, began a lawsuit alleging private nuisance and sought certification of the claim as a class action.

Issue:
Should the claim be certified as a class action?

Held: No. Class action certification is not the preferable procedure for environmental claims.

Reasoning: The B.C. Supreme Court denied the class action certification because the claim failed to meet certain requirements for certification, namely: the class members' claims did not raise common issues, a class proceeding was not the preferable procedure for the resolution of the common issues and Mr. Baker was found not to be an appropriate representative plaintiff.

Ratio: Private nuisance damages are measured by the harm to a plaintiff's property, rather than by the conduct of the defendant. This is in conflict with the class action requirement to prove common harm. The surrounding properties vary greatly in use - from residential, to industrial, commercial, agricultural, and rural. Thus, harm cannot be common. If the compositing facility were located in uniformly residential area, harm could be common.

Discussion: This case creates support that class action certification is not preferable for environmental nuisance under today's law. This suggests that property owners claiming environmental nuisance must approach it through individual litigation, which could arguably be more costly and reduce the incentive for people to claim private nuisance in similar cases. Several common statues for private nuisance were referenced which reinforced the decision.

Case Brief #3 – Suzuki v. Monroe[v]

Facts: Mr. and Mrs. Suzuki (plaintiffs) claim their neighbour's installation of a central air conditioning unit (AC) and surveillance cameras constitute a private nuisance on the basis of noise and privacy. The plaintiffs and defendants both reside on a residential cul-de-sac called Madrona Place in the City of Coquitlam. There are no major roads or non-residential uses in the area. Their houses are relatively close together at 13' apart. There are no local bylaws related to AC noise. The Munroes installed a surveillance camera on the outside of their home that takes in the AC unit, a portion of the Suzuki entrance, front yard and driveway. The Suzukis obtained an interlocutory injunction on September 10, 2007 that requires the air conditioning unit not be operated between 9:00 p.m. and 7:00 a.m. daily.

Issue:
Have the Munroes committed private nuisance through use and operation of the AC unit in the past or currently; does the operation of the surveillance camera constitute private nuisance; if private nuisance is established, what is the appropriate remedy?

Held: Yes. The Munroes committed private nuisance. Both damages and injunctive relief will be granted. Damages totalling $6,000 and injunctive relief related to the operation of the AC unit and surveillance cameras.

Reasoning: The B.C. Supreme Court found that the nuisance of the AC was both substantial, and unreasonable. Professional measurement of sound levels at various times of day was compared to noise bylaws of similar residential areas, and suggestions by reputable bodies including the World Health Organization which concluded the decibel level exceeded what is objectively reasonable, and thus the Suzuki's were not unduly sensitive. Further, Mrs. Suzuki has undergone ongoing psychiatric treatment for depression and chronic stress as a result of sleep disturbance, which was found to be directly attributable to the AC unit and deteriorating relationship with the neighbours. The surveillance camera was found to monitor the Suzuki's driveway and entry, and did not monitor the defendant's own property in a way that would deem the camera to have reasonable utility. Further, the defendant's refusal to move or redirect the camera was intended to annoy the plaintiffs further, which constitutes nuisance.

Ratio: The harm was determined to be unreasonable and substantial, because relocating the AC unit did not reduce its utility to the defendants, and its current location created harm to the property and the health and wellbeing of the property owner.

Discussion: Given this case was minimally influenced by statute, it may serve as stare decisis for future cases in lower courts (in this case, only Provincial Small Claims Court as this case was not appealed to a higher court). However, it's worth noting that reasonableness is subjective, especially when it comes to noise levels and neighbourhood context. It's also worth noting that areas with higher populations of retired people who spend more time at home and who are already susceptible to heath issues due to their age may have different standards of reasonableness than urban or improving areas.

[i] https://www.courts.gov.bc.ca/jdb-txt/sc/18/08/2018BCSC0828.htm
[ii] https://www.courts.gov.bc.ca/jdb-txt/ca/18/yk/2018YKCA0008.htm
[iii] https://www.courts.gov.bc.ca/jdb-txt/ca/18/yk/2018YKCA0001.htm
[iv] https://www.courts.gov.bc.ca/jdb-txt/sc/16/08/2016BCSC0801.htm
[v] https://www.courts.gov.bc.ca/jdb-txt/SC/09/14/2009BCSC1403cor1.htm