NOVA SCOTIA COURT OF APPEAL
Citation: *Bellton Farms Ltd. v. Campbell*, 2016 NSCA 1

Date: 20160121
Docket: CA 438464
Registry: Halifax

Between:

Bellton Farms Limited and Alan Campbell

Appellants

v.

Colin Campbell and Mary Nova Jane Campbell

Respondents

Judges:	MacDonald, C.J.N.S., Bryson and Bourgeois, JJ.A.
Appeal Heard:	December 7, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois, J.A.; MacDonald, C.J.N.S. and Bryson, J.A. concurring
Counsel:	Robert H. Pineo, for the appellants Charles Thompson, for the respondents

Reasons for judgment:

[1] In the first line of their factum, the Appellants submit that "[t]his matter is at its core about equity and justice". Having read the record in its entirety, and in particular his evidence, it is understandable why the Appellant Alan Campbell would view the decision under appeal as inequitable and lacking in justice. That does not make it so.

[2] The Appellants Alan Campbell and Bellton Farms Limited appeal an order of Justice Elizabeth Van den Eynden (as she then was). That order required Alan Campbell to purchase the shares of the Respondent Colin Campbell in Bellton. The hearing judge declined to reduce the value of those shares by the "sweat equity" Alan Campbell claimed he had contributed to Bellton. She further rejected a claim of proprietary estoppel by which the Appellants sought title to lands owned by the Respondent Mary Nova Jane Campbell.

[3] For the reasons to follow, I would dismiss the appeal.

Background

[4] In 1980, Ralph Campbell, after many years of operating a family dairy farm, incorporated Bellton, and in turn transferred most of the farming assets into that company. A 258 acre tract of land was not included in the transfer. Upon Ralph's death in 1982, title to that property passed to his wife Winnifred. In 2004, Winnifred conveyed the property to her daughter-in-law, the Respondent Mary Nova Jane ("Nova") Campbell. Mostly wooded, a cleared portion of that property had been used by Ralph for farming purposes, and continued to be used following his death.

[5] Ralph's sons, Alan and Colin, grew up on the family farm and contributed to its operation as farm children often do. Upon incorporation of Bellton, Ralph Campbell caused to have 60 of the common shares issued to Alan; 10 shares to Colin, and he retained 30 for himself. Two years later, Ralph transferred his shares to Alan, increasing his shareholding to 90%.

[6] Of the two brothers, Alan was the farmer. Although Colin built his home adjacent to the farm, it was Alan who undertook the primary day-to-day responsibility of operating the farming enterprise. Initially having provided some assistance, Colin's involvement with the farm ceased in 1984 due to an unfortunate

incident which caused a long-lasting breakdown in the relationship between the two brothers.

[7] Alan continued to operate the farming enterprise, and in doing so, continued to utilize and expand upon the cleared lands held by his mother Winnifred, and later Nova Campbell. Some years ago, Alan was diagnosed with Parkinson's disease, which made the demands of farming difficult for him. Between 2007 and 2009, Bellton sold significant assets used in the farming enterprise, including livestock and milk quota.

Decision under appeal

[8] The decision under appeal arose from two applications in court, which were ultimately consolidated. The first application was filed by Colin and Nova Campbell in 2010, in which Colin sought oppression remedies against Alan including an order that his shares be purchased. Nova Campbell sought an order prohibiting further entry upon the 258 acre parcel by Alan and Bellton, an order for past rent, and damages for trespass.

[9] In response to that application, Alan and Bellton filed a Notice of Contention in which they denied any oppressive conduct and furthermore, alleged that through Colin Campbell's objectionable behaviour, he had forfeited the ownership of his shares in Bellton. In the alternative, it was pled that should the court conclude Colin was entitled to have his shares purchased, the value should be reduced to reflect the personal funds and sweat equity injected into Bellton by Alan. With respect to the claim advanced by Nova Campbell, Alan and Bellton asserted they had gained title to the property by way of adverse possession, or in the alternative, they should be compensated for improvements made to the land on the basis of *quantum meruit*.

