Docket: CA 154852
Date: 19991026

NOVA SCOTIA COURT OF APPEAL

[Cite as: Muise v. Sampson, 1999 NSCA 125]

Glube, C.J.N.S., Pugsley and Bateman, JJ.A.

BETWEEN:

MARY MUISE	)	Patrick D. Muise,
	)	son of the appellant,
	)	representing the appellant
Appellant	)	
	)	
	)	Ivo R. Winters
- and -	)	for the respondents
	)	
	)	
RALPH and BLANCHE SAMPSON	)	
	)	
	)	
Respondents	)	
	)	Appeal Heard:
	)	October 12, 1999
	)	
	)	Judgment Delivered:
	)	October 26, 1999
	)	
	)	

THE COURT: The appeal is dismissed as per reasons for judgment of Pugsley, J.A., Glube, C.J.N.S., and Bateman, J.A., concurring

PUGSLEY, J.A.:

[1] The appellant, Mary Muise, 87 at the time she gave evidence at trial in October of 1998, appeals from the judgment of Nunn, J., of the Supreme Court, which determined that the respondents, Ralph and Blanche Sampson, had good and marketable title to the lands outlined on a plan of survey prepared by Brian Anderson, dated August 25, 1986. The lands consist of approximately three acres, situate on the Bras d'Or Lakes, at St. Peter's, Cape Breton, known as Lot 12, Block C, (the Property).

[2] In July, 1969, the Sampsons received a warranty deed to the Property from Joseph A. Sutherland. Justice Nunn determined that Mr. Sutherland, and his predecessors, had established good title to the Property as they:

> ...acted as owners of all the lands claimed by [the Sampsons] open, notoriously and continuously, for a period of 48 years, well beyond the required period to establish a possessory title.

[3] Mrs. Muise maintains that the Sampsons do not own the Property as Joseph A. Sutherland did not own the land he conveyed, but rather the adjoining Lot 11. Lot 12, it is submitted, is owned by her and her predecessors in title.

[4] Mrs. Muise was represented by counsel at trial. In March, 1999, Mrs. Muise filed a written consent with the Court authorizing her son, Patrick Muise, to speak, and act, on her behalf "on all issues" relating to her appeal. All matters in connection with this appeal, including oral submissions to this Court, were conducted by Mr. Muise, a land

surveyor, whose permanent home is in British Columbia. Mr. Muise did not give evidence at trial, nor was he present at trial to instruct his mother's counsel.

[5] In essence, it is submitted, on behalf of Mrs. Muise, that Justice Nunn erred:

- by failing to ensure he had access to, as well as failing to review, survey plans introduced on behalf of Mrs. Muise;
- in accepting the evidence, and survey, of Brian Anderson, a Nova Scotia surveyor, retained by, and called on behalf of the Sampsons. Mr. Muise has applied to introduce fresh evidence (a survey plan prepared by him in July, 1999, and photographs of the Property taken by him in September, 1999) which he submits will demonstrate the "falsity" of Mr. Anderson's evidence;
- by relying on statutory declarations which, on their face, were contradictory, and were not consistent with *viva voce* evidence at trial;
- by failing to dismiss the Sampsons' claim as that claim should have been pursued by way of a Quieting of Titles application;
- in concluding adverse possession had been established, and further erred in concluding that once established, it continued.

[6] Mr. Muise contends, in addition, that the appeal should be allowed because the Sampsons were guilty of laches which prejudiced his mother's position. This issue was not raised before the trial judge.

Background

[7] The originating notice, and statement of claim, were issued on January 22, 1997. The Sampsons' claim is outlined on the Anderson Plan of August 25, 1986. A copy of the plan, recorded at the Registry in Arichat, was attached to the statement of claim.

[8] The Sampsons sought a declaration confirming that the boundaries as shown on the Anderson survey of August, 1986, depicting the Property, are the property lines of the lands of the Sampsons.

