NOVA SCOTIA COURT OF APPEAL

Citation: Thomas v. Cottam, 2006 NSCA 134

Date: 20061213
Docket: CA 268483
and CA 268484
Registry: Halifax

Between:

Wayne Michiel Thomas, Deborah Morash and Marilyn Peters

Appellants

v.

Moira Claire Cottam, The Attorney General of Nova Scotia and The Attorney General of Canada

Respondents

AND

Between:

Wayne Michiel Thomas, Deborah Morash and Marilyn Peters

Appellants

v.

Sonja Taylor, The Attorney General of Nova Scotia and The Attorney General of Canada

Respondents

Judges:	Roscoe, Bateman and Hamilton, JJ.A.
Appeal Heard:	December 1, 2006, in Halifax, Nova Scotia
Held:	Appeal is dismissed with costs of $500 plus disbursements to each respondent per reasons for judgment of Roscoe, J.A.; Bateman and Hamilton, JJ.A. concurring.
Counsel:	Tim Hill, for the appellants Colin D. Bryson for Moira Clare Cottam and Sonja Taylor, respondents no one appearing for other respondents

Reasons for judgment:

[1] The issue in these appeals is whether the appellants are entitled to be named as defendants in two quieting of titles actions. Justice Arthur W. D. Pickup, in chambers, dismissed the appellants' application to be joined as defendants after determining that it was clear that the appellants had no interest that may be affected by the quieting of titles actions. See: 2006 NSSC 350 and 2006 NSSC 351.

[2] In both actions pursuant to the **Quieting Titles Act**, R.S.N.S. 1989 c.382, as amended, the plaintiffs claimed certificates of title to separate adjacent lots of land on the Sandy Cove Road in Terence Bay, Halifax County, Nova Scotia. The appellants sought to be added as defendants in both actions pursuant to s. 10 of the **Act**:

> 10 (1) Any person, who thinks that he may be affected by the claim for the certificate, may be heard on the application for directions and may be permitted to intervene as a defendant at any time, by the court or a judge, but shall not be permitted to contest the claim unless the person is added as a defendant.
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> (2) The person shall apply to a judge in chambers to be made a defendant after giving two clear days notice of application to the plaintiff, and the judge shall permit the person to intervene as a defendant unless it is clear that the person has no interest that may be affected by the proceedings.

[3] The appellants take no issue with the boundaries of the lands claimed by the respondents, nor do they claim any interest in the lands based on any grant or deed to them or any other documentary evidence. Their contention that they should be added as defendants is based solely on four statements contained in Mr. Thomas' affidavits. The first two claims are said to be part of Mr. Thomas' family's oral history:

a. that the grantors of a deed in 1907, being the heirs of Peter Jollimore, to a predecessor of the respondent Taylor did not intend to include the lands as described in the deed;

b. that the family of Peter Jollimore dedicated the property, which includes the lands claimed by the respondent Taylor, for public use prior to the 1907 deed;

c. that the appellants and several other residents of Terence Bay, many of whom are heirs of Peter Jollimore, have used the Taylor property for generations for recreational activities such as walking over it to access a beach, walking on trails, berry picking, and picnicking;

d. that the appellants, none of whom own land adjacent to the lands in question, have crossed over the property claimed by the respondent Cottam to access the lands claimed by Taylor, the lighthouse property owned by the federal Crown and the beach.

[4] The respondents acknowledge the existence of an unspecified right of way to the Crown for the purpose of accessing the lighthouse property, and it is the location of the right of way that is the focus of the Cottam claim which is defended by the Crown. Ms. Cottam claims that the right of way does not cross her property but is located entirely on the Taylor property. Ms. Taylor concedes that the right of way crosses her land. The appellants argue that it is partly on the Cottam property.

[5] The chambers judge applied the test set out by Justice Moir in **Frank Georges Island Investments v. Nova Scotia (Attorney General)** 2004 NSSC 136 and concluded that it was clear that the appellants had no right, title, claim or legally protected interest in the lands claimed by the respondents.

[6] The appellants submit on appeal that the chambers judge erred in subjecting their claim of an interest in the lands to too high a threshold or test. They argue that the judge erred by weighing the quality or sufficiency of the evidence they propose to call at trial. They assert that the threshold or gateway test should be whether their claims are absolutely unsustainable, the burden of which should be on the plaintiffs.

[7] There are two issues on the appeal:

1. Did the chambers judge err in stating the test on an application to be added as a defendant in a quieting of titles application?

