NOVA SCOTIA COURT OF APPEAL
Citation: *Duncanson v. Webster*, 2015 NSCA 29

Date: 20150326
Docket: CA 428172
Registry: Halifax

Between:

Robert K. Duncanson

Appellant

v.

Marilyn Webster, Dorothy Leon Melanson, Elaine Marie Mahar, James Phillip Mooney, Joseph Fraser Mooney, Grace Allison Nickerson, Neil Duncanson and Michael Hurlburt

Respondents

Judges:	MacDonald, C.J.N.S.; Farrar and Bryson, JJ.A.
Appeal Heard:	March 17, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $5,000.00 per reasons of the Court
Counsel:	Jonathan G. Cuming, for the appellant Rubin Dexter, for the respondent

By the Court:

[1] Robert Duncanson has appealed the decision of the Honourable Justice C. Richard Coughlan in which he determined the joint boundary line between Mr. Duncanson and the respondents, (2014 NSSC 152).

[2] The parties had common predecessors in title. Robert Duncanson and his mother acquired title to the lands north of the respondents from Frederick Duncanson in 1964. In 1966 Frederick Duncanson conveyed to the respondents' predecessor, Fraser Mooney, lands to the south of those earlier conveyed to Muriel Duncanson and Robert Duncanson. The 1966 deed to Fraser Mooney described his Northern line as the "Southern line of land of Keith Duncanson". It was common ground that Keith Duncanson never owned any land in this area although the lands conveyed to Robert Duncanson and Muriel Duncanson in 1964 were locally known as Keith Duncanson's land.

[3] During this six day trial Justice Coughlan heard from 19 witnesses, including two surveyors who gave expert evidence. In resolving the issue of the respondents' Northern line, the trial judge was required to consider and weigh all this evidence. In the end, he preferred the evidence tendered on behalf of the respondents and in particular, accepted the expert opinion of their surveyor. He rejected the opinion evidence of Mr. Duncanson's surveyor – a finding that has not been appealed, notwithstanding counsel's reference to this evidence in his oral argument.

[4] Inauspiciously, the appellant lists eight grounds of appeal, (reduced to six in his factum). While most are characterized as errors of law, in fact they allege mixed errors of law and fact to which a standard of palpable and overriding error of review is applied by this Court. For example, the grounds include allegations that the trial judge erred in law "by failing to consider all relevant evidence…by considering irrelevant factors…by disregarding or misapprehending the evidence of certain witnesses…by emphasizing and placing great weight upon portions of the testimony of a particular witness". The appellant's submissions largely request that this Court reconsider and reweigh the evidence. That is not our function.

[5] Mr. Duncanson most strongly presses the argument that the trial judge should not have resorted to extrinsic evidence, but should have fixed the respondents' Northern line based on the acreage of one hundred acres "more or less" as described in the 1966 deed. This ignores the ambiguity in the words

"more or less" which are hardly clear or certain. Then Mr. Duncanson objects to the extrinsic evidence on which the judge did rely, in effect saying that he went too far. We disagree. The trial judge was justified in entertaining evidence of what the "land of Keith Duncanson" in the 1966 deed meant, because the southern boundary of that land was described as Mr. Mooney's northern boundary in that deed. As the Supreme Court observed in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, evidence of surrounding circumstances is always permitted:

> [60] … The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

It was appropriate for the judge to consider evidence of what the "land of Keith Duncanson" meant because it describes a key fact which was known or ought reasonably to have been known to the parties at the time.

[6] With respect, having heard counsel for both parties, having carefully considered the factums and having reviewed the record, we are unable to find any clear and material error of fact or law by the trial judge. The appeal is dismissed with costs of $5,000.00, inclusive of disbursements.

MacDonald, C.J.N.S.

Farrar, J.A.

Bryson, J.A.