NOVA SCOTIA COURT OF APPEAL
Citation: Wile v. Glenelg Homestead Ltd., 2005 NSCA 4

Date: 20050107
Docket: CA 212994
Registry: Halifax

Between: Kevin B. Wile

Appellant

v.

Glenelg Homestead Limited

Respondent

Judges: Roscoe, Saunders and Oland, JJ.A.

Appeal Heard: November 22, 2004, in Halifax, Nova Scotia

Held: The order of the trial judge is confirmed and the appeal is dismissed, with costs to the respondent in the amount of $2,000 plus disbursements per reasons for judgment of Roscoe, J.A.; Saunders and Oland, JJ.A. concurring.

Counsel: Allen C. Fownes, for the appellant
Michael J. Wood, Q.C., for the respondent

Reasons for judgment:

[1] Mr. Kevin Wile appeals from a judgment of Justice John D. Murphy declaring the respondent Glenelg Homestead Limited to be the owner of a property at Rose Head, Lunenburg County. The decision under appeal is reported at [2003] N.S.J. No. 274 (Q.L.).

Background:

[2] Leonard Wile, the appellant's father, had acquired two lots of land by warranty deed from his mother in 1972. The descriptions were as follows:

> 1ST BOUNDED on the East by lands of Zenas Hirtle; BOUNDED on the North by Rose Bay shore; BOUNDED on the West by land of John Mossman; and BOUNDED on the South by land of Rufus Mossman and being about five acres, more or less.
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> 2ND BOUNDED on the East by lands of Nathin Hirtle; BOUNDED on the South by lands of Nathaniel Knock; BOUNDED on the West by land of Eli Mossman; and BOUNDED on the North by lands of Nathan Hirtle, Zenas Hirtle and John Mossman, and being about three acres, more or less.

[3] Only the first lot was described as being bounded by Rose Bay.

[4] In 1974 Leonard Wile retained Neiff Joseph, N.S.L.S to prepare a survey of the lands he had acquired from his mother. Mr. Joseph prepared a plan and a legal description of a lot, containing 2.55 acres and being bounded on the north by Rose Bay. According to the hearsay evidence of Mr. Wile, Mr. Joseph told him the survey was of the second lot in the deed from his mother and he was not able to find the location of the other lot.

[5] In 1978 Mr. Wile agreed to sell the lands shown on the Joseph plan to Glenelg. Mr. Ripley, one of the owners of Glenelg, and Mr. Wile walked around the property shown on the survey plan together and then entered into an agreement of purchase and sale. Glenelg owned a house on an adjacent property. Glenelg retained a lawyer who acted for both sides on the transaction. Glenelg paid $1,800 for the vacant lot. The lawyer added the words: "being and intended to be the second lot as described in a deed from Lena M. Wile (Wyle) to Leonard Edward Wile dated August 18th, A.D. 1972 ..." to the legal description Mr. Joseph had prepared. The 1978 warranty deed was not recorded at the Registry of Deeds until 1998 when Glenelg had agreed to sell all its property in the area.

[6] In 1996 Leonard Wile decided to convey his remaining lot to his son, Kevin Wile, even though neither of them knew where that lot was situated. Both

Leonard and his mother executed quit claim deeds for Lot #1 as described in the 1972 deed. Both father and son testified that the land was a gift, but that Kevin paid the $1.00 noted on the deed as the consideration to his father. His deeds were recorded at the Registry in 1996, two years before the Glenelg deed.

[7] Shortly after acquiring the property from his father, Kevin Wile mortgaged it to Reginald Fahie who registered the mortgage, again before the Glenelg deed. In 2001 Kevin Wile quit claimed his interest to Mr. Fahie.

