Date: 19980609 Docket: C.A. 144122

NOVA SCOTIA COURT OF APPEAL
Cite as: Brennan v. Hendricks, 1998 NSCA 123

Freeman, Pugsley and Cromwell, JJ.A.

BETWEEN:

THOMAS BRENNAN	)	Stewart McInnes, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Elizabeth Cusack Walsh,Q.C.
	)	for the Respondent
GEOFFREY HENDRICKS	)	
	)	
Respondent	)	Appeal Heard:
	)	May 15, 1998
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	)	
	)	Judgment Delivered:
	)	June 9, 1998
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THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Pugsley, JJ.A. concurring.

CROMWELL, J.A.:

1. Introduction

Geoffrey Hendricks brought an action for a declaration, an injunction and damages against Thomas Brennan in the Supreme Court claiming that Mr. Brennan trespassed on his land. Mr. Brennan defended claiming that he owned the lands on which the alleged trespass occurred. The essence of the dispute between the parties was the true location of the rear boundary of the Hendricks property. Edwards J, in a reserved decision after a three day trial, gave judgment in favour of Mr. Hendricks. The trial judge granted a declaration as to the rear boundary of the Hendricks property, a permanent injunction prohibiting Mr. Brennan from entering the disputed land, and awarded Mr. Hendricks $4200 special damages for trespass, punitive damages of $3000 and costs.

Mr. Brennan now appeals, arguing that the trial judge erred in his interpretation of the chain of paper title, in his application of the burden of proof and his assessment of the evidence. In the alternative, Mr. Brennan argues that the trial judge erred in awarding special and punitive damages.

2. Facts and Decision of the Trial Judge

The disputed land is a 32.65 acre parcel at the rear of the Hendricks property and abutting the Brennan property in Colindale, Inverness County. Mr. Hendricks' position is that the rear line of his property is the general rear line. Mr. Brennan claims that he acquired title to the disputed land from his predecessor in

title, Beaton, who, he claims, acquired it from Mr. Hendricks' predecessor in title, William Gillis. There is no record of and no reference in any other deeds in evidence at trial to this alleged Gillis to Beaton conveyance.

Mr. Hendricks' claim to title , in summary, is this. There is no dispute that William Gillis owned the disputed land as part of his "170 acres more or less" with its rear boundary at the general division or boundary line. William Gillis, in 1905, conveyed 50 acres to his son Donald A. and 70 acres to his son John A. In his will, Mr. Gillis, Sr. devised 2 acres out of the twenty, on which he resided, to his son John A and the balance of the twenty acres "containing 18 acres more or less" to his other son Donald A. The residue of the estate went to John A. After a series of conveyances which do not have to be detailed here, Mr. Hendricks obtained title in 1965 to the lands previously owned by the two Gillis sons. To summarize, Mr. Hendricks received everything the two Gillis sons acquired from their father. Their father owned the disputed property. There is no record of any conveyance or devise by the father to anyone other than his two sons.

Mr. Brennan's position is that at some unknown time prior to 1905, William Gillis, by a conveyance of which there is no record, disposed of the back 30 or so acres of his land to John Beaton. This mystery conveyance, according to Mr. Brennan, provides the basis for his claim to the disputed property or at least raises sufficient doubt about Mr. Hendricks' title so as to defeat his action in trespass.

At trial, Mr. Brennan advanced several points in support of his position. The trial judge considered them but found that Mr. Hendricks' title had been established.

Mr. Brennan's claim was said to be supported by the amount of land conveyed and the change in the description of the rear boundary. William Gillis owned the original parcel said to be "170 acres more or less". There is accordingly about 30 acres "missing" from this 170 acres by the time Mr. Hendricks acquired title if one totals the acreages referred to in the intervening conveyances. At the time of the 1905 deeds, the rear boundary of the Gillis sons' lands began to be described as "lands in possession of John Beaton" rather than as the general rear or division line. The trial judge found that the discrepancy in the number of acres and the change in the description of the rear boundary were of no significance given his view that the boundaries of the land conveyed were well defined.

Mr. Brennan relied on the evidence of Angus MacLean. He was 68 at the time of trial and had lived on an adjacent property all his life. He testified that since his earliest recollection the 32 acre lot had always been part of the Beaton farm. He also was permitted by the trial judge to give hearsay evidence to the effect that he had been told by his father that the Gillis' had sold part of their farm to the Beatons. The trial judge rejected the evidence of Angus MacLean, "totally", based on his assessment of that witness's credibility which turned on the witness's obvious dislike of Mr. Hendricks and the hearsay nature of much of his evidence.