[9] The statement of claim recites that the Sampsons entered into boundary line agreements, recorded at the Arichat Registry, with all neighbouring land owners, except for Mrs. Muise.

[10] In April of 1998, a Chambers application was brought on behalf of Mrs. Muise for an order dismissing the action pursuant to **Civil Procedure Rule 25.01(2)**.

[11] **Civil Procedure Rule 25.01(1)** provides in part:

> (1) The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,
>
> . . .
>
> (d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary;

[12] **Civil Procedure Rule 25.01(2)** provides:

> (2) Where in the opinion of the court the determination of any question or issue under paragraph (1) substantially disposes of the whole proceeding, or any cause of action, ground of defence, counterclaim or reply, the court may thereupon grant such judgment or make such order, as is just.

[13] The application was based on the submission that the order should be granted as the Sampsons should "pursue their claim by way of a Quieting of Titles application" under the provisions of the **Quieting of Titles Act**, S.N.S. 1989, c. 382, since the title to the Property was in dispute.

[14] The application was dismissed by Justice Edwards of the Supreme Court, without reasons, on April 2,1998. No appeal was taken from the order issued in June of 1998.

[15] The defence, filed in September of 1998, in addition to denying the material allegations in the statement of claim, stipulated that the Sampsons were seeking to acquire title to land where no title existed and reiterated that the proper and only recourse was a Quieting of Titles application.

[16] Before the calling of evidence, counsel advised the Court that they had agreed on a list of exhibits prepared on behalf of the Sampsons. Those exhibits included:

- two statutory declarations registered in April, 1977, from Daniel Stone (then 69), and Joseph M. Sutherland (then 76);

- Boundary line agreements executed in September, 1987, between the Sampsons and neighbouring landowners on the east (John P. Sampson), as well as on the west (Robert and Beatrice Morrison);
- the Anderson survey.

[17] Counsel for Mrs. Muise advised the Court that four survey plans, each prepared by other surveyors, would “go in by consent”. In fact, two of those survey plans (one dated December 24, 1897, prepared by John J. Robertson, “government surveyor”, and a partially completed survey plan, prepared by R. K. MacInnis, Nova Scotia Land Surveyor, dated May 26, 1988) were not tendered or marked as exhibits - a matter to which I will refer later.

[18] In addition to Mr. Sampson, and Mr. Anderson, counsel for the Sampsons called as witnesses Joseph Martin Sutherland, and Clarence MacDonald, aged 70 and 77 respectively, whose association with the Property commenced in the 1920's and 1930's. The Court was advised that both counsel were in agreement that Mr. Anderson was:

> ...a qualified land surveyor, able to give expert testimony ... concerning issues on surveys and boundaries.

[19] In addition to Mrs. Muise, the only witness called on behalf of the defence was Robert Morrison, a party to one of the boundary agreements.

Analysis

First Ground - The Missing Exhibits

[20] Mr. Muise submits that the Robertson Plan, and the MacInnis Plan, both available at trial and referred to by one, or more, of the witnesses, were intended to be introduced and filed as exhibits. The transcript is supportive of this position.

[21] Unfortunately, it would appear that counsel for Mrs. Muise failed to have the plans marked and introduced as exhibits. As a result, they were not in the file material available to Justice Nunn from October 9, 1998, to December 23, 1998, the period of time the judgment was reserved.

[22] Mr. Muise submits the plans contained “critical points that if the judge had reviewed them it would have affected his decision”. Mr. Muise further contends that “the evidence was tampered with”; by that, I take it, he suggests that some person adverse to his mother’s interests removed the plans from the court file.

[23] I conclude, after reviewing the file material, including the transcript, that the problem respecting the “missing” plans arose by inadvertence - essentially as a consequence of counsel not taking steps to have the plans marked and filed as exhibits.

[24] Counsel for the Sampsons advised the Court that it was his recollection that the plans were introduced in evidence by consent at the outset of the trial.

[25] In these circumstances, it is appropriate for this Court to review both plans.