2. Did the chambers judge err in finding that the appellants did not satisfy the test in this case?

Standard of review:

[8] Since the order made by the chambers judge effectively terminated the appellants' claim, the standard of review is not that usually applied to discretionary orders of an interlocutory nature but rather, whether there was an error of law resulting in an injustice: **Purdy Estate v. Frank**, [1995] N.S.J. No. 243 (C.A.) at 10; **Clarke v. Sherman**, [2002] N.S.J. No. 238 (C.A.) at 10; **Binder v. Royal Bank of Canada**, 2005 NSCA 94 at ¶ 21.

1. The test on an application to be added as defendant:

[9] This court has not previously dealt with this issue and the only other reported decision from the Supreme Court of Nova Scotia on the appropriate test to determine whether a person should be joined as a defendant in a quieting of titles application is **Frank Georges Island**, *supra*. In that case, Justice Moir dismissed applications by ten individuals who sought to be added as defendants. The applicants owned properties near the land in dispute, an unoccupied island in St. Margaret's Bay, and had all visited the island by boat for recreational purposes for many years, using the land in much the same way as the appellants in this case allege. As well, it was well known that other people sailing in the bay often visited the island. The applicants in the **Frank Georges Island** case also claimed that a previous owner had dedicated the island for public use. The Provincial Crown who was a defendant supported the applications by the individuals to be added as defendants and also asserted ownership on the basis that the island had never been granted by the Crown.

[10] Justice Moir reviewed the extensive affidavit evidence presented by the individuals in the context of the history of occupation of the island and the abstract of title. With respect to the interpretation of s. 10 of the **Act**, Justice Moir stated:

> 21 Section 10 of the **Quieting of Titles Act** provides for intervention in a quieting of titles action. A person "who thinks he may be affected by the claim for a certificate" may apply: s. 10(1). Subsection 10(2) empowers the judge. The language is mandatory and the threshold is low: "... the judge shall permit the person to intervene as a defendant unless it is clear that the person has no interest that may be affected by the proceedings."
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> ...

23 The main argument for the applicants takes "interest" to have the sense of "The relation of being concerned or affected in respect of advantage or detriment" or "The feeling of one who is concerned or has a personal concern in anything": "interest", Oxford English Dictionary 2nd ed. (Oxford, 1991), v. VII, p. 1099, senses I 2a and I 7a. The question is whether, in subsection 10(2), "interest" has that kind of meaning or its primary meaning, "The relation of being objectively concerned in something, by having a right or title to, a claim upon, or a share in." including "legal concern *in* a thing; esp. right or title to property ...": OED, sense I 1, I 1a.

24 I must construe the operative words of s. 10(2) in their full context including the surrounding text, the statutory scheme of which they are part and the statutory purposes which they are to serve.

25 The relevant textual references include the long title, "An Act to Provide for the Judicial Ascertainment of Rights in Real Property". The word "interest" is used in the primary sense for the definition of "property right", "any estate, interest, power or other right in or with respect to land": s. 2(h). Section 9 concerns references by the Court to the Attorney General where a judge is not satisfied that materials filed by the plaintiff "disclose all the persons and interests likely to be affected": s. 9(1). The referee must "investigate in the interest of all adverse claimants": s. 9(1) and must report "all interests and circumstances that appear to be reasonably possible": s. 9(4). ... [quotes s. 10 (1) and 10(2)]

The word "interest" also appears in s. 12(2), which allows the court to order a special remedy. Where a person who has not been in possession in the past twenty years "has or may have an interest in the lands" the Court may order "that the interest of such person vest in the plaintiff" subject to a provision for compensation under s. 12(3) for "the value of that interest". The usual remedy under the statute is a certificate of title and the essential finding to support a certificate of title is made by the Court summarily under s. 11(4) or after trial under s. 12(1). In either case the finding must be that a claimant is "entitled" to a "property right".

26 The word "interest" in s. 10 is used in association with textual references to property rights. Further, the same word is used in s. 2(b), s. 12(2) and s. 12(3) in its primary sense. Furthermore, the use of the plural of the same word in s. 9(1) and s. 9(4) is at least as consistent with the primary sense of a legal right in something as it is with the secondary sense of a concern for or curiosity in something. The surrounding text suggests the primary meaning.

