Date: 19981029 Docket: CA 145943

NOVA SCOTIA COURT OF APPEAL

Cite as: Veinot v. Veinot Estate, 1998 NSCA 164

Chipman, Pugsley and Flinn, JJ.A.

BETWEEN:

GERALD W. VEINOT	)	Walton W. Cook, Q.C.
	)	for the Appellant
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	Kenneth O. Thomas, Esq.
	)	for the Respondents Reginald
REGINALD A. VEINOT, M. CARMON VEINOT, and **NINA L. VEINOT,**	)	and Carmon Veinot
Administratrix of the Estate of Maurice Clinton Veinot	)	
	)	
Respondents	)	Appeal Heard:
	)	September 28, 1998
	)	
	)	Judgment Delivered:
	)	October 28, 1998
	)	
	)	
	)	

THE COURT: The appeal is dismissed, per reasons for judgment of Pugsley, J.A.; Chipman and Flinn, JJ.A., concurring.

PUGSLEY, J.A.:

After a six-day trial concluding on February 10, 1998, Justice Goodfellow of the Supreme Court, sitting alone, filed a lengthy decision on February 13th, concluding that the respondents, Reginald Veinot and his brother Carmon, had established a constructive, or resulting, trust respecting a farm operation conducted by them with their late father, Maurice Veinot, on three properties in Lapland, Lunenburg County, aggregating approximately 700 acres.

The trial judge determined that each of the respondents should be entitled to 35% of the net value of the farm operations.

Justice Goodfellow also determined that a younger brother, the appellant Gerald Veinot, had established a constructive, or resulting, trust as well. He limited his entitlement, however, to 5% of the net value of the farm operations, as he concluded that Gerald's participation lasted for a shorter period and was less intensive.

Gerald Veinot appeals, submitting the trial judge ignored relevant evidence, as well as misunderstood, and drew erroneous conclusions from, the evidence. He submits, as well, that the trial judge erred in limiting the award of trial costs to him to be paid out of his father’s estate, to the sum of $7,525.00. Finally, a motion is made for the admission of fresh evidence, in support of an application that a new trial be ordered as the trial judge prejudged the case as evidenced by his alleged comments to counsel during a Chambers

conference before Gerald Veinot's evidence was heard, which created a reasonable apprehension of bias.

OVERVIEW:

Maurice Veinot, 83 years of age, died intestate on February 15, 1994. Administration was granted in July, 1995 to his widow, Nina L. Veinot. The trial judge estimated the inventory of the estate at approximately $800,000 after the deduction of expenses. Title to the three properties comprising the farm operation was acquired by Maurice Veinot between 1936 and 1965, and remained in his name at the time of his death.

The action was commenced by Reginald and Carmon Veinot, initially against Nina L. Veinot, Administratrix, their brother Gerald Veinot, as well as the children of the late Marilyn (Veinot) Naugler, their deceased sister. Counsel for the estate appeared at the opening of the trial to confirm that the action of Reginald and Carmon Veinot had been discontinued against Mrs. Nina Veinot and the children of the late Marilyn (Veinot) Naugler, upon consent of the parties involved.

In his reserved decision the trial judge concluded that all three sons had worked on the farm during their respective childhood, but once leaving school, he found that only the respondents Reginald and Carmon devoted themselves entirely to the farm operations.

Justice Goodfellow carefully considered the evidence of the 23 witnesses called at trial, and made very definite, and critical, findings of fact, as well as inferences from the established facts, including the following:

> . . . effectively from 1983 onward, Reginald and Carmon ran the farm business and its total operations because of the diminishing capacity to participate by their father due to his health problems . . .
>
> All the family and friends who gave evidence were lacking, to varying degrees, in objectivity.
>
> Having said that, I have no reservation in accepting the remainder of the evidence advanced by Reginald and Carmon as relates to the depth of their commitment to the farm operations. The farm operations have been their life since they left school . . . They have devoted themselves to the career of farming and I accept the description they give of farming being a seven day a week operation . . .
>
> ...Without the effort of Reginald and Carmon, the farm operation would be no way near its present standing . . .
>
> Their efforts were of such a magnitude that the farm has prospered, grown, and is a far, far different farm operation due to their efforts, than it was in the 1970's or would have been without their participation. In many respects it is accurate to describe the farm as theirs, limited only to the degree of contribution from the initial stages of the farm operations that come from their father and by the father's contribution to 1982, and a small but important degree of contribution that I find was made by Gerald in the time frame between 1974 and 1982. Without belabouring the efforts of Reginald and Carmon in any greater detail, I find that they have overwhelmingly established the existence of a constructive trust . . .
>
> ...Unlike their brother Gerald, they were not only active on a career basis, but they took the financial risk and responsibility in financing for the acquisition of milk quota and improvements to the value of the farm operations. It would be a grave injustice not to recognize the overwhelming contribution and sacrifice they made that gives the farm operations the value and standing it is today.
>
> Unlike Reginald and Carmon who at an early age and for a longer period, committed their lives fully to the farm, Gerald's contribution was far, far more limited.
>
> The farming operations as they exist today are substantially and overwhelmingly the product of the sweat, toil, financial responsibility, business acumen, etc., of Reginald and Carmon Veinot.

FIRST ISSUE - Trial judge ignored relevant evidence, misunderstood and drew erroneous conclusions from the evidence:

In essence, counsel for the appellant seeks to have us retry the case. It is the responsibility of the trial judge to find the facts. Justice Goodfellow has done so. His conclusions are supported, in most cases, by overwhelming evidence, but, at least, by some evidence in all cases. The appellant submissions, when analyzed, deal with the weight of the evidence. These are matters that are peculiarly within the province of the trial judge who has the advantage of seeing the witnesses and assessing their evidence. (**Parsons v. Parker** (1997), 160 N.S.R. (2d) 321 at 334) . This Court should not interfere with Justice Goodfellow's findings of facts, nor the evidentiary conclusions he drew from those facts, merely because we take a different view of the evidence. (**Toneguzzo-Norwell v. Burnaby Hospital**, [1994] 1 S.C.R. 114 per McLachlin, J., for the Court, at p. 121).

I conclude that Justice Goodfellow committed no palpable or overriding error respecting his conclusions on matters of fact.

SECOND ISSUE - Trial judge erred in limiting the award of costs to the appellant to the sum of $7,525.00:

In the decision of February 13, 1998, the trial judge gave a “preliminary view” that the estate should pay a total of $7,525.00, as party-and-party costs, together with reasonable disbursements to the successful respondents Reginald and Carmon Veinot,

who were represented by one counsel, as well as $7,525.00 as party-and-party costs to Gerald Veinot, together with reasonable disbursements. No reasons were advanced in the decision supporting this position. Counsel were invited to express their views in writing to the trial judge if they were not prepared to accept this recommendation.

Counsel for the appellant, accordingly made written representations requesting that party-and-party costs be taxed in favour of their client in the amount of $15,000, plus reasonable disbursements, payable out of the estate.

Justice Goodfellow filed a supplementary decision dealing with the issue of costs. He apparently proceeded on the assumption that counsel's request for costs of $15,000 was a request for costs on a solicitor and client basis.

He said in part:

> ...At one time there was a tendency to look to the estate for all fees on a solicitor/client basis but no such automatic policy has been mandated by the **Civil Procedure Rules**. There is a clear trend to allow only the solicitor for the representative party solicitor/client fees, unless the claimants can establish circumstances warranting the exercise of discretion for granting them solicitor and client costs.
>
> In my view there is no justification for starting at any other point than a possible discretionary award of party and party costs to a claimant for which payment may be directed out of the estate/fund.
>
> If solicitor and client costs are warranted then such must be justified. There must be exceptional circumstances to warrant the exercise of discretion in any proceeding by awarding a claim of solicitor and client costs.

Justice Goodfellow continued:

> While strictly speaking this proceeding is not estate litigation the policy consideration in estate litigation whereby the difficulties that give rise to the litigation are primarily caused by the actions of the testator makes it appropriate to have the testator, through the estate, pay at least party-and-party costs for the litigation, his actions or in action gave birth to...
>
> I conclude that the proper exercise of judicial discretion in this case warrants the claimants receiving party-and-party costs payable out of the estate.

I agree with these comments and also the conclusion reached by the trial judge that the proceedings were not unduly complex, although the matters were of the utmost importance to the parties.

In order to determine the “amount involved” pursuant to Tariff “A” of **Civil Procedure Rule** 63, the trial judge referred to the rules, the directions with respect to utilization of the Tariff of Costs and Fees, and also he referred to "the practice I’ve utilized in the past of a rule of thumb so as to develop a real measure of consistency... where the non-monetary aspects are significant".