[26] A photostat of part of the Robertson plan, which included the Property, was introduced and marked as an exhibit at trial by counsel for the Sampsons. This exhibit was, of course, available to Justice Nunn as he took possession of all exhibits at the conclusion of the trial.

[27] Although the Robertson Plan in its entirety, and the MacInnis Plan, were not available after trial to the trial judge, upon review of them, I am satisfied that their absence from the court file has not prejudiced Mrs. Muise to the extent that a miscarriage of justice has occurred.

[28] I come to this conclusion for the following reasons:

- Both plans were available in court at the time of trial. Counsel for Mrs. Muise had a full opportunity to cross-examine Mr. Anderson, and examine or cross-examine any other witness, respecting any detail on the plans. Such an opportunity was, in fact, exercised by counsel in his cross-examination of Mr. Anderson. It is a reasonable inference that there were no additional questions helpful to Mrs. Muise which should have been directed to any witness, or perspective witness, respecting either of the plans;
- the key issue in the trial, namely the actions of the Sutherlands, commencing in 1929, extinguishing the title of the former owner, was not affected by the information contained on the plans.

[29] It is relevant that Mr. MacInnis was not called as a witness by counsel for Mrs. Muise.

[30] I would, accordingly, dismiss this ground of appeal.

Second Ground of Appeal - Trial Judge Erred in Accepting the Evidence of Mr. Anderson - Fresh Evidence Application

[31] Mr. Muise has applied to introduce fresh evidence on this appeal in the form of eight photographs of the Property, and adjoining lands, taken by him on September 12, 1999. The basis of the introduction of the photographs is to correct "the false impression" arising from the introduction of photos at trial taken by Mr. Anderson. The trial exhibits were, in the words of Mr. Muise, employed by Mr. Anderson "to deceive . . . and mislead the trial judge".

[32] Mr. Muise also applied to introduce before this Court a survey plan prepared by him in July, 1999, "showing the eastern location of Lot 11", immediately adjacent to the Property. The introduction of this plan, it is submitted, would assist this Court in rectifying an injustice.

[33] Mr. Muise justifies the delay in presenting the material as:

> ...until July, 1999, he was a resident of British Columbia and could not devote the time necessary to produce this plan.

[34] The respondents oppose the application for introduction of the eight photographs and the 1999 survey plan.

[35] Applications to adduce fresh evidence on an appeal are made pursuant to **Civil Procedure Rule 62.22**, which provides:

> **62.22** (1) The Court, on application of a party may on special grounds authorize evidence to be given to the Court on the hearing of an appeal on any question of fact as it directs.
> (2) The evidence shall be taken by oral examination before the Court or by affidavit or deposition, as the Court directs.
> (3) The Court on an appeal may on special grounds inspect or review any place, property or thing.

[36] The test was set out by MacIntyre, J., writing for the Supreme Court of Canada in **R. v. Palmer** (1979), 50 C.C.C. (2d) 193 (S.C.C.):

> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . .
>
> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) the evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[37] The procedure which should be followed when an application is made to a court of appeal for the admission of fresh evidence is set out by Justice MacIntyre, again writing for the Supreme Court of Canada, in **R. v. Nielsen and Stolar** (1988), 40 C.C.C. (3d) 1 (S.C.C.) at p. 8:

> ...the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to the disposition of the appeal. . . .

See also **Thies v. Thies** (1992) 110 N.S.R. (2d) 177 per Freeman, J.A., on behalf of the Court, at 179.

[38] This is the procedure followed by the Court in the present case. The application to admit fresh evidence was heard and decision reserved.

[39] Mrs. Muise was represented by counsel at trial. Counsel was aware, by virtue of the stipulations in the statement of claim, that the Sampsons would be relying upon the Anderson Plan. Counsel for Mrs. Muise, at the commencement of trial, placed before the Court four additional survey plans. Counsel elected not to call any expert evidence at trial to refute the evidence of Mr. Anderson, or to introduce photographs demonstrating the scene in the photographs now sought to be introduced by Mr. Muise. The evidence sought to be introduced on this application was all available by the exercise of due diligence. Patrick Muise obviously spent a significant period of time in connection with the issues involved in this appeal. His participation with, and assistance to, counsel for Mrs. Muise prior to, and at the trial of the action, might, conceivably, have been of assistance to her position.