[10] In 2013, Alan and Bellton filed a Notice of Application in Court against Nova Campbell in which they claimed title to the cleared portion of the 258 acres parcel on the basis of adverse possession or proprietary estoppel, or in the alternative, damages for improvements made thereto.

[11] Nova Campbell responded with a Notice of Contest, in which she alleged that the necessary elements for the claims advanced did not exist in the circumstances and ought to be dismissed.

[12] As an application in court, the consolidated matter proceeded by way of affidavit evidence, with the deponents being subject to cross-examination. Prior to the hearing, a preliminary motion was brought by Alan and Bellton seeking to have an affidavit sworn by Winnifred Campbell struck. Mrs. Campbell's affidavit was sworn on April 12, 2013; however, she passed away prior to the hearing, and without being discovered. After receiving submissions from the parties, and hearing evidence, particularly that of Alan Campbell, the hearing judge concluded that the affidavit ought to be entered into evidence.

[13] The hearing itself was heard over the course of two days. The three parties were cross-examined on their affidavits, as was an expert called by Alan and Bellton. Having reserved her decision, the hearing judge rendered an oral decision on March 23, 2015.

[14] In her decision, the hearing judge set out the issues she was tasked to resolve. They were as follows:

- Having abandoned the claim for adverse possession, was Alan Campbell and/or Bellton entitled to the land claimed on the basis of the doctrine of proprietary estoppel?;
- If not so entitled, was Alan Campbell and/or Bellton entitled to damages in light of the improvements made to the land?;
- Did Colin Campbell forfeit his shares by not sufficiently contributing to the farming operations?;
- Was Colin Campbell, as a minority shareholder, entitled to an oppression remedy due to the actions of Alan Campbell?;
- If oppression were made out, and if an order for the purchase of Colin Campbell's shares was an appropriate remedy, should the value be reduced in recognition of Alan Campbell's contributed sweat equity?

[15] The hearing judge considered each of the above issues and concluded:

- The claim of proprietary estoppel was not made out on the evidence before her;
- Alan Campbell and/or Bellton were not entitled to damages for improvements made to the land;

- An injunction prohibiting Alan Campbell and Bellton from further entry upon the land was appropriate. An award for past rent and damages for trespass was denied;
- Colin Campbell did not forfeit his shares in Bellton;
- Alan Campbell as a majority shareholder had acted oppressively, entitling Colin Campbell to an oppression remedy;
- As an appropriate remedy, Alan Campbell was to purchase Colin Campbell's shares, at a value of $143,000, being 10% of the agreed value of Bellton on June 30, 2007;
- Nothing was deducted from the above purchase price to reflect Alan Campbell's contributed sweat equity.

[16] The Appellants only challenge two of the above findings – the dismissal of the proprietary estoppel claim, and the failure to recognize and deduct Alan Campbell's sweat equity from the value of Colin Campbell's shares. They do not challenge the hearing judge's conclusions relating to the alleged forfeiture of shares; that Alan Campbell acted oppressively towards Colin Campbell, or that a share purchase was an appropriate remedy.

Issues

[17] Although advancing seven grounds in their Notice of Appeal, the Appellants condensed this significantly in their submissions. As such, I will consider the issues to be as articulated in their factum:

1. Did the hearing judge commit a reversible error by concluding Alan Campbell was disentitled to equity and thereby disentitling him to the fruits of his labours (invested sweat equity in the farm)?
2. Did the hearing judge commit a reversible error by admitting into evidence the affidavit of Winnifred Campbell?
3. Did the hearing judge commit a reversible error by failing to declare that the Appellants have title to the cleared land via the doctrine of proprietary estoppel?

Standard of Review

[18] Despite noting the same case authority, the parties disagree with respect to the appropriate standard of review. Relying on *McCormick v. MacDonald*, 2009 NSCA 12, the Appellants had this to say in their factum:

> 55. The Appellants submit that all three issues raise errors of law or errors of mixed fact and law. However, upon close scrutiny, it is clear that the errors of mixed fact and law are actually errors in the application of legal principles to a set of facts. Thus, the standard of review for all of the alleged errors is correctness.