The rule of thumb had been used by the trial judge in land/boundary dispute cases and in "complex Chambers applications" wherein he treated each day, or part of the final day, of a trial, as equivalent to an amount involved of $15,000.

As the present litigation occupied seven days of court, and “counsel were well organized”, his rule of thumb of $15,000 per day yielded an amount involved of $105,000.

Using that amount at Scale 3, the trial judge determined that party-and-party costs should be awarded to Gerald Veinot in the amount of $7,525.00 plus taxable disbursements, a result which the trial judge considered to be “virtually identical to my original judgment call”.

Counsel for Gerald Veinot contends that the trial judge erred in relying on his “rule of thumb” to fix the amount involved at $105,000, in particular, where the inventory of assets was appraised at close to $900,000.

Counsel for the respondents does not take any position on this issue.

The trial judge, in my opinion, properly exercised his discretion by ordering that party-and-party costs out of the estate be made payable to all claimants in the litigation, and that exceptional circumstances had not been shown to justify the award of solicitor and client costs.

He pointed out that the amount involved was “far from clear”. He stated:

> There was a multitude of matters to address starting with a determination of whether or not each of the claimants made out either a resulting trust or constructive trust and then to determine the percentage of entitlement. The percentage of entitlement had a direct impact on the statutory entitlement each of the claimants had as a matter of right. To some extent the predictable success was dependent upon the accumulative weight to be attached to the evidence and the relevant degrees of success measured in percentage would not be a fair yardstick for a determination or assessment of the amount involved calculated by an assessment of the result on an appropriate dollar level.

I agree that these were appropriate considerations.

With respect, I do not agree, however, that the rule of thumb, employed by the trial judge was an appropriate yardstick. It is, in my view, an arbitrary classification which in most cases, except by happenstance, would be of little relevance. I would, however, not interfere with the determination by the trial judge of the amount involved at $105,000, as I consider that to reasonably approximate the amount in issue for Gerald Veinot.

The trial judge suggested $800,000 was a reasonable approximation of the net value of the estate after deduction of expenses. Pursuant to the provisions of the **Intestate Succession Act**, S.N.S. 1990, c. 236, Mrs. Nina Veinot, was entitled to the first $50,000 from the estate, together with one-third of the residue. The claim advanced on behalf of Gerald Veinot was as an equal partner (entitled to one-quarter of the residue) with his two brothers, and the estate of his father, or alternatively that a constructive, or resulting trust, should be found in his favour in that proportion. Thus the amount involved in light of the claim of Gerald Veinot approximated $125,000. This is the relevant amount involved rather than the appraised inventory of approximately $900,000, as suggested by counsel for the appellant.

Civil Procedure Rule 63.02(1) provides that:

> ...the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court . . .

I would not interfere with the award of party-and-party costs of $7,525.00 to the appellant as I conclude that the trial judge determined the amount involved at an appropriate level, albeit for reasons with which I do not concur.

The appellant raises a further matter. After trial, the solicitor for Reginald and Carmon Veinot forwarded a draft order to the trial judge. Counsel for Gerald Veinot objected to the form of the order. After communications were received by both counsel at his office, the trial judge arranged for a teleconference with counsel to discuss the matter further.

Counsel notes in the appellant's factum:

> During this teleconference, counsel expressed his views and at the end of the teleconference His Lordship made a cost order against the appellant in the amount of $200.00 to be paid to the estate and $200.00 to be paid to Reginald and Carmon Veinot. The appellant respectfully submits that this cost order was unnecessary and inappropriate in the circumstances . . . Upon providing the order to His Lordship, the appellant respectfully submits that His Lordship had the jurisdiction to issue the order if he felt that it accurately reflected his decision without the consent of the appellant's solicitor as to its form. This it is submitted could have been done without the need of a teleconference between the parties.

In view of the issues placed before the trial judge, it was, in my view, entirely appropriate for him to consult counsel before considering the five-page order that was placed before him consequent upon his decision. We have no material placed before us to suggest that the matters raised at the teleconference, or the length of the teleconference, rendered this cost award to be in error, or based on a wrong principle.

I would accordingly, dismiss this ground of appeal.