[40] In my opinion, the fresh evidence does not meet any of the tests in **Palmer** and the applications, accordingly, should be dismissed.

[41] Justice Nunn made these findings:

> Brian Anderson, a Nova Scotia Land Surveyor, prepared a survey plan of the plaintiffs' lands in 1986, which plan is in Exhibit 1, Tab 13. He testified as to what he found on the land and how he established his lines and particularly how he established the "general rear line". I accept his survey as accurate in outlining the Plaintiffs' lines and particularly I accept his "general rear line" which conforms to the general rear line of adjoining properties.
>
> . . .
>
> There is sufficient evidence of occupation to the "general rear line" which line was determined in the Anderson survey which I accept as accurate.

[42] Mr. Muise contends that the trial judge erred in accepting the evidence of Mr. Anderson. Such a contention ignores the advantage afforded to Justice Nunn of seeing, and hearing, Mr. Anderson give his evidence, of observing his demeanour and conduct, of hearing his:

> ...nuances of speech and subtlety of expression and the opportunity of weighing all those intangibles that must be considered in determining whether a witness is truthful. (MacDonald, J. A. in Travellers Indemnity Company v. Kehoe (1985), 66 N.S.R. (2d) 434, (C.A.) at p. 437.

[43] This Court did not have that opportunity.

[44] After reviewing the evidence adduced at trial, I am satisfied that there are no reasons, let alone any strong and cogent reasons, justifying this Court to reject the conclusions reached by the trial judge respecting the reliability of Mr. Anderson.

Third Ground - Statutory Declarations

[45] The trial judge concluded that Joseph A. Sutherland, who deeded the Property to the Sampsons in 1969, and his predecessors in title, acted as owners of all of the lands claimed,

> ...open, notoriously and continuously for a period of 48 years, well beyond the required period to establish a possessory title.

[46] In support of this conclusion Justice Nunn relied, in part, on the statutory declarations of Daniel C. Stone and Joseph A. Sutherland, both declarations being sworn on April 21, 1977, and registered in the Registry at Arichat.

[47] Joseph A. Sutherland declares:

> 1. That I am 76 years of age and a lifelong resident of St. Peters in the County of Richmond and Province of Nova Scotia, and have personal knowledge of the matters herein deposed to except where otherwise stated.
>
> 2. That I know of certain lands situated at St. Peters, Richmond County, Nova Scotia, as described in Schedule "A" hereto attached;
>
> 3. That the said lands were occupied by Neil Sutherland (my father) from 1929 until he conveyed part of the lands to Louise Sutherland (my mother) on or about 1945.
>
> 4. That the said lands were occupied by my mother from on or about 1945 until on or about 1962 when part of the lands were conveyed to me by the Municipality of the County of Richmond.
>
> 5. That I continued the possession of the said lands from 1962 until the present date.
>
> 6. That the Heirs of Neil Sutherland and Louise Sutherland are Ambrose Sutherland, Tina Sutherland, Catherine Sutherland and myself, and I am told and believe that this date a Deed is being made from the said Heirs to myself which would convey all the interest of the Heirs of Neil Sutherland and Louise Sutherland.
>
> 7. The occupation of the said lands by Neil Sutherland, Louise Sutherland and myself was open, continuous, notorious, exclusive and undisputed in that we farmed the said lands, kept the said lands fenced and I believe that no one has a better title to the said lands than I have.