[19] The Respondents submit that *McCormick* simply does not support the above statement, and it is only where there is an extricable error in legal principle, does the correctness standard apply to issues of mixed fact and law. They submit that as the Appellants have not identified, or alleged, any particular extricable error in legal principle, that the standard of review for all issues is whether the hearing judge made a palpable and overriding error.

[20] Although I will address the standard of review for each issue in the analysis to follow, given the different views advanced, it is useful to confirm what this Court noted in *McCormick*:

> [20] The standard of review to be applied when evaluating a lower court's decision for error, is well known. Findings of fact, or inferences drawn from those facts are reviewed on a standard of palpable and overriding error. Matters involving pure questions of law are subject to a correctness standard. Where a distinct legal issue can be isolated from a challenged question of mixed fact and law, then the standard applied to that extricated issue will also be one of correctness. Otherwise the same palpable and overriding measure is invoked. **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.
>
> [21] As this court observed in **McPhee v. Gwynne-Timothy**, 2005 NSCA 80:
>
> > [33] On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of

> mixed law and fact is reviewable on the standard of palpable and overriding error.

Analysis

Did the hearing judge commit a reversible error by concluding Alan Campbell was disentitled to equity and thereby disentitling him to the fruits of his labour (invested sweat equity in the farm)?

[21] In her decision, the hearing judge set out the principles of unjust enrichment, noting in particular those articulated in *Kerr v. Baranow*, 2011 SCC 10 and *Garland v. Consumers' Gas Co.*, 2004 SCC 25. She identifies the necessary elements to the claim as being an enrichment to the defendant; a deprivation to the claimant, and the absence of a juristic reason for the enrichment.

[22] With respect to juristic reason, the hearing judge noted as follows:

> It really is a two-part test to determine whether or not there is an absence of a juristic reason for the enrichment. Step one is this; the first step of this analysis is that the Plaintiff must show there is no juristic reason to deny recovery from an established category. The established categories that can constitute juristic reasons include a contract, disposition of law, a donative intent or a gift, and other valid common law or statutory obligations. The second part of that test is if the Plaintiff - - [and that would be Alan Campbell] - - can show there is no juristic reason to deny recovery from an established category, the analysis moves to step two where it's open to the Defendant - - [in this case Colin] - - to show that there is another juristic reason beyond the established categories to deny recovery. In this part of the analysis the Court should have regard to the reasonable expectation of the parties and public policy considerations. The Court may also take into account moral and policy based arguments about whether particular enrichments are, in fact, unjust.

[23] In the analysis which followed, the hearing judge agreed with the position advanced by Colin Campbell that the evidence failed to satisfy the required elements for unjust enrichment. She found there were a number of juristic reasons to deny the equitable remedy claimed, including that Alan Campbell had not come to court with clean hands.

[24] At this point, it is helpful to return to the standard of review. The Appellants have not taken issue with the law identified by the hearing judge. The authorities relied upon in her decision were quoted to her by both parties. The Appellants put forward the same authorities on appeal to this Court. They take issue with how the

hearing judge applied the legal principles to the evidence before her. Given there is no extricable legal error alleged, the hearing judge's conclusions ought to be reviewed for palpable and overriding error.

[25] The thrust of the Appellants' argument is that the hearing judge erred in finding a juristic reason for the purported enrichment, which in turn led to her conclusion that Alan Campbell's claim for constructive trust ought to fail. Although the hearing judge based her conclusion on a number of findings, in my view, the issue of whether Alan Campbell had "clean hands" is dispositive of this ground of appeal.

[26] On that issue, the Appellants asserted in their factum:

> 52. … [T]he alleged error is that the Trial Judge failed to regard the totality of the evidence, improperly weighed the evidence and the contextual background of the case in determining that the Appellant did not come to court with clean hands.