[8] Justice Murphy made the following findings of fact:

> (1) Schedules 'A' to the Glenelg deed, the Quitclaim Deeds, the Mortgage and the 2001 Deed describe the same property, being the lot referenced in the Surveyor's Description and the Plan, which was one of the lots described in the 1972 Deed. Each of the Glenelg Deed, the Quitclaim Deeds, the Mortgage, and the 2001 Deed convey the same property.
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> (2) After receiving advice from the surveyor, Leonard Wile concluded prior to 1978 that both lots conveyed to him by the 1972 Deed included waterfrontage, and he intended to convey by the Glenelg Deed the lot referred to in the 1972 Deed as #2, containing approximately three acres.
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> (3) Leonard Wile assumed that after delivery of the Glenelg Deed he retained ownership of Lot #1 in the 1972 Deed, and he intended to convey it to Kevin Wile in 1996.
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> (4) Leonard Wile and Lena Wile instructed the lawyer who prepared the Quitclaim Deeds that the five-acre lot was to be conveyed to Kevin Wile, and when preparing those deeds he incorporated from the 1972 Deed the description of Lot #1 which referenced the five acres.
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> (5) Leonard Wile acted in good faith and did not knowingly or intentionally convey the same property to Kevin Wile in 1996 as had been conveyed to Glenelg in 1978. He erroneously believed after 1996 that he had conveyed one lot to Glenelg and the other to Kevin Wile; he mistakenly believed that the Glenelg Deed and the Quitclaim Deeds conveyed two different lots which together included all the property he had received by the 1972 Deed.
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> (6) When Kevin Wile received and registered the Quitclaim Deeds in 1996, he knew that there had been a conveyance of land at Rose Head by his father to Glenelg in 1978. However, he was not aware that the

> Quitclaim Deeds conveyed the same lot as the one which had been described in the Glenelg Deed.
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> (7) When Kevin Wile provided the 2001 Deed to Reginald Fahie, the Glenelg Deed had been recorded, and both Kevin Wile and Reginald Fahie had notice of Glenelg's claim, having participated at that time in this lawsuit.
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> (8) None of the parties had any suspicion or knowledge that the Glenelg Deed conveyed the same lot as the Quitclaim Deeds and Mortgage until the issue arose when Glenelg attempted to sell its land in 1998.

[9] Justice Murphy noted that the claim before him was not for a certificate of title or to resolve whether the Glenelg deed conveyed the first or the second lot in the 1972 deed, but only to determine the priorities between the Kevin Wile deed and the Glenelg deed, to the land described by the legal description prepared by the surveyor.

[10] The trial judge, after considering the effect of s. 18 of the **Registry Act**, R.S.N.S. 1989, c. 392, and relevant case authority, concluded that Kevin Wile had not established that he had purchased the property for valuable consideration and therefore his subsequent deed did not have priority over the Glenelg deed even though he had registered his first. On this point he summarized his analysis at ¶ 28:

> 28 Kevin Wile has not established that the sum of $1.00 paid when the Quitclaim Deeds were delivered constitutes valuable consideration; therefore, in accordance with s. 18 of the **Registry Act** conveyance by the Glenelg Deed has priority over conveyance of the same property by the Quitclaim Deeds despite prior registration of the Quitclaim Deeds. Glenelg's interest in the lands described by metes and bounds in Schedule 'A' to the Glenelg Deed is prior to that of Kevin Wile.

[11] With respect to Mr. Fahie, the trial judge found that he had met the burden of proving that he had no notice of the prior unregistered deed and had advanced valuable consideration in exchange for the mortgage. Therefore, the Glenelg interest was subject to the Fahie mortgage. These findings have not been appealed.

[12] The order issued following trial rectified the deed to Glenelg by deleting the “being and intended” clause referring to the second lot and declared that Glenelg has priority to the lands described in its deed, over the subsequent conveyance to Kevin Wile.

Issues:

[13] On appeal, Kevin Wile, who is now represented by counsel, raises the following issues:

> 1. Did the Learned Trial Judge err in law in interpreting or applying the law as it relates to a bona fide purchaser for value without notice ? Did he specifically err in concluding that consideration in the amount of One Dollar ($ 1.00) was a nominal and therefore not a real consideration, and misapprehend the state of the law in this regard?
> 2. Did the Learned Trial Judge err in failing to consider the alternative finding, that a deed under seal imparts its own consideration ?
> 3. Did the Learned Trial Judge err in ordering rectification as a remedy when it was clear from all of the evidence that Leonard Wile intended to convey Lot #2 to the Respondent, Glenelg Homestead Limited ?
> 4. Was there not insufficient evidence before the learned trial judge, for the judge to conclude that Leonard Wile had conveyed the wrong lot to Glenelg Homestead Limited, the Respondent ?