[11] After discussing the scheme and purpose of the statute, and the inapplicability of intervention pursuant to **Civil Procedure Rule** 8.01 in quieting of title matters, Justice Moir concludes that segment by stating:

> ¶ 35 Accordingly, the only question to be answered in determining whether an application for intervention under the *Quieting of Titles Act* should be allowed or disallowed is whether "it is clear that the person has no interest that may be affected by the proceedings", it being understood that "interest" has the primary sense involving a right, title, claim or legally protected share in something. [emphasis added]

[12] I agree with Justice Moir's interpretation and his reasoning. The question then becomes, when is it clear that the person has no interest?

[13] In **Frank Georges Island**, Justice Moir examined the common law prerequisites of proof of the specific interests claimed in the land in question. For example, to establish dedication to public use, the applicants would have to prove both an actual intention on the part of a predecessor in title and that the intention was carried out by actual use by the public for a substantial period of time. Occasional recreational use of an interesting place proves only that it was uninhabited, not that it had been thrown open for public use by a previous owner. Justice Moir concluded that the evidence of public dedication offered by the applicants "is so weak that a claim would clearly fail" and that he was therefore satisfied "that there is clearly no case to be made for dedication to the public". A similar conclusion, that the evidence clearly failed to establish any possibility of an interest in land, was reached in respect of the evidence of customary use of the island as a park and as common land.

[14] I agree with the analysis undertaken and the nature of the test formulated by Justice Moir in **Frank Georges Island**. A person may be added as a defendant in a quieting of titles application unless it is clear that he has no interest. Interest means a property interest affecting the subject property. An applicant wishing to be joined as a defendant must demonstrate that he has some evidence which, if accepted at trial, could establish an interest in the land. If, in the context of the abstract of title, that evidence is clearly insufficient, or, to quote Justice Moir, it is "so weak that a claim would clearly fail" to "establish any possibility of an interest in land", he should not be joined as a defendant.

2. Did the chambers judge err in finding that the appellants did not satisfy the test?

[15] The appellants' first claim is that the grantors in a 1907 deed did not intend to include the lands now claimed by the respondent Taylor. The evidence to support this claim is:

- Mr. Thomas' mother, who was born in 1908, and was the daughter of one of the grantors of the 1907 deed, told him that the deed did not include the land claimed by Taylor;

- Mr. Thomas' mother used the land to walk on it, cross over it to go to the beach and the cove and to pick berries all of her life (1908- 2003) as did many other members of his extended family;

- Mr. Thomas personally used the property in a similar manner for 50 years;

- Mr. Thomas' second cousin gathered firewood from the property in the 1950's;

- the people with the paper title to the lands over these years did not occupy or use the land for any purpose and did not prevent others from using it.

[16] This evidence must be assessed in light of the abstract which shows that:

- The lands claimed by Ms. Taylor are approximately 15 acres of land which were included in a 50 acre parcel granted by the Crown to George Jollimore in 1866 and later that same year were conveyed to Peter Jollimore by warranty deed.

- In 1885, Peter and his wife Sophie conveyed the lighthouse parcel, 1.5 acres, to the Crown with a 16.5 foot unspecified right of way over his remaining lands.

- In 1896, Peter and Sophie mortgaged their land as described in the Crown Grant to Howard Barss. That mortgage was assigned to George Marryatt in 1902.

- In 1907, by deed signed by Sophie, the widow of Peter, Mr. Thomas' grandfather and six other heirs of Peter Jollimore and their spouses, the property described in the mortgage was conveyed to George Marryatt.

- According to a statutory declaration filed in 1983, George Marryatt conveyed portions of the original Crown Grant to others during his lifetime - Ms. Taylor does not claim any part of those lands.

- George Marryatt died in 1921 and by will bequeathed all his lands to his daughters Zella and Jennie. The respondent Sonja Taylor is the daughter of Jennie and claims the lands by virtue of the intestate death of her mother in 1960, and as the sole beneficiary in the wills of her father who died in 1982, and her aunt Zella who died in 1979.