[48] The declaration of Mr. Stone is as follows:

> 1. That I am 69 years of age and a lifelong resident of St. Peters, Richmond County, Nova Scotia, and have personal knowledge of the matters herein deposed except where otherwise stated.
>
> 2. That I know of certain lands situated at St. Peters, Richmond County, Nova Scotia, as described in Schedule “A’ hereto attached.
>
> 3. That the said lands were occupied by Neil Sutherland from 1929 until he conveyed part of the lands to his wife, Louise Sutherland, on or about 1945.
>
> 4. That the said lands were occupied by Louise Sutherland from on or about 1945 until on or about 1962 when part of the lands were conveyed by the Municipality of the County of Richmond to Joseph A. Sutherland.
>
> 5. That Joseph A. Sutherland continued in possession of the said lands from 1962 until the present date.
>
> 6. That the heirs of Neil Sutherland and Louise Sutherland are Ambrose Sutherland, Tina Sutherland, Catherine Sutherland and Joseph A. Sutherland, and I am told and believe that this date a Deed is being made from Ambrose Sutherland, Tina Sutherland and Catherine Sutherland to Joseph A. Sutherland which would convey all interest of the Heirs of Neil Sutherland and Louise Sutherland.
>
> 7. The occupation of the said lands by Neil Sutherland, Louise Sutherland and Joseph A. Sutherland was open, continuous, notorious, exclusive and undisputed in that they farmed the said lands, kept the said lands fenced and I believe that no one has a better title to the said lands than the said Joseph A. Sutherland.

[49] The description of the land contained in Schedule “A” refers to a survey of J. D. Campbell dated February 22, 1977.

[50] Justice Nunn commented with respect to the declarations as follows:

> There are 2 statutory declarations, registered in 1977. The first of Daniel J. Stone aged 69 states he knows the lands occupied by Neil Sutherland and his wife and later by his son, Joseph, that they farmed the lands and fenced them and were open and notorious and continuous in their possession to the date of the declaration, a period 48 years. Of similar effect is the declaration of Joseph Sutherland who was then 76 years old. Both declarants were lifelong residents of St. Peters. <u>The lands they referred to included the lands claimed by the Plaintiffs</u>. [emphasis added]

[51] Apart from the remarkable similarity in form, and content, of the two declarations, there are some apparent inaccuracies.

[52] Paragraph 4 stipulates that the lands were:

> ..occupied by Louise Sutherland from on or about 1945 until on or about 1962 . . .

In fact, the transcript suggests that the *viva voce* evidence of Joseph M. Sutherland, testified that Louise Sutherland died in 1949.

[53] Section 7 stipulates that Joseph A. Sutherland's occupation of the lands, after the death of his father, up until April, 1977, was "open, continuous, notorious, exclusive and undisputed in that we farmed the said lands, kept the said lands fenced...".

[54] Joseph M. Sutherland, however, testified:

> Q. So it is fairly accurate to say that around about 1950, the farming operations pretty much ceased?
> A. Yeah. More or less.

[55] Justice Nunn would appear to have erred when he determined that the lands referred to in the statutory declarations included all the lands claimed by the Sampsons.

[56] The declarations stipulate that the lands are described in Schedule "A". Schedule "A" refers to a plan of survey of J. D. Campbell, dated February 22, 1977.

[57] It would appear that Schedule "A", interpreted in light of the plan, only covers approximately one-half of the Property.

[58] Accordingly, the statutory declarations should not have been relied upon in support of the Sampsons' claim to all of the Property.

[59] The statutory declarations were contained in a list of documents filed by counsel for the Sampsons as an exhibit at the commencement of the proceedings. Counsel for Mrs. Muise advised the Court:

> We have agreed that the Plaintiffs' list of document will go in and we won't be taking exception to that.