1. Valuable Consideration:

[14] Section 18 of the **Registry Act** states:

> 18 Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to the same land, be ineffective unless the instrument is registered in the manner provided by this Act before the registering of such subsequent instrument.

[15] The appellant advances two arguments: that the $1.00 he paid to his father was valuable consideration and that all the other effort expended, after the deed from his father in attempting to locate the land is “a form of quasi-consideration”.

[16] The trial judge determined that there is a difference between the “nominal consideration” noted in the deed which might be sufficient to show consideration in the contractual sense, and “valuable consideration” necessary to defeat the title by previous conveyance in accordance with the **Registry Act**. He relied principally on **Marriot v. Feener**, [1950] 1 D.L.R. 837 (N.S.S.C.) and **Re McNair** (1991), 81 D.L.R. (4th) 744 (N.B.C.A.).

[17] In **Marriot v. Feener** the defendants relied on a series of deeds where consideration was stated to be $1.00 but they were unable to prove that any of their predecessors in title were actually purchasers for value. Ilsley, J., as he then was, quoting with approval from **Dickson v. Evans** (6 T.R.60) affirmed at page 842 that:

> ...and we think the law does require that the party claiming under the subsequent conveyance, and seeking to displace the first by reason of the prior registry of the deed, must give some proof that he stands in the position of a purchaser or mortgagee for valuable consideration, for that is necessary to make out his case.
> The only question is, whether he can be held to have given any evidence of that fact, such as calls on the other party to impeach his deed, when he merely produces and proves his deed, which states on the face of it a consideration paid by him. We think not, because that deed can estop no one but the parties to it; it forms no evidence of consideration, as against any stranger to the deed. ...

[18] At page 843, Illsley, J. adopts the following statement from **Miller v. Halifax Power Co.** (1914), 24 D.L.R. 29:

> And in order that one whose deed is prior in record, but subsequent in date to another, should claim precedence of right thereby, he must shew that he is a purchaser for consideration actually paid; the recital of such payment in the deed is not enough.

[19] In **McNair**, the New Brunswick Court of Appeal, relied on **Marriot v. Feener** and going one step further, specifically distinguished "nominal consideration" of $1.00 cited in the deed from the payment of "valuable consideration". Since there was no evidence in that case that "any money other than what was recited in the deed, the nominal sum of $1, was paid", the prior unregistered deed was held to have priority.

[20] Another interesting case, where nominal consideration was distinguished from valuable consideration is **Annable v. Coventry** (1911) 1 W.W.R. 148 (Sask.C.A.) where Wetmore, C.J. stated:

> ... The consideration stated in this transfer is only one dollar. There was evidence given to the effect that sometimes this amount was inserted in the transfer as the consideration when as a matter of fact there was a valuable consideration; sometimes the true consideration was put in. That to my mind does not at all affect the *prima facie* presumption raised by what is set forth in the deed. That presumption

> is not conclusive in any case, but the true consideration may be established if there was any other than that expressed in the deed. It merely throws on the party wishing to establish that the true consideration was other than that stated in the deed the onus of proving it. I therefore agree with the learned trial Judge in holding that the onus was cast upon Annable to prove that the true consideration for this deed was other than expressed therein, or in other words, that the transfer was made for valuable consideration. Certainly $1 could not be called valuable consideration for the land in question. ... [emphasis added]

[21] An appeal to the Supreme Court of Canada was dismissed without reference to the issue of valuable consideration: (1912) 46 S.C.R. 573.