[17] In order for the appellants to be successful in their claim that the grantors in the 1907 deed did not intend to include the property now claimed by Ms. Taylor, they will have to seek rectification of the deed. Rectification requires clear and convincing proof of mutual mistake between the grantors and the grantee that the deed did not reflect the intention of the parties at the time of the agreement. The actual mutual intention of the parties to the deed must be established. In **Dartmouth Police Association v. Dartmouth** (1998), 172 N.S.R. (2d) 352 (C.A.) Cromwell, J.A., for the court, said:

> 8 The City, in this case, claimed the remedy of rectification. Fundamental to that claim is proof of an agreement between the parties which is not reflected in the written instrument which they signed. Courts do not rectify agreements, they rectify instruments recording agreements: see I.F.C. Spry, **The Principles of Equitable Remedies** (5th, 1997) at 607. Professor Fridman put this point succinctly: "Rectification is not used to vary the intentions of the parties, but to correct the situation where the parties have settled upon certain terms but have written them down incorrectly": G. H. L. Fridman, **The Law of Contract in Canada** (3d, 1994) at 822; see also **Tobias and Triton Alliance Ltd. v. Nolan** (1987), 78 N.S.R.(2d) 271 (N. S.S.C.A.D.) at 287 and ff.
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> 9 The existence of the agreement must be clearly proved. As McLachlin, J.A. (as she then was) said in **Bank of Montreal v. Vancouver Professional Soccer Ltd.** (1987), 15 B.C.L.R. (2d) 34 (C.A.) at 36, "The standard of proof of these elements is a stringent one because of the danger of imposing on a party a contract which he did not make."

[18] The chambers judge here assessed the applicants' evidence that the 1907 deed should be rectified and concluded that:

> [13] I am satisfied that the applicants have no interest that may be affected by the proceedings.
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> [14] The applicants have not provided any substantial material evidence to support their position, other than for the assertion that the conveyance from Peter and Sophia Jollimore was never intended to include the lands in question. There are also vague statements as to occupation by unknown persons, albeit, members of the Jollimore family.

[19] Given the standard of proof required to rectify a deed, the unavailability of any of the parties to the deed after 99 years to provide evidence of their intention, and the lack of any other documentary evidence, such as, for example, the purchase agreement or other correspondence between the parties to the deed, I agree that the claim for rectification has no chance of success.

[20] An alternative claim of the appellants is that the family of Peter Jollimore dedicated the lands claimed by Ms. Taylor to public use prior to the 1907 deed. The evidence they presented to support this claim is the same as listed above (¶ 15) in relation to the rectification claim emphasizing the fact that Ms. Taylor's mother and aunt moved to British Columbia many years ago and have never made any claims to the land.

[21] As noted above, Justice Moir reviewed the requirements to support a claim of public dedication in **Frank Georges Island**. I agree with his summary of the relevant law:

> 38 According to Duff, J. as he then was, writing for the majority in **Bailey v. City of Victoria** (1920), 60 S.C.R. 38 at p. 53, land may be dedicated to the public if two conditions are satisfied: "first, there must be on the part of the owner the actual intention to dedicate ... and second, it must appear that the intention was carried out by the [road]way being thrown open to the public and that the way has been accepted by the public." He followed (p. 55) Lord MacNaghten in **Simpson v. Attorney General**, [1904] A.C. 477 at p. 493: "that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not in itself amount to dedication". However, it is also said that "Open and unobstructed use by the public for a substantial period of time is, as a rule, the evidence from which a trier of fact may infer both dedication and acceptance." Brooke, J.A. in **Gibbs v. Grand Bend**, (1995), 26 O.R. (3d) 644 (OCA) at p. 680. Mr. Keith points out that

> public use is merely evidence going towards proof of the two conditions. So, in **Attorney-General v. Esher Linoleum Co. Limited**, [1901] 2 Ch. 647 at p. 650 the Court stressed that "user is but the evidence to prove dedication" and "what always has to be investigated is whether the owner of the soil did or did not dedicate certain land to the use of the public." With roadways, there needs to be proof of "an actual intention on the part of a predecessor in title of the plaintiff to dedicate the road as a public highway": **Reed v. Lincoln** (1974), 6 O.R. (2nd) 391 (CA) at p. 396.
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> 39 Hence, a claim by the applicants that Frank Georges Island has been dedicated to the public would involve their offering evidence of use by the public of a kind that could prove that a predecessor of the plaintiff dedicated the island for public use as a park. In my assessment, the evidence for dedication is so weak that such a claim would clearly fail.

[22] In this case, the appellants claim that prior to 1907 one of the owners of the lands claimed by Ms. Taylor dedicated the land to public use and since then it has been used in a way which substantiates the dedication. As noted above, there were two owners of the land prior to the 1907 deed, George Jollimore who owned it for less than a year and Peter Jollimore who owned it from 1866 until his death. In 1896, Peter Jollimore mortgaged the land to Barss. That mortgage is evidence which on its face contradicts any prior public dedication. Individuals cannot use public parks as security to borrow money. The record before us does not indicate the year of Peter Jollimore's death, but his widow Sophie and many, if not all, of his children and their spouses conveyed the land in question in the 1907 deed. Why would they have signed that deed to George Marryatt in 1907 if the land had been previously dedicated to public use? The appellants offer no explanation. Nor have they offered any evidence of use by the public, as opposed to the family of Peter Jollimore, prior to the 1907 deed.