[60] The cautionary approach taken by Hallett, J., as he then was, in **Lynch v. Lynch** (1985), 71 N.S.R. (2d) 69, at p. 76, should have been considered:

> I ruled against the admission of the declaration because (i) there is no provision in the **Evidence Act** to admit the declarations; and (ii) the Rules of Evidence do not permit the admission of such documents as the deponent is not available for cross-examination; and (iii) the declarations did not fit into any of the standard exceptions to the Hearsay Rule such as being declarations of a deceased person against interest. The declarations essentially supported the position of the plaintiffs that they and their predecessors had been in possession of the lands for many years. It was apparent from the face of the declarations that they were all in error on a particular fact. Furthermore, there was a sameness to them that would indicate the declarations were, to a certain extent, almost the words of the lawyer who prepared them. . .
>
> There are the provisions in our Civil Procedure Rules to which I have referred pursuant to which affidavits can be tendered in evidence at the discretion of the court. I can think [i]f situations where, in a property case, such declarations could be quite useful; for instance, if they were declarations of a deceased surveyor, known for his integrity and competency, that dealt with the location of old lines, etc. If a Court were satisfied that the declarations had been duly signed and sworn to by the deponent and satisfied of his competency and impartiality, then the Court could exercise its discretion under Civil Procedure rule 31 to admit such documents even though the surveyor was not alive to be cross-examined. ...
>
> In this case, the deponents whose statutory declarations the plaintiff sought to introduce were not experts and from the face of the documents it could be readily seen that one would have to question reliability of the declarations and I exercised my discretion not to allow them to be tendered.

[61] The trial judge did not, however, rest his determination solely on the information contained in the statutory declarations. He found some support for his conclusion in the evidence of Ralph Sampson, who:

> ..was aware of the property in 1948 and regarded it as belonging to Neil [Sutherland] as it was occupied and used by him. While the Plaintiff described his acts on the property since 1969, it is clear that any sporadic acts he did would not constitute acts of dispossession, however, such are not necessary once the Sutherlands are determined to have possessory title.

[62] Justice Nunn's conclusions were based, as well, in part on the *viva voce* evidence of Joseph Martin Sutherland, who lived with his grandparents, Neil and Louise Sutherland, in their home, located on Lot 11, from 1927 until 1954. Joseph Martin Sutherland testified that his grandparents fenced the Property, grew hay on it, and raised cattle, sheep, hens and a pig on the Property. Another witness, Clarence MacDonald, 77 years of age at the time of trial, confirmed that he assisted in the clearing of the Property and helped in the construction of fences.

[63] Justice Nunn was also influenced by the lack of evidence of any claim to the Property between 1929 and 1977 by any person other than the Sutherlands or Mr. Sampson.

[64] Justice Nunn noted that the Department of Highways of the Province of Nova Scotia in 1941, when relocating a public highway, treated Neil Sutherland as the owner of the Property.

[65] Finally, Justice Nunn concluded that if he had any doubt as to the open, notorious and continuous possession of the Sutherlands for a period of 48 years,

> ....it would be dispelled when I considered the chain of title of the Defendant.

[66] He referred to a predecessor in title to Mrs. Muise who "did two things which remove any question as to the plaintiff's title and the possessory title of the Sutherlands". The first act was a conveyance of land by warranty deed in September 1972 to John Sampson.

[67] That deed, Justice Nunn determined:

> ...acknowledges the ownership of the Plaintiffs, Ralph Sampson to lands forming the Western line of the lands conveyed.

[68] The second significant act was a deed to Mrs. Muise and her husband, from their predecessor in title, Mary Middleton, in August of 1978. That deed recited that:

> ...and a considerable number of small lots had been taken over by squatters, who have length of tenure on these lands, and must therefore be considered as owners of the land so occupied.

[69] Justice Nunn continued:

> While this latter does not particularly point to the lands claimed by the Plaintiffs, when you add this to her reference to lands owned by the Plaintiffs in her deed to John P. Sampson, one can only conclude that she regarded the plaintiffs as having good title and, obviously recognized the Sutherlands as having good possessory title to those lands.

[70] Mrs. Muise, Justice Nunn concluded, is:

> ...clearly wrong in maintaining that she has any title to the Plaintiffs' lands, and particularly that the Sutherlands could not convey any lands out of Lot 12.