Also relied on by the appellant at trial was the evidence of Collin Beaton. Mr. Beaton gave evidence relating to the use of the disputed property for the approximate time period 1926 to 1939. He recalled his grandfather, Donald Beaton, doing some farming on about 3 acres of the disputed land and some wood cutting--Mr. Beaton described it as "...now and again, not very much" on the rest. As to this evidence, the trial judge found that it did not materially support Mr. Brennan's position.

Simon Aucoin, a surveyor, testified on Mr. Brennan's behalf that there was a rock wall fence approximately 500 feet long that is so nearly parallel to the general rear line that, in his opinion, it must have been laid out by a surveyor. It is in the location that could mark the boundary between the Hendricks and Brennan properties if the boundary is as claimed by Mr. Brennan. This rock wall does not extend across the width of the disputed property. There was also evidence that rock walls like this were found elsewhere on the property and that they were commonly used for purposes other than to mark boundaries. Mr. Aucoin acknowledged that it was impossible to say with certainty, without knowing more, that a rock wall was intended as a property boundary as opposed to some other type of demarcation. The trial judge found that Mr. Aucoin's survey did not advance Mr. Brennan's position other that to describe precisely the land in dispute. As for the evidence relating to the rock wall, the trial judge declined to find that it was probably laid out by a surveyor or that it was intended to mark a property boundary.

3. Analysis

The appellant, in essence, invites us to retry the case. It is argued that the trial judge erred in his conclusion that Mr. Hendricks had good title because of various errors in the trial judge's assessment of the evidence. Special emphasis is placed on his decision not to attach significance to the "missing" acreage especially in conjunction with the change in the description of the rear boundary of the Gillis property and the evidence that the rock wall may have been laid out by a surveyor and that it could be a boundary marker.

Findings of fact were for the trial judge to make. As McLachlin J. put it on behalf of the Supreme Court of Canada in **Toneguzzo-Norvell v. Burnaby Hospital,** [1994] 1 S.C.R. 114 at 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is a palpable and overriding error. ... A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

I refer as well to the following comments from Lamer, C.J.C. in **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at paragraphs 88 and 90 which are apposite here:

> ... it is important to understand that even when a trial judge has erred in making a finding of fact,

> appellate intervention does not proceed automatically. 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' (citation omitted)
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> . . . . .
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> It is not open to the appellants to challenge the trial judge's findings of fact merely because they disagree with them. I fear that a significant number of appellants' objections fall into this category. Those objections are too numerous to list in their entirely. The bulk of these objections, at best, relate to alleged instances of misapprehension or oversight of material evidence by the trial judge. However, the respondents have established that, in most situations, there was some contradictory evidence that supported the trial judge's conclusion. The question, ultimately, was one of weight, and the appellants have failed to demonstrate that the trial judge erred in this respect.

At the hearing of the appeal, the appellant filed lengthy new written submissions entitled "speaking notes" which purport to identify various ways in which the trial judge erred in his factual findings. I will not refer to them in detail although I have carefully reviewed them. Having done so, I am not persuaded that the trial judge made any reversible error in his approach to the evidence. His findings are supported by the evidence.

Mr. Brennan's assertion of ownership of the disputed property and his submission that there is doubt about Mr. Hendricks' title are based on an alleged

conveyance of which there is no record, no mention in the abstract and, with all respect to the appellant's submissions to the contrary, no compelling evidence on the ground. The trial judge did not err in upholding Mr. Hendricks' title.

At the hearing, the appellant stressed the "missing" acreage, particularly in conjunction with the change in the description of the rear boundary. In addition to the points referred to by the trial judge in deciding not to draw the inference urged upon him from these circumstances, one may refer to the fact that defining the rear boundary by reference to the Beaton lands is consistent with the boundary being at the general division line and the change is readily explained by other factors having nothing to do with a change in the boundary. It could also be noted that the adjoiners' descriptions do not reflect any change in the rear boundary of what is now the Hendricks' property. The "discrepancy" in acreage is also equivocal in that if Mr. Brennan is indeed the owner as he claims, his acreage is significantly more than is to be found in the conveyances in his abstract.

It is argued that the trial judge erred in rejecting the evidence of Mr. MacLean. As Professor A. W. Mewett put in his treatise *Witnesses* (1991) at page 11-3, the assessment of credibility and weight is "... eminently a matter for the trier of fact...". The trial judge gave reasons for his treatment of this evidence. Those reasons, as well as other factors reinforcing them, are supported by the evidence at trial. The witness had ill feeling toward Mr. Hendricks, his evidence was vague and significant portions of it were hearsay. Even if, as the appellant submits, a

special approach to oral history of land possession and ownership should be adopted here (and I do not need to decide the point), it remains necessary to make decisions about the appropriate weight to attach to such evidence. The trial judge did not commit any palpable or overriding error in deciding, in the circumstances of this case, not to give this evidence any weight.

