Date: 20010719
Docket No.: CA 172340

NOVA SCOTIA COURT OF APPEAL

[Cite as: Gould v. Edmonds 2001 NSCA 115

BETWEEN:

SUSAN DALE GOULD

Applicant/Appellant

- and -

CLINTON J. EDMONDS and BARBARA EDMONDS

Respondents

DECISION

Counsel:	George W. MacDonald, Q.C. and Jane O'Neill for the applicant/appellant Douglas W. Lutz for the respondents
Application Heard:	July 16, 2001
Decision Delivered:	July 19, 2001

BEFORE THE HONOURABLE JUSTICE E.J. FLINN
IN CHAMBERS

FLINN, J.A. (In Chambers):

[1] This is an application for a stay of a trial judge's order, pending appeal.

[2] The appellant and the respondents are adjoining land owners. Their properties are at Seabright, Nova Scotia. The appellant's property is her summer cottage. The respondents' is their permanent home. This appeal is from a decision of Justice Tidman of the Supreme Court of Nova Scotia in which he resolved a dispute between these parties over the boundary line between their respective properties. He decided that the appellant could not claim adverse possession to a portion of the respondents' property. This portion of the respondents' property upon which the appellant claimed title by way of adverse possession, includes, among other things, part of the existing gravel road by which the appellant and her guests gain access to her property, and an area where the appellant and her guests park their motor vehicles.

[3] Prior to the trial of this action, Justice Kelly of the Supreme Court, on July 18, 2000, issued an injunction effectively maintaining the status quo pending further order of the court. This injunctive relief had been requested by both parties. Both parties, obviously, felt that the status quo should be maintained pending the resolution of their dispute. The operative paragraphs of Justice Kelly's order provide as follows:

> IT IS ORDERED a follows:
>
> 1, The "area in dispute" shall be defined as the area generally to the west and the northeast of the line of spruce trees, and to the southwest of the "occupation boundary" as marked on the attached sketch showing Existing Conditions between Lot AX & Lot Bl, MacDonald Point Road, Seabright (MacDonald Point), Halifax County, Nova Scotia, dated May 25, 1999, and prepared by Thompson Conn Limited, Nova Scotia Land Surveyors (the "Sketch"), and labelled on the Sketch as "Lawn".
>
> 2, Until further Order of this Court, the Plaintiff and the Defendants, their agents and guests, shall not enter nor leave objects in or on the area in dispute, except to the extent the Plaintiff or her agent may continue the normal mowing and maintenance of the area in dispute.
>
> 3. The Plaintiff and the Defendants, their agents or guests shall not expand any current activities now carried out on their respective properties, including

> gardening, onto the area in dispute.
>
> 4. The Defendants shall not interfere with or impede the access of the Plaintiff, her guests, agents, or any other person, or vehicle, lawfully entering the Plaintiff's property by way of the existing gravel road which forms part of the area in dispute.
>
> 5. The Defendants shall not interfere with the Plaintiff, her guests, agents or any other person lawfully entering the Plaintiff's property from parking their vehicles in the gravel area currently used for parking which forms part of the area in dispute.

[4] Following the trial of this action, Justice Tidman filed written reasons for judgment on January 25, 2001. An order giving effect to that judgment, and providing for the dissolution of Justice Kelly's injunction, was issued on June 25, 2001.

[5] Following Justice Tidman's decision, and before the date of the order dissolving Justice Kelly's injunction, counsel for the appellant advised counsel for the respondents of the appellant's intention to appeal Justice Tidman's decision. He also requested that the status quo be maintained pending the resolution of the appeal. The respondents ignored the request to maintain the status quo, and constructed a fence along their property line (as that line had been determined in Justice Tidman's decision) which fence has effectively blocked vehicle access by the appellant and her guests to her property over the existing gravel road. As well, the fence has blocked access to the area where the appellant and her guests park their motor vehicles. Both of these uses (access and parking) have been in existence since 1976.

[6] The appellant has applied for a stay of Justice Tidman's order pending the hearing of this appeal.

[7] Applying the test set out in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341, I am satisfied that the appellant, in her notice of appeal, has raised arguable issues. Among other things the appellant alleges that the trial judge made errors in law in his interpretation and application of the law of adverse possession. Counsel for the respondents concedes that this appeal raises arguable issues.

[8] Prior to the trial, both parties, relying on irreparable harm to the enjoyment of their respective property rights, sought and obtained injunctive relief so that the status quo would be maintained pending further order of the court. Justice Kelly agreed, and granted the injunction referred to in § 3 hereof. Neither party objected to or appealed the interlocutory injunctive relief which Justice Kelly granted. The respondents cannot now be heard to say that there can be no irreparable harm to the appellant's enjoyment of the property rights which she alleges if I do not grant a stay until such time as the matter is resolved on appeal.

[9] The balance of convenience clearly favours the appellant. Her use, and that of her guests, of the driveway to gain access to her property, and her use of the area in which she and her guests park their motor vehicles, have been in existence since the appellant purchased the property in 1990, and by her predecessors in title dating back to 1976. Those uses did not cause any concern to the respondents until a recent event which led to this litigation. Therefore, until this matter is resolved on appeal, it is of no inconvenience to the respondents that these uses continue.

[10] **Civil Procedure Rule** 62.10 gives a Chambers judge the discretion to stay the execution of any judgment appealed from on terms as the Chambers judge deems just. Contrary to the submission of counsel for the respondents, I consider the word "execution" in the phrase "stay the execution of any judgment" in the broad sense. It does not apply only to cases where an Execution Order might issue under the **Civil Procedure Rules.** It refers, also, in my view to the process, generally, of enforcing or carrying out a judgment.

[11] In considering the exercise of my discretion in this matter, I have also considered the observations of Justice Cromwell in **Brown v. Brown** (1999), 173 N.S.R. (2d) 41 at § 12:

> . . . the true objective of granting judges the discretionary power to grant a stay of execution is to achieve justice as to between the parties pending appeal in the particular circumstances of their case.

[12] In my view I would do justice between these parties, pending the resolution of this appeal, if the injunction which Justice Kelly granted before trial - and which both parties had requested - were to be continued pending further order of this court. To accomplish that, I will order that the order of Justice Tidman, dated June 25, 2001, to the extent that it provides for the dissolution of the

injunction issued by Justice Kelly of the Supreme Court of Nova Scotia on July 18, 2000, shall be stayed pending further order of this court.

[13] This order creates an inconvenience to the respondents because they will have to remove the fence which they constructed following Justice Tidman's decision, but before Justice Tidman's order dissolving the injunction. However, the respondents had no right to construct that fence while Justice Kelly's injunction was still in force. Therefore, the respondents cannot complain that they will have to remove that fence pending a resolution of the issue between the parties on appeal. In order that there be no dispute as to the "fence" to which I refer in these reasons, the fence is shown in the photographs attached as exhibit 14 to the affidavit of Susan Dale Gould sworn to June 26, 2001 which affidavit is on file in this proceeding.

[14] The purpose of this order is that pending the hearing and resolution of this appeal, the appellant and her guests will be able to access her property by motor vehicle over the existing gravel road which has been used for that purpose since the appellant purchased her property (and beforehand). Further, that the appellant and her guests will be able to park their motor vehicles as they have done before the respondents erected the fence in question.

[15] I have set this appeal down to be heard on October 17, 2001, three months from now. Hopefully, this order will also ensure that further confrontation over the issue which gives rise to this appeal will be avoided until the issue is resolved one way or the other following that hearing.

[16] Costs of this application will be in the cause of the appeal.

Flinn, J.A.