[71] The inconsistencies within the statutory declarations, their similarity in content, and the errors of fact demonstrated by the *viva voce* evidence, suggests that in some areas they are unreliable. With respect, I conclude that Justice Nunn erred in concluding that they related to the whole of the Property. A review of the description annexed to the declarations, in light of the 1977 plan, indicates that they only dealt with approximately one-half of the Property.

[72] Justice Nunn, however, did not accept the Sampsons' claim on the sole basis of the information contained in the statutory declarations. His conclusions are supported, in part, by the evidence of Ralph Sampson, in part, by the evidence of Joseph M. Sutherland, in part, by the evidence of Clarence MacDonald, as well as the other evidence to which I have referred.

[73] In short, Justice Nunn's reasons are supported by at least some evidence in all cases. Mr. Muise's submissions, when analyzed, deal with the weight of the evidence. These are matters that are peculiarly within the province of the trial judge. This Court should not interfere with Justice Nunn's findings of facts, nor the evidentiary conclusions he drew from those facts, even if we took 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).

[74] I conclude that Justice Nunn committed no palpable, or overriding, error respecting his determination of matters of fact.

Fourth Ground - Quieting of Titles Application

[75] Justice Nunn rejected the submission that the only way the Sampsons could proceed to have the boundary determined was by a Quieting of Titles application.

[76] He stated:

> In this case, I do not agree with that suggestion as the evidence here supports the possessory title to the general rear line, both the evidence of the witnesses and of the Anderson survey and earlier survey plans including that of John J. Robertson prepared in 1897. ... I have indeed determined that the Plaintiffs have good title to these lands.

[77] There was evidence to support these findings.

[78] The submission of the appellant is summarized by referring to the arguments addressed in the factum:

> The Muises have stated that this issue needs to be resolved under the Quieting of Titles and Justice Nunn has ignored this fact by saying there are only two parties involved where there are four parties involved here. They are John Sampson and Robert and Beatrice Morrison, adjoiners on the east and west of Ralph Sampson, whose lands have never been clearly established by an accepted plan of survey. Mr. Anderson's plan conflicts with the other two surveys of these lands and will impact on these other boundaries. Mrs. Muise's land abuts the land mentioned and will also impact on these boundaries.

[79] This submission does not take into account the execution of boundary line agreements in September, 1987, between the respondents and John Sampson, and the respondents and the Morrisons. The agreements provide, in part, that the abutting land owners agree that the boundary line between their land and the Property is as shown on the Anderson Survey. Further, the abutting land owners each quit claim to the Sampsons any of their land that encroaches on the Property beyond the boundary line.

[80] I am satisfied there is no merit in this ground.

Fifth Ground - Nature and Duration of Adverse Possession

[81] Mr. Muise submits that the trial judge erred in concluding adverse possession had been established, and further erred in concluding that the adverse possession was continuous, particularly between the years 1949 and 1962.

[82] The adverse possession determined by Justice Nunn was not "equivocal, occasional or for a special or temporary purpose". (See opinion of Hallett, J. A., on behalf of the Court in **Partington v. Musial** (1999), 171 N.S.R. (2d) 228, at 234, approving comments in *13 Canadian Encyclopaedic Digest*, 2nd Ed., at p.20.)

[83] The evidence established that the Property was located in a rural, sparsely populated area directly adjacent to Lot 11, where the Sutherlands resided. According to Joseph M. Sutherland, the family used the Property for growing and harvesting hay,

raising cattle and other livestock, and fowl, and for planting vegetable gardens in disparate areas.

[84] In addition, Mr. Sutherland testified:

> That property was fenced. . . . There it was always fenced, all the while that they owned it, it was fenced
>
> . . . the fence went all the way around.
>
> . . . It was fenced in from the Old French Road down across the Number 4 Highway to the shore on both sides . . . which included where Ralph Sampson is today...
>
> ...The Old French Road, beyond that was used for pasture, to my knowledge.