ISSUE THREE - Application for fresh evidence in support of submission the trial judge prejudged the case:

In support of the application for the introduction of fresh evidence, counsel for Gerald Veinot, has filed his own affidavit as well as the affidavit of Debbie Woodworth, court reporter, both sworn on August 6, 1998.

Counsel deposed in part:

> (3) THAT during the trial, there were several In-Chambers Conferences held between His Lordship Justice Goodfellow and counsel for the parties. Present during these chambers discussions was Ms. Debbie Woodworth. Ms. Woodworth advises me, and I do verily believe this to be true, that she was present at these In-Chambers Conferences for the purpose of recording the proceeding for the Court record at the request of Justice Goodfellow.
>
> (4) THAT at the time of the preparation of the Appeal Book, my office requested copies of these notes for the purpose of including them in our Appeal Book. At that time my office was informed by Ms. Woodworth that her notes for these In-Chambers Conferences were not complete. My office requested that Ms. Woodworth translate from her shorthand the notes as best she could.
>
> (5) THAT because of the incomplete nature of these notes, Ms. Woodworth, who is a certified court reporter, could not certify these notes. Upon our review of these notes, it became apparent that only small bits and pieces of the conversations had actually been recorded. I am attaching hereto as Exhibits “A”, “B’, “C” and “D” to this my affidavit copies of the notes which we received from Ms. Woodworth.
>
> (6) THAT during these In-Chambers Conferences, prior to the Defendant/Plaintiff by Counterclaim, Gerald Veinot calling evidence, Justice Goodfellow made a comment to counsel to the effect of, “While I have not heard the defendant’s evidence, I am satisfied that a relationship does exist in favour of Reginald and Carmon Veinot”. In the notes produced by Ms. Woodworth, there is no record of this comment or the context of the conversation in which the comment was made.
>
> (7) THAT during these In-Chambers Conferences, Justice Goodfellow made several statements to counsel that the parties should settle the matters prior to him having to make a decision in the matter and made reference to the displeasure that Maurice Veinot would express if he knew what had come of his Estate.

Ms. Woodworth deposed in part as follows:

> (4) THAT throughout the course of this trial, there were several In-Chambers conferences between counsel and the judge . . .
>
> (5) THAT His Lordship Walter E. Goodfellow requested that I be present to record the proceedings at the In-Chambers Conferences held during the trial. I attended before His Lordship in Chambers, along with counsel for the parties. As there are no recording devices in the room which was used for the conferences, I attempted to record the proceedings by use of shorthand in my stenographer's notebook.
>
> (6) THAT I was present for In-Chambers Conferences on February 6, 1998 at 10:25 a.m., February 6, 1998 at 10:45 a.m., February 9, 1998 and February 10, 1998.
>
> (7) THAT during these In-Chambers Conferences I attempted to take down what was said by the lawyers, as well as the judge. However, due to the speed of the interaction between the lawyers and the judge, I was unable to record all of what was said.
>
> (8) THAT upon being asked to type out the notes for the appeal of Mr. Gerald Veinot to the Nova Scotia Court of Appeal, I was, therefore, only able to produce an incomplete record of the proceedings which take place during the In-Chambers Conferences. Accordingly, these notes are attached hereto as Exhibits "A", "B', "C" and "D". Because these notes are not a complete recording, I was, therefore, not able to certify them in the normal fashion.

Ms. Woodworth's notes do not disclose the alleged comment attributed to the trial judge in paragraph 6 of counsel's affidavit.

Counsel for the respondents at the hearing of this appeal advised the Court that he could not recall the alleged specific comments being made by the trial judge.

After counsel was heard on the motion, judgment on the admissibility of the evidence was reserved. A review of the transcript leads to the reasonable inference that the conference which the counsel for the appellant directs our attention, occurred on the

morning of February 9th before court was convened. Although the case for Gerald Veinot opened on the afternoon of February 5th, he was not called to give evidence until the late morning of February 9th.

The transcript does not disclose any objection made by counsel on February 9th respecting the alleged comments by the trial judge.

Post-trial oral submissions were presented by both counsel on the morning of February 10th.

The only comment by the appellant's counsel that could be considered to remotely bear on this issue is as follows:

> Even though you urged us so hard, and we tried, I believe, all counsel tried hard, to reach a solution upon Your Lordship's urgings, we're still grateful that we could contribute our testimony, because I think then you have, for sure, the full...