[22] In **Schoppel v. Beaumont Estate** [1970] B.C.J. No. 432, (B.C..S.C.) the facts were somewhat similar to this case in that the property was apparently intended to be transferred by a gift but the recipient actually paid the $1.00 noted in the agreement signed by the donor. Chief Justice Wilson, in discussing the significance of the payment of the dollar noted:

> ¶ 11 What appears from this evidence is that there was no bargaining such as normally occurs in a transaction of sale and purchase. The plaintiff's own opinion that a gift was being made to him is not conclusive against him because it is an opinion on a matter of law, but it has a very strong bearing on the first question I have to answer – was the one dollar a real consideration or was it merely symbolic, an attempt to impart to a gift the colour of a sale?
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> ¶ 12 Counsel for the defendant has cited to me many cases in which it has been held by English courts that five shillings, the rough equivalent of one dollar in Canadian money, was not valuable but merely nominal consideration. (authority cited) I do not think it is wise to tie a decision on a matter of this kind to any particular sum, such as one dollar -- to say, in effect, that one dollar can never be more than nominal consideration. It might well be that in certain types of transactions $50 would be considered as nominal rather than real consideration. As has so frequently, repetitiously and perhaps banally, but nevertheless necessarily been said, each case must stand on its own merits. I cannot, having read the admirably frank evidence of the plaintiff, come to any other conclusion than that the benevolent intention of the donor here was to make a gift, or to promise to make a gift and that the payment of one dollar by the plaintiff to Beaumont

> was entirely colourable, an attempt in good faith by Beaumont to make a gift look like a sale. There is no contract here which I can order to be specifically enforced, and I say this with a great deal of sympathy for the plaintiff, whose highly creditable veracity largely leads to his defeat on this aspect of the case.

[23] In my opinion, based on the cases cited above, the trial judge was correct in his determination that the payment of $1.00 by the appellant to his father was not valuable consideration as that term is used in section 18 of the **Registry Act**. There is a distinction between what is sufficient consideration as between two parties to a contract to permit enforcement of it, and valuable consideration required to oust the title of a person who has paid valuable consideration for a property but not recorded his deed. The $1.00 consideration paid by Kevin Wile might be determined to be sufficient in a dispute with Leonard Wile to require performance of the bargain between them, but the issue here is whether as between Glenelg and Kevin Wile, Kevin Wile is a purchaser for valuable consideration. He is not, in my opinion. Here, Leonard Wile made a gift of the land to Kevin Wile; Kevin Wile was the donee of a gift, not a purchaser for value; there was no purchase of the land for $1.00.

[24] The alternative submission on the first issue is that Kevin Wile expended valuable time, effort and funds after receiving the deed from his father, in order to search the title and locate the land, which it is submitted, should be found to be valuable consideration pursuant to s. 18 of the **Registry Act.** The appellant offers no authority for the proposition that funds expended after the conveyance, not paid in return for the conveyance, can be considered consideration for the deed. In my view, this argument is without merit. Anything voluntarily done or expended subsequent to the delivery of the deed to improve the worth of the property to the grantee, which is not in return for the deed, cannot logically constitute the consideration for the previous bargain to convey the property.

2. Deed under seal:

[25] The appellant submits that valuable consideration is not necessary when the deed in issue has been made under seal, relying on this statement from an article on ***Real Estate Conveyancing***, by Donald H.L. Lamont, Q.C., Law Society of Upper Canada Lectures, Toronto, 1976, at page 81:

> A deed under seal need not be supported by valuable consideration but reference to the consideration is a typical example of the

> components of a deed which have carried over from early English times. The statement of consideration and receipt is unnecessary for the efficacy of the conveyance in passing the estate in land. However, by ss. 6 and 7 of the Conveyancing and Law of Property Act the statement of the consideration operates as a sufficient discharge to the purchaser without further receipt and is evidence to subsequent purchasers without notice to the contrary that the consideration was in fact paid.

[26] The statement that when a contract is made under seal, there is no need for consideration moving from one party to the other may still be valid. (see the discussion of the issue in ***The Law of Contract in Canada***, G.H.L. Fridman, 4th ed., 1999, pp.127 - 129) However, for the same reasons as developed in the discussion of the first issue, although a seal would be of assistance to Kevin Wile in a dispute with his father as to the validity of the deed, it does not remove the necessity of proof of valuable consideration in s. 18 of the **Registry Act**, to defeat the title of the previous purchaser for value.