[85] Taking into account the "character and value of the Property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with due regard to his own interests" (CED at p. 20), I am satisfied that Justice Nunn was correct in concluding that the Sutherlands had established adverse possession for a period in excess of twenty years.

[86] Once the acts of the Sutherlands extinguished the title of the former owner by adverse possession, their subsequent absence from the family home and sporadic use of the Property does not result in an abandonment of their possessory claim. (See **Deslaurier v. Nova Scotia (Attorney General) and Land and Building Overseas Ltd.** (1988), 80 N.S.R. (2d) 7, per Rogers, J. at 20.)

[87] I conclude that Justice Nunn was correct in his resolution of the issues raised by Mr. Muise respecting possession.

Sixth Ground - Laches

[88] In the notice of appeal prepared by Mr. Muise, he lists the following ground:

> We would also like to make an application to dismiss the action on grounds of delay. By his own admission, Ralph and Blanche Sampson first became aware of the problem in 1978. By 1986 he had a plan produced and a claim drawn up, but he waited until 1998 to take Mrs. Muise to court. In this time Mary Middleton, John P. Sampson and Daniel J. Stone have all died important witnesses who should have been questioned. This action has been dormant for 12 years. What is Mr. Ralph Sampson's explanation for this? He has known that since 1978 Mrs. Muise has repeatedly informed him by Lawyer and verbal that she does not recognized (sic)his claim to any land East of Lot 11, Block C, or the Cleared Field as shown on Campbell's plan (**Martell v. Robert Mcalpine Ltd**. (1978) 25 N.S.R. (2d) 540).

[89] This ground of appeal was not addressed in the factum filed by Mr. Muise. It was not referred to in the factum filed on behalf of the Sampsons. The issue is not pleaded in the defence, nor was the issue addressed at trial.

[90] A number of the "factual issues" mentioned by Mr. Muise in the notice of appeal were not established in evidence.

[91] I am of the view that it would be manifestly unfair to permit Mr. Muise to raise this issue for the first time at this appeal. The Sampsons had no opportunity to introduce evidence to offer any explanation for the delay in the commencement of their action.

[92] The decision of this Court in **Martell**, on which Mr. Muise relies, is clearly distinguishable. In **Martell,** action was commenced by the plaintiff on March 18, 1968, by having a writ of summons issued. The defendant, although served personally, did not advise his solicitor for some time that he had been sued. An appearance was filed on

March 17, 1970. No steps were taken by Mr. Martell for seven years. An application was brought on behalf of the defendant on January 4, 1978, to dismiss the action for want of prosecution. Mr. Martell was obviously aware of the application and had full opportunity of introducing evidence by way of affidavit, or otherwise, to respond to the motion.

[93] If the application to permit laches to be included as a ground of appeal is granted, the Sampsons would be denied such an opportunity.

[94] The actions taken by Mrs. Muise of causing R. K. MacInnis to prepare a plan on May 28, 1988, and Stewart MacPhee a further plan on December 9, 1992, both directed to the boundaries of the Property, would mitigate against the contention that Mrs. Muise did nothing to protect her own interests.

[95] It is not possible to speculate how the issue would have unfolded had it been raised in the defence and subject to evidence at trial.

[96] The principal issue with which the Court should be concerned in a motion of this kind is whether the amendment can be made without injustice to the other side. (**Scott Maritimes Pulp Limited v. B. F. Goodrich Canada Limited and Day & Ross Limited** (1977), 19 N.S.R. (2d) 181 (N.S.C.A.); **Homburg et al. v. S-Marque Inc**. (1999), 176 N.S.R. (2d) 218, per Glube, C. J., on behalf of the Court at 223).

[97] I am satisfied that the amendment should not be allowed and the issue of laches, accordingly, not be permitted to be raised.

Conclusions

[98] I would dismiss the appeal with costs in the amount of Fifteen Hundred Dollars ($1,500.00), together with disbursements to be paid to the respondents.

Pugsley, J.A.

Concurred in:

Glube, C.J.N.S.

Bateman, J.A.