The Notice of Appeal was filed on March 11, 1998. It enumerates sixteen specific grounds of appeal, none of which allege that the trial judge erred by expressing an opinion, or a bias, adverse to the position of the appellant during the course of the trial.

The twelfth ground of appeal reads:

> That the learned trial judge erred in law and in jurisdiction by acting as broker of settlement and failing to perform and maintain his role as trier of fact and law, in particular by unilaterally suggesting that there be a settlement in the case prior to the Appellant having an opportunity to call his case.

I construe this ground to allege the trial judge erred in urging both counsel to settle rather than evidence of bias towards any of the parties.

On May 11, 1998, a Notice was filed by counsel for the appellant for a hearing on May 27th to amend the Notice of Appeal to add two grounds respecting the disposition of costs made by the trial judge. Counsel's affidavit of May 11th was filed in support. It consists of nine paragraphs, none of which deals with the present issue.

It was not until August 6, 1998, that reference to this issue first appears in the appellant's material in a notice filed for the admission of fresh evidence.

In considering issues of this kind, this Court has concluded that the guidelines disclosed by the authorities include the following:

> A lawyer who wishes to object to a presiding judge on the ground of reasonable apprehension of bias is expected to make the recusal motion with reasonable promptness after ascertaining the grounds for filing the motion; otherwise there will be a waste of judicial time and resources and a heightened risk that litigants would use recusal motions for strategic purposes... (**R. v. Smith and Whiteway Fisheries Ltd.**), (1995), 133 N.S.R. (2d) 50, at 60.

In addition to the two reasons cited, a further reason may be advanced that is particularly cogent in the light of the present circumstances.

The affidavit filed by counsel for the appellant does not purport to set out the exact words used by Justice Goodfellow, but rather disposes that Justice Goodfellow made a

comment "to the effect". The appellant's counsel does not advise whether he made notes at the time of the Chambers conference on February 9th to ensure the accuracy of the purported comments of the trial judge. If the matter had been raised by counsel, either at the Chambers conference, or immediately thereafter when matters proceeded in open court, there would have been an opportunity for both opposing counsel and the court reporter to both relate to the court their recollection of the words used by the trial judge, and there would have been an opportunity as well for the trial judge to place his recollection on record.

As a consequence of the appellant's counsel waiting six months before raising the issue, this Court is denied the opportunity of having these additional recollections before it.

Apart from the importance of discouraging counsel from delaying raising an objection in the hope of receiving a favourable verdict on the merits, the case does highlight the difficulties raised when there is no proper record. The trial judge and counsel would likely have agreed on the facts before memories faded so that there would be no dispute on the words uttered by the trial judge. Here, as I have noted, counsel for the appellant is only able to approximate the words of the trial judge. The importance of a contemporaneous record where the exact wording is so critical cannot be over emphasized.

I would dismiss the application for the introduction of the fresh evidence as the motion was not made with reasonable promptness. I would not describe the delay in this

case as pernicious (as found by the Alberta Court of Appeal in **R. v. Smith** (1995), 31 Alta. L.R. (3d) 227 at 231). I would, however, note that counsel's failure to promptly bring this issue forward in light of other steps taken by counsel respecting the appeal, together with the inability of counsel for the respondents to recall the specific comments made by the trial judge, in the light of the complete absence of any record, leads me to conclude that the appellant is not able to satisfy the burden that the proposed evidence is reasonably capable of belief. (**Thies v. Thies** (1992), 1001 N.S.R. (2d) 179).

CONCLUSION:

I would dismiss the appeal.

The successful respondents should have their party-and-party costs together with reasonable disbursements paid out of the estate. Taking into account that there was no significant dispute with the legal requirements of a constructive, or a resulting trust, and that the only real issue was whether the facts established met the requirements of a constructive, or a resulting trust, I would not award costs to the unsuccessful appellant out of the estate, nor, in the circumstances, would I order costs against the unsuccessful appellant.

Pugsley, J. A.

Concurred in:

Chipman, J.A.

Flinn, J.A.

C.A. No. 145943

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

GERALD W. VEINOT	)	
Appellant	)	
- and -	)	
REGINALD A. VEINOT, **M. CARMON VEINOT**, and **NINA L. VEINOT**, Administratrix of the Estate of Maurice Clinton Veinot,	)	REASONS FOR JUDGMENT BY: PUGSLEY, J.A.
Respondents	)	