It is argued that the trial judge erred in his application of the burden of proof. His reasons for judgment show that he was persuaded on the balance of probabilities that Mr. Hendricks had good title. The trial judge did not put any burden on Mr. Brennan in this regard. Mr. Brennan pleaded in his defence that he was the owner. The burden of proving his ownership was on him. The trial judge did not misdirect himself on this issue.

Mr. Brennan submits that the trial judge erred in his evaluation of the evidence of his surveyor, Mr. Aucoin, particularly with respect to the evidence relating to the rock wall. Mr. Aucoin's evidence was clear that there were other explanations as to why the rock wall was positioned as it is and that rock walls were used for purposes other than marking property boundaries. I will cite two examples:

> Q. Now, in this particular case the rock wall doesn't extend the width of the property, does it?
> A. That's correct.
> Q. And you say that must have been built by a surveyor because it's parallel off a degree and off 20 feet with the back boundary of the property?
> A. That's correct, yeah.
> Q. I presume then that it's parallel aside from the fact that there's a shore line with what would be otherwise the front

boundary of the property?
A. I don't understand the question.
Q. Well, the crown grants in Nova Scotia, except for the odd one, were pretty well parallelograms, weren't they?
A. Some were square. In French the term is called "(inaudible)" meaning very square. So where I live rear lines are squared to the main, the main lines are squared to the rear line.
Q. Usually the front line is parallel to the back line, and the side lines are parallel to each other?
A. That's right.
Q. Whether they're square or on a diagonal, there's usually a parallelling of the sides, is my point, isn't that correct?
A. That's correct.

. . . . .

Q. They knew how to wield a compass, didn't they, sir?
A. That's right.
Q. And if they like things symmetrical they probably abide by their existing property boundaries.
A. That's correct. I call that the visual perfection syndrome.

. . . . .

Q. Now, I want to talk about rock walls. You would agree with me, would you not, but if you don't know who built the rock wall or why he or she built a rock wall, or what use was made of the land adjacent to the rock wall following the building of the rock wall, that you cannot give an unequivocal statement that the rock wall was a property boundary as opposed to some other type of boundary. You'd agree with me on that point, wouldn't you, sir?
A. I'm a little confused on the question.
Q. You're confused? Well, if you don't know who built it or why he or she built it, or what use was made of the adjacent lands you cannot say definitely that a rock wall was intended as a real property as opposed to some other type of boundary, or built for some other use. Can you, sir? Not with certainty, sir.
A. Rock walls were built, I believe, when they were clearing the land and wanted to plant wheat or pastures. Or they might have also been cleared just, just for actually pasture. So the

> division line between farm land and wood land.
> Q. It could be a division line between farm land and wood land. It could donate, it could denote a pasture land. It could be the back of a hay field.
> A. That's correct.
> Q. It could be the back of a vegetable field. Isn't that right?
> A. That's right.
> Q. And rock walls were useful because you could put a brush fence on top of them and help to keep the cows in, couldn't you?
> A. That's right.

There is no basis for appellate intervention in the trial judge's assessment of this evidence.

The trial judge's award of punitive damages is also attacked on appeal. In this regard, the trial judge said:

> ...Brennan acknowledged that he had an oral agreement with Hendricks not to do anything further on the disputed property until this litigation was resolved. In spite of that agreement, Brennan proceeded in a surreptitious manner to construct a very substantial road on the disputed property. ... Brennan's action is inexcusable and reprehensible. It is precisely the type of outrageous conduct which ought to trigger consideration of a punitive damage award. The construction of the road was an arbitrary and wilful disregard of the plaintiff's rights. It was also an indication of Brennan's disdain for the legal process.

The role of the Court of Appeal in reviewing punitive damages awards made at trial has been discussed recently by the Supreme Court of Canada and by this Court. The principles are summarized in **Elia v. Chater**, [1998] N.S.J. No. 105 at page 23 - 24. The trial judge's decision to award punitive damages will not be set aside provided the judge has not misdirected him or herself on any applicable principle, the decision does not give rise to an injustice and the award of punitive

damages serves a rational purpose.

In my view, the trial judge did not misdirect himself on the applicable law, nor does his decision give rise to an injustice. On the evidence at trial, punitive damages in this case serve a rational purpose, particularly having regard to the modest award of compensatory damages. I would not interfere with the trial judge's decision respecting punitive damages.

4. Disposition

I would dismiss the appeal with costs to the respondent fixed at $2350.00 (that is 40% of costs at trial) plus reasonable disbursements.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.

C.A. No.144122

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

THOMAS BRENNAN

Appellant

- and -

GEOFFREY HENDRICKS

Respondent

REASONS FOR JUDGMENT BY:

CROMWELL, J.A.