[23] Justice Pickup reviewed the law of public dedication as set out in **Frank Georges Island** and concluded:

> [20] I am not satisfied on the evidence before me that the applicants have an interest in these lands on this basis. The evidence tendered in the *Frank Georges Island* case was much more extensive than that before me.
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> [21] Though there is a low threshold of proof on the applicants, the court still must be satisfied there is some interest in these lands by the applicant parties which would involve " a right, title claim or legally protected share in something" as stated by Justice Moir in *Frank Georges Island*, *supra*.

> [22] The applicants argue that this case is distinguishable from *Frank Georges Island* because in that case, the Crown was asserting title to the property. I cannot agree with the distinction on that basis. The evidence offered to support the applicants' position is less detailed than that described in paragraph 7-16 of the *Frank Georges Island* decision and is similar in its reference to the type of visits such as berry picking, nature walks and going to the beach. I agree with the court's assessment of this type of evidence in paragraphs 40-42 of *Frank Georges Island* that such acts are common place activity on uninhabited lands and do not support the proposition on which an inference of dedication to the public could be founded.

[24] I would agree that based on the scant evidence presented by the appellants on the issue of public dedication, in the context of the abstract of title, their claim against the Taylor lands would clearly fail. Any evidence of intention to dedicate, such as, for example, a sign designating a public park or a photograph, a newspaper article or a diary entry about a dedication ceremony at any time before or since the 1907 deed, together with the evidence of public use in subsequent years may have been sufficient to found a defence to the quieting of titles claim. Without something more than that presented by the appellants, the claim of an interest in the Taylor lands would surely fail.

[25] The appellants also claim an interest in the Taylor lands based on adverse possession. The evidence to support the claim is set out above in ¶ 15. It is undisputed that in order to establish an interest in land based on adverse possession, it is necessary to prove with very persuasive evidence an actual adverse occupation which is exclusive, continuous, open and notorious. (See **Ezbeidy v. Phalen** (1958), 11 D.L.R. (2d) 660 (N.S.S.C.); **Spicer v. Bowater Mersey Paper Co.**, 2004 NSCA 39 and the cases cited therein.)

[26] In this case, the claim for adverse possession is clearly inadequate as there is no evidence of at least two of the prerequisites: exclusivity and continuity of possession. The activities of the appellants and the others referred to in Mr. Thomas' affidavit were not acts that ousted the true owners or excluded them from entry on the land. (see: **Carson v. Musialo**, [1940] 4 D.L.R. 651, [1940] O.J. No. 246 cited in **Spicer**, supra at ¶ 17). Sporadic acts, even if frequent, of berry picking, crossing over the land to go to the beach and walking around on the land are not capable of proving continuous occupation. See: **Grace v. Gavin** (1990), 99 N.S.R. (2d) 34 (C.A.) and **Sherren v. Pearson** (1887), 14 S.C.R. 581, cited at ¶ 18 of

Spicer, *supra.*) It is clear that the appellants have no interest in the Taylor lands based on adverse possession.

[27] In summary, it is clear that the appellants have no interest to the lands claimed by Taylor that would entitle them to be joined as defendants in her action for a certificate of title.

[28] The last claim of the appellants is that they have a prescriptive right of way over the Cottam lands. Counsel for the appellants acknowledged at the hearing of the appeal that if the court concluded the appellants clearly have no interest in the Taylor lands, their claim of interest in the right of way should likewise fail because they would have no interest in lands adjacent to or nearby the right of way. The absence of an interest in a dominant tenement is fatal to a claim for an easement. (see: **Kimbrell v. Goulden**, 2006 NSCA 102, ¶ 37-40) I conclude that since there is no error in denying the application to be added as defendants in the Taylor action, there is likewise no error in the Cottam matter.

[29] In conclusion, the appellants clearly have no interest in land claimed by the respondents Taylor and Cottam. The chambers judge made no error justifying appellate intervention. I would dismiss the appeals and order the appellants to pay costs of $500 plus disbursements to each of the respondents.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.