C.A. No. 119148

NOVA SCOTIA COURT OF APPEAL

Cite as: Dunrite Contracting Ltd. v. Christians, 1996 NSCA 120
Hallett, Freeman and Roscoe, JJ.A.

BETWEEN:

DUNRITE CONTRACTING LIMITED and IVAN MacDONALD Appellants - and - PETER CHRISTIANS and BARBARA CHRISTIANS Respondents	Robert Murrant, Q.C. for the Appellant Harold A. MacIsaac for the Respondent Appeal Heard: June 4, 1996 Judgment Delivered: June 26, 1996

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Freeman and Roscoe, JJ.A. concurring.

HALLETT, J.A.:

The appellants commenced an action against the respondents for breach of contract. The trial was by judge and jury. Four questions were submitted to the jury. The first question asked if either of the defendants breached contractual obligations to the plaintiff. The jury answered "no". Therefore, there was no need for the jury to consider any of the other questions.

The appellants assert that the trial judge erred in refusing the appellants' motion to call rebuttal evidence and that this Court should order a new trial.

Facts

The respondents own 100 acres of land with frontage on a river in Cape Breton. In 1984 they entered into a management agreement with the Government to manage this woodlot in accordance with a management plan. At the time the respondents were residents of Germany who used the property when vacationing in Nova Scotia. In 1988 the respondents had correspondence with various government agencies respecting their plan to build a lodge for vacationers on the property and their intention to immigrate to Canada.

In April, 1989, the appellant MacDonald (the principal of Dunrite, a tree harvesting and silviculture contractor) had obtained the agreement of various owners in the area to put some 800 acres of their land under a management plan which he would implement. The plan contemplated harvesting of timber, spacing, thinning, etc. MacDonald approached the respondent, Peter Christians (Christians), to determine if he wanted to have work done on his property as part of this project. The respondents already had a management plan. Christians testified that he advised MacDonald from the outset that he intended to build a lodge on the eastern half of the property which abutted on the river and, therefore, did not want the eastern half cut as he wanted to preserve it for its wilderness attraction for tourists for hiking trails, etc.. The 100-acre lot is divided in half

by the Collins Road.

On April 17, 1989, the respondents signed an agreement prepared by MacDonald; it was agreed that the appellant Dunrite would "carry out all silviculture work on the property as per the Management Plan."

On February 26, 1990, Christians heard some disturbing rumours about Dunrite. He wrote the government department administering the management plan advising that he did not want MacDonald doing silviculture work and road work on his property. He also purported to cancel the right-of-way that he had granted to Dunrite to access the wood on his property and through which Dunrite could access other properties on which Dunrite had obtained permission to cut in accordance with the management plan he had developed.

On March 12, 1990, Christians, who was then in Germany, wrote advising Dunrite that it was only to cut wood on his property when he was at the property.

Through this period the respondents were attempting to immigrate to Canada and were working on obtaining government grants and financing to build the lodge. Immigration status was granted to the respondents; the lodge was completed in 1992.

In April of 1991 the respondents had returned to Nova Scotia from Germany. Christians and MacDonald met and walked the Collins Road. They had discussions about cutting on the respondents' property.

MacDonald testified under direct examination with respect to his dealings with Christians in 1991. He was questioned about the right-of-way that had been granted by the respondents and which Christians had attempted to cancel. He stated that as far as he was concerned it was a permanent legal right-of-way which the respondents could not cancel. MacDonald was then asked by his counsel when it was that he tried to resolve the problem of Christian having said that MacDonald could not cut when Christians was not there. Mr MacDonald answered as follows:

> "A. ..... And so when he came in '91 or whatever, it was okay. He said, "You can do all the work on the back part of the property and then later we'll see what we're going to do down below." I said, "Okay. Well, I'll do all the work on the back part first.""

The "back" of the property refers to the western half; "down below" the eastern half.

MacDonald was then questioned about the work he had done:

> "Q. So we're now in the year 1991.
> A. In the spring of '91, we were making the road back across the property. And Christians came up and walked on the road with us and said, "Well, I want you to do all the work on that side of the road first." I said, "Well, yeah. I don't have a problem with that. I'll do all the work over there first." He said, "And then we'll see what we're going to do down below."
> Q. Is this at the same point in time that Mr. MacKenzie went down to look at bulldozing down below?
> A. Yeah. It's all around the same time.
> Q. Okay. At that time, was it said to you that there was going to be a lodge built or property taken out of management?
> A. No.
> Q. No. Did your company expect to finish this work on the eastern half of the Christians' property?
> A. Well, yes. Mr. Christians told me that he wanted the work done on that side of the road first. And then we'd look at what we had to do down on the other side of the road."

MacDonald went on to testify that he intended to cut the 50 acres on the east side of the road in the spring of 1992. He testified that Dunrite was never allowed to complete its work on the eastern half of the property but he was not given any reason for it, just that Christians had changed his mind and he did not want any work done on the eastern part of the property.