3. and 4. Rectification:

[27] The appellant has combined the arguments raised in his third and fourth grounds of appeal, dealing with the applicability of the remedy of rectification in these circumstances. The appellant argues that there was insufficient evidence before the trial judge for him to come to the conclusion that the Glenelg deed and the Kevin Wile deed conveyed the same property and that as a result of the order for rectification, Kevin Wile now owns no land. It is submitted that there has been an injustice because it is obvious that Leonard Wile intended to convey the other parcel that he had not sold to Glenelg to his son.

[28] The appellant refers to **Dartmouth Police Association v. Dartmouth**, (1998) 172 N.S.R. (2d) 352 (C.A.) as support for the submission that the trial judge erred in finding that rectification was an available remedy in this case. There, Cromwell, J.A., for the court, said:

> ¶ 8 The City, in this case, claimed the remedy of rectification. Fundamental to that claim is proof of an agreement between the parties which is not reflected in the written instrument which they signed. Courts do not rectify agreements, they rectify instruments recording agreements: see I.F.C. Spry, *The Principles of Equitable Remedies* (5th, 1997) at 607. Professor Fridman put this point succinctly: "Rectification is not used to vary the intentions of the

> parties, but to correct the situation where the parties have settled upon certain terms but have written them down incorrectly": G. H. L. Fridman, *The Law of Contract in Canada* (3d, 1994) at 822; see also **Tobias and Triton Alliance Ltd. v. Nolan** (1987), 78 N.S.R.(2d) 271 (N.S.S.C.A.D.) at 287 and ff.
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> ¶ 9 The existence of the agreement must be clearly proved. As McLachlin, J.A. (as she then was) said in **Bank of Montreal v. Vancouver Professional Soccer Ltd.** (1987), 15 B.C.L.R. (2d) 34 (C.A.) at 36, "The standard of proof of these elements is a stringent one because of the danger of imposing on a party a contract which he did not make."

[29] The appellant submits that the agreement between Leonard Wile and Glenelg was clear and was not written down incorrectly. It is submitted that Leonard Wile's intention was to convey lot #2 to Glenelg and the deed accurately reflects that intention.

[30] Whether there was a mutual mistake or a unilateral mistake in adding the "being and intended to be" lot #2 clause to the deed was a question of fact for the trial judge. As such, the standard of review, as indicated by Cromwell, J.A. in the **Dartmouth Police Association** case, is very deferential:

> ¶ 6 The scope of appellate intervention with respect to findings of fact at trial is well-known and has often been repeated. To justify appellate intervention, there must be a "palpable or overriding error": **Toneguzzo-Norvell v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at 121. It is not every error that leads to appellate intervention. As Lamer C.J.C. said in **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 10110 at para 88:
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> > The error must be sufficiently serious that it was 'overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue'.

[31] In this case there was clear evidence before the trial judge which he accepted that Leonard Wile and Mr. Ripley walked around the property near the Glenelg property with the legal description and the plan prepared by Mr. Joseph. The evidence supports the finding that the common intention was that the property shown on that survey was to be conveyed to Glenelg. The was no evidence that Mr. Ripley and Leonard Wile discussed whether the land being conveyed was the first or second lot in the previous deed. The addition of the reference to lot #2 to the legal description did not reflect their common intention. The effect of the rectification ordered by the trial judge, namely the removal of the "being and intended to be" clause from the

Glenelg deed, which is to correct the deed so that it reflects the mutual intention of the parties, that is, to convey the property shown on the plan.

[32] Having reviewed the record and the findings of the trial judge, I am satisfied that there was ample evidence to support his conclusion that this was a suitable case for rectification and that the description in the deed to Glenelg should be rectified in this manner. There was no palpable or overriding error in his findings of fact.

[33] The order of the trial judge should be confirmed and the appeal should be dismissed, with costs to the respondent in the amount of $2,000 plus disbursements.

Roscoe, J.A.

Concurring:

Saunders, J.A.

Oland, J.A.