[27] And further:

> 69. … As stated above, **the Appellant submits that the trial judge erred in finding that the Appellant engaged in oppressive conduct**. The Appellant comes to this court with clean hands, and as such, he is entitled to an equitable remedy. (Emphasis added)

[28] The Appellants did not challenge the hearing judge's finding of oppressive conduct as it related to the oppression remedy granted. As such, maintaining the above assertion may have proven difficult. In their oral submissions, the Appellants clarified their position, asserting that the hearing judge had inappropriately utilized her findings on the oppression claim when considering the constructive trust claim; in particular, in finding that Alan Campbell did not have clean hands.

[29] The Appellants provided no authority to support a conclusion that behaviour considered to be "oppressive" for the purpose of one claim, may not be considered in the context of another. In my view, the hearing judge made strong and clear factual findings relating to Alan Campbell's conduct. Nothing precluded her from considering those findings in the context of the different claims before her, both legal and equitable.

[30] With respect to Alan Campbell's conduct, the hearing judge found:

> In 1984 Colin Campbell was helping his brother, Alan Campbell, herd loose cattle back into the pasture from which they escaped. Alan Campbell completely lost his cool. Under no uncertain terms, he told Colin Campbell to get off the farm property, he shouted vulgarities at his brother, he chased him to his home while still yelling and cursing at him, Colin Campbell made it to his house before his brother could catch him and he locked the door.
>
> A short time after this event Alan Campbell made the unilateral decision to pull the bookkeeping and accounting work that Colin Campbell performed for Bellton Farms. At this juncture Alan Campbell considered Colin Campbell to no longer have an interest in Bellton Farms.

And further:

> Alan Campbell ran Colin Campbell off the farm in a threatening manner, Alan took the accounting and bookwork from Colin, he drew a line in the sand and acknowledges from that point forward he did not consider Colin to have any further interest in Bellton Farms . . .
>
> Alan Campbell, in my view, created an environment which effectively froze out Colin from any ongoing contribution. It is understandable why Colin would resign as a director and officer of Bellton Farms in this hostile climate.

[31] Based on her various factual findings, the hearing judge concluded:

> … I've indicated before – and I will repeat – I find Alan Campbell does not come to Court with clean hands. I find that Alan Campbell acted in a manner that was oppressive, unfair, and disregarded his brother's interest in the corporation.
>
> Alan Campbell should not be permitted to capitalize on his improper conduct. Alan Campbell was the majority shareholder and sole director and officer since 1985. Essentially from the time his father died, or at least since the dispute in 1984, he acted as if Bellton Farms was his sole property. He wrongly determined that Colin Campbell was not a legitimate shareholder with a legitimate interest that he had to be mindful of and not to trample upon as a director and a majority shareholder of Bellton Farms.
>
> I find that Alan conducted himself and the business of Bellton Farms with total disregard, if not contempt, to the interest of Colin Campbell. He acted only in the interest of himself, as he did not see a distinction between him and the company. Alan ran the farm reasonably well for many years, and while doing so he had sole control over all the farm income and assets, he was able to accumulate some modest assets or wealth.
>
> That aside, although he had a modest salary in some years and in some years none, he essentially had his day-to-day living costs covered by Bellton Farms. He worked hard, however he exclusively enjoyed the benefits, which amount, in my view, to reasonable remuneration in the overall context. In my view, it would be

> unfair and unjust to reduce the value of Bellton Farms in the circumstances of the case before me.

[32] The evidence before the hearing judge amply supported the factual conclusions she reached. She concluded there was juristic reason to deny the equitable remedy of constructive trust sought by Alan Campbell; namely, that he did not come to court with clean hands, and that an award would unreasonably permit him to capitalize on his own improper conduct. I see no reason, in fact or law, to interfere with this conclusion and would dismiss this ground of appeal.

Did the hearing judge commit a reversible error by admitting into evidence the affidavit of Winnifred Campbell?

[33] As noted earlier, the hearing judge at a pre-hearing motion concluded that the affidavit of Winnifred Campbell was admissible. In doing so, she relied upon the legal authorities provided to her by both parties, most notably *R. v. Khelawon*, 2006 SCC 57. There was no dispute with respect to the law relating to the admissibility of hearsay evidence.