MacDonald testified that in 1991 he did not know about any plans the respondents had for a lodge on the eastern half of the lands. He acknowledged that he had

heard from Christians about building a few cabins down by the river.

Under cross-examination MacDonald testified it was in the spring of 1991 that Christians told him, in the presence of a Mr. Hill, that the work on the west side would be done first and "then we're going to do the work on the other side of the road."

He was further cross-examined by counsel for the respondents with respect to what work was to be done. MacDonald responded that in 1991 Christians said:

> "A. ..... "Do that stuff first. And then we'll do the work down on the other part."
> Q. Well, I undertook your testimony to be just -- I understood your testimony to be just recently that Mr. Christians said not -- "We'll do the work on the other part, but we'll see about the other part."
> A. Yeah, that's what I said. "We'll see about doing the work down there after you do the work on this side first."" (AB p. 353) {Emphasis added}

On the other hand, Christians testified that in 1989 when he first had his discussions with MacDonald as to having him doing some silviculture work he advised MacDonald that he planned to use part of the property for recreational purposes.

Christians further testified that in the summer of 1992 Dunrite was cutting on Christians' neighbour's land east of the Collins Road. Christians complained about this and about cutting over the line. MacDonald said he intended to cut east of the Collins Road, not only on the neighbour's land but also to cut all the trees on the respondents' land.

Under cross-examination Christians denied that he made any statement to MacDonald in Mr. Hill's presence in 1991 that would permit Dunrite to cut east of the Collins Road. The transcript shows the following questions and answers:

> "Q. Mr. Christians, in 1991 -- or let me backtrack. In 1989 you said that you told Mr. MacDonald there'd be no work done to the east of the Collins Road.
> A. Yes.
> Q. And in 1991, in the spring, you told Mr. Hill that east of the Collins Road, "Well, we'll see about that."
> A. No, it was never "we'll see."

Q. You never told Mr. Hill about any agreement in 1989, I put it to you.
A. I didn't meet him in 1989. I met him the first time in '91.
Q. Yeah, in 1991. And he asked you about when the work was going to be done to the east and you said, "Well, we'll see when we get to that."
A. No, that is not true.
Q. No. That's not true?
A. That is not - - -
Q. You deny that in front of this jury, sir? You deny you said that to Mr. Hill?
A. I didn't say - - I deny that I ever said we will do something there. I always said, "We will never do any harvesting there." I didn't say that there should be not done any spacing. Like if the trees are too close, young trees which are to be spaced, that's okay. (Inaudible.)
Q. Did you say to Mr. Hill in the spring of 1991, "We'll see about that later"?
A. Not about any harvesting. That's for sure."

On further cross-examination Christians was asked whether he told Mr. Hill in the spring of 1991 that he might do his own forestry work. Christians responded, "Like spacing, yes". He was then asked:

"Q. Couldn't you have said to Mr. Hill, "Look, I've got an agreement from 1989 with Dunrite, we're not going to do anything down there"? Why didn't you tell him that?
A. Anything - - even if Mr. MacDonald would come to me and say there's something to space. I don't want any clear cutting. That's what I don't want."

Christians was cross-examined with respect to purported conversations with Hill that supposedly took place in 1992. He was asked:

" Q. Well, sir, I'm suggesting to you in the spring of 1992 you told Mr. Hill that you didn't want any wood cut on any land down there including your neighbours'.
A. No, that's not true. That's a lie.
Q. That's a lie, is it?
A. That's a lie, yeah.
Q. Yeah. You didn't -- not only didn't you want your land cut --
A. I -- (inaudible)

> Q. --- but you didn't want MacAuley's done or anybody elses'. Anything east of the Collins Road you didn't want done.
> A. I mean, perhaps everybody would know that's against common sense.
> Q. Well, I would suggest to you ---
> A. I wouldn't say anything like that. It makes no sense. I cannot say what my neighbour should do. I cannot give recommendations or even --I cannot give recommendations to my neighbour."

Mr. Michael Hill was the government technician who supervised the carrying out of the management plan that the appellant was implementing. He had been called as Dunrite's witness. He was not questioned by counsel for either party about the April, 1991, conversation between MacDonald and Christians which, according to MacDonald's evidence, was made in Mr. Hill's presence.

Hill's evidence, for the most part, dealt with questions as to how management plans work and how much wood was on the respective stands on the respondents' property.

After the close of the defendants' case, counsel for Dunrite called Mr. Hill as a rebuttal witness. Counsel for the appellant asked Mr. Hill the following question:

> "Q. Sir, can you tell us what, if any, discussions you had with Mr. Peter Christians in the spring of 1991 concerning the doing of silviculture work on the <u>eastern portion of his property</u>." {Emphasis added}

Before the question was answered the trial judge intervened and advised counsel that this was a matter he wished to discuss out of the presence of the jury.