[34] Citing *Khelawon*, the hearing judge summarizes the law as follows:

> And really the party who seeks to adduce the hearsay evidence must demonstrate it is necessary and reliable. And that's Mr. Thompson's burden to bear today to make sure that he's satisfied the Court that it's necessary and reliable in the circumstances.
>
> Even if it is necessary, (a) because Mrs. Campbell is deceased, and reliable, it's sworn under oath, I still have to consider whether or not its probative value is outweighed by the prejudicial effect. The impact it has on including it.
>
> I must also balance the prejudicial effect, the impact of admitting it and the impact on excluding it. Both parties see it as a significant piece of evidence. And I have done that. I've considered the effect of inclusion and exclusion very carefully and have balanced that interest.

[35] The hearing judge concluded that the affidavit was necessary given Mrs. Campbell's passing, and given it was sworn under oath, it met the requirement of threshold reliability. With respect to the probative value and prejudicial effect, the hearing judge concluded:

> And I have weighed the prejudicial effect and the probative value and I'm satisfied that the evidence is probative and the probative value outweighs any prejudice to Alan Campbell and Bellton Farms. So the affidavit will be admitted.

> I do want to also note that it seems on the evidence before me and the cross-examination of Alan Campbell that there does not appear to be significant contest with respect to the contents of Winnifred's affidavit, at least not clearly articulated by Alan Campbell at this time.

[36] The Appellants have not identified any error in terms of the legal principles applied by the hearing judge. Nor have they identified how the hearing judge palpably and overridingly erred in her conclusions. With respect, the Appellants simply repeat the same arguments advanced in the court below, looking for a different outcome.

[37] Before this Court, the Appellants repeat the "prejudice" mantra, now only saying that the prejudice they warned the hearing judge about has come to fruition. Despite sweeping statements that they were prejudiced by virtue of the admission of Mrs. Campbell's affidavit, the Appellants have failed to point to anything in the record or ultimate hearing decision supportive of that conclusion. I would dismiss this ground of appeal.

Did the hearing judge commit a reversible error by failing to declare that the Appellants have title to the cleared land via the doctrine of proprietary estoppel?

[38] In their factum, the Appellants summarize the hearing judge's purported error as follows:

> 107. The Appellants respectfully submit that the Learned Hearing Judge erred at law by failing to consider and apply the underlying elements of proprietary estoppel and that she rendered her decision on this issue without evidence on the issue of whether or not the Appellants suffered a burden from the development of the cleared lands.

[39] Nowhere in their written submissions do the Appellants suggest that the hearing judge failed to identify the correct test for proprietary estoppel. Rather, their submissions centered upon how the hearing judge misapplied the principles to the evidence before her. Such attracts the standard of palpable and overriding error. However, at the hearing before this Court, the Appellants added a new argument.

[40] In their oral submissions to this Court, the Appellants asserted that the hearing judge erred in law by inappropriately adding an element to the test for proprietary estoppel – that the claimant must hold a mistaken expectation or belief

that they had or would obtain an interest in the property claimed. I agree with the Appellant that the hearing judge must be correct in terms of her identification of the test for proprietary estoppel. That being said, this late in the day criticism of the hearing judge is entirely unwarranted. I will explain.

[41] In their written submissions both before the hearing judge and this Court, the Appellants set out the same authorities in support of their claim for proprietary estoppel, most notably *Zelmer v. Victor Projects Ltd*. (1997), 90 B.C.A.C. 302 and *Maritime Telegraph and Telephone Company v. Chateau Lafleur Development Corporation*, 2001 NSCA 167.

[42] The Appellants had this to say about the significance of *Zelmer* in their factum to this Court:

> 112. . . . The Court of Appeal upheld the easement by promissory estoppel and stated:
>
> > When a party expends money on the land of another **under an expectation**, created or encouraged by the land owner, of acquiring a right over the land, **such expectation** arising from what the owner has said or done, the Court will order the owner to grant the party that right on such terms as may be just on the basis of proprietary estoppel. Here, the words and conduct of the defendant's (neighbour) principal and engineer **led the plaintiffs (developer) to believe** that they had approval to construct the reservoir and would be granted an easement. The equitable doctrine of promissory estoppel was established. The trial judge did not err in granting the declaration sought by the plaintiffs entitling them to an easement over a portion of the land. (Emphasis added)

[43] The Appellants relied on *Maritime*, saying:

> 113. . . . The Nova Scotia Court of Appeal upheld the trial judge's decision stating at paragraph 50:
>
> > Proprietary estoppel in a case like this is concerned with equitable rights to land. It follows, therefore, **that the expectation or belief on which the estoppel is based must relate to the acquisition of rights in or over land**. . . :
> >
> > When A to the knowledge of B acts to his detriment in relation to his own land **in the expectation**, encouraged by B, of acquiring a right over B's land, **such expectation** arising from what B has said

> or done, the Court will order B to grant to A that right on such terms as may be just. (Emphasis added)

[44] The identical submissions were made by the Appellants to the hearing judge. In reviewing her decision, it is clear that she accepted the test, as suggested to her by the Appellants, quoting the principles as they appear in *Zelmer*. She further referenced several other authorities and sources as supportive of the test she identified for proprietary estoppel.

[45] It is helpful to examine two of the other sources referenced by the hearing judge. In *Nova Scotia Real Property Practice Manual*, C.W. Macintosh, Q.C. (Looseleaf ed., LexisNexis) proprietary estoppel is described at page 2-190 as follows:

> An interest in property may be created in circumstances where there is proprietary estoppel. This may arise **when a person under an expectation**, created or encouraged by the owner of the property, that the person shall have an interest in the property, and the person thereafter to the knowledge of the owner and without objection from him, acts to his or her detriment in connection with the land. (Emphasis added)

[46] The hearing judge also referenced *Robertson v. McCarron*, [1985] N.S.J. No. 457. There, the principles of proprietary estoppel were noted by the court to be as follows:

> 36 . . . As stated by *Anger and Honsberger*, Second Edition, Volume 2, at p. 1469, this doctrine is invoked when a person having a right in land observes another incurring a detriment **on the mistaken belief** that he has a right to do so and that in such cases there may be a duty upon the person whose rights are being transgressed to speak out so as to prevent further harm. Ordinarily the five requisites necessary to invoke this type of estoppel are:
>
> 1. The person seeking to raise the estoppel **must have made a mistake as to his legal rights.**
>
> 2. He must have done some act to his detriment, such as the expenditure of money, **on the faith of the mistaken belief**.
>
> 3. The person sought to be estopped must know of the existence of his own right which is inconsistent with the right claimed by the party seeking to raise the estoppel.
>
> 4. The person sought to be **estopped must know of the other's mistaken belief** as to his rights.

> 5. The person sought to be estopped must have encouraged the other in the acts done to his detriment, either directly or by abstaining from asserting his own rights. (Emphasis added)

[47] The Appellants provided no authority in support of their submission that the hearing judge erred by considering whether Alan Campbell and Bellton held a mistaken belief or expectation as to their interest in the claimed property. The authorities they themselves submitted, as well as many others, are contrary to that position. I am satisfied the hearing judge did not err in identifying the test for proprietary estoppel, including the requirement for a mistaken expectation or belief on the part of the claimant.

[48] I will now turn to the Appellants' submissions regarding the hearing judge's misapplication of the principles she identified. Although the Appellants advanced multiple arguments in challenging the conclusion that a claim for proprietary estoppel was not made out, the remainder of this ground of appeal can be dealt with in quick order.

[49] The hearing judge found that neither Alan Campbell nor Bellton were under a mistaken belief as to their legal interest or entitlement in the claimed property. That is a factual finding, left unchallenged by the Appellants, and amply supported by the record. On this basis alone, the claim for proprietary estoppel could not succeed, making a review of the hearing judge's analysis of other factors, and her purported errors, unnecessary. I would dismiss this ground of appeal.

Disposition

[50] For the reasons above, I would dismiss the appeal with costs and disbursements of $16,800.00, being 40% of the costs awarded at the hearing.

Bourgeois, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bryson, J.A.