The jury was excused. The trial judge advised counsel for Dunrite that the issue was not covered during the direct examination of Mr. Hill. The trial judge suggested that Dunrite (the plaintiff) was attempting to split its case and that the evidence ought to have been elicited in the first instance during the plaintiffs' case-in-chief and then used to confront the defendant with it on cross-examination. Representations were made by both counsel. The trial judge refused to allow Mr. Hill to testify about any discussions between

himself and Christians in the spring of 1991 concerning the doing of silviculture work on the eastern portion of the property.

The Issues

Counsel for the appellant argues that the trial judge erred in refusing to allow the rebuttal evidence.

The Law

The legal principles applicable to the exercise by a trial judge of his discretion in determining the admissibility of rebuttal evidence are well summarized in Sopinka & Lederman, 1974, **The Law of Evidence in Civil Cases**, at p. 517 where the authors state:

> "At the close of the defendant's case, the plaintiff has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. As a general rule, however, matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded. A plaintiff is therefore precluded from dividing his evidence between his case in chief and reply, for two very practical reasons:
>
> '. . . first, the possible unfairness of an opponent who has justly supposed that the case in chief was the entire case which he had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning.'
>
> The Ontario Court of Appeal recently held in *Allcock, Laight & Westwood v. Patten et al.* that the trial judge had erred in permitting the plaintiff to adduce evidence, ostensibly as rebuttal, when the evidence was in effect confirmatory only of the plaintiff's case. Schroeder J.A., noting with approval an earlier decision of the Court of Appeal, *R. v. Michael*, [1954] O.R. 926 stated:
>
> 'It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on *prima facie* proof, and when this has been shaken by his adversary, adducing confirmatory evidence: *Jacobs v. Tarleton* (1848), 11 Q.B. 421, 116 E.R. 534 . . . The Rule is now so well settled that it requires no further elaboration . It is important in the trial of actions, whether before a jury or a Judge alone, that this rule should be observed. A defendant is entitled to know the case which he has to meet when

> he presents his defence and it is not open to a plaintiff under the guise of replying to reconfirm the case which he was required to make out in the first instance or take the risk of non-persuasion.""

In **The Law of Evidence in Canada**, Sopinka, Lederman and Bryant, 1992, the opinions expressed in the 1974 edition are confirmed.

In **Mersey Paper Co. Ltd. v. Co. of Queens** (1959), 18 D.L.R. (2d) 19 this Court held that the trial judge erred in refusing to allow rebuttal evidence in circumstances where the facts which the plaintiff wished to contradict by rebuttal evidence were unknown and unforeseen by the plaintiffs before the defendants' evidence was called.

Disposition of the Appeal

If Mr. Hill was privy to the conversation between MacDonald and Christians in April of 1991 or any other conversation he may have had with Christians that would have been relevant he ought to have been questioned about such conversations on direct examination. Even if he had testified on rebuttal in a manner confirmatory of MacDonald's testimony, as to what Christians may have said in these conversations, I would not interfere with the exercise of the trial judge's discretion to disallow the rebuttal evidence for a number of reasons. First, MacDonald would have been aware if Hill was present on the occasion of the April 19, 1991 conversation between MacDonald and Christians. Accordingly, if Hill was present he ought to have been asked under direct examination when called as the plaintiff's witness, what exchange took place between MacDonald and Christians. Secondly, MacDonald was aware of the respondents' position with respect to the agreement made between the parties from the time the amended defence was filed. In paragraph 7 of the amended defence it is stated:

> "7. Upon the making of the agreement on April 17, 1989 it was clearly pointed out to Ivan MacDonald, the principal of the Plaintiff, that there

> was to be no cutting or other work done East of the Collins Road as the Defendant, Peter Christians had already taken steps to create a resort on that portion of the property and did not want any cutting done on it."

Thirdly, MacDonald's evidence about the April 19, 1991, conversation with Christians is weak and ambiguous. I am referring specifically to the testimony at Appeal Book, pp. 352-353 which I have set out where MacDonald testified that Christians purportedly said: "We'll see about doing the work down there after you do the work on this side first."

If that is what Christians said the evidence is ambiguous as to whether there would be any cutting permitted east of the Collins Road. This would be consistent with Christians' evidence which shows the planning for the lodge was in progress long before he first spoke with MacDonald and is consistent with his evidence that in 1989 he told MacDonald that he did not want the eastern portion of the property cut.

Fourth, I cannot accept the argument that the evidence of Christians on the issue of cutting to the east of the Collins Road was neither unknown or unforeseen by the appellant. That was the crux of the defence as disclosed in paragraph 7 of the amended defence.

The learned trial judge did not err in principle in refusing to allow the rebuttal evidence; he applied the correct legal principles. The evidence, if confirmatory of MacDonald's evidence, should have been adduced as part of the appellants' case in chief. This was not a new matter raised by the defence evidence; it was the centre piece of the statement of defence filed in the proceedings.

Nor does the learned trial judge's ruling or the upholding of that ruling by this Court result in a patent injustice to the appellants as Mr. Hill's evidence at its highest, presumably, would have been no more than confirmatory of MacDonald's testimony respecting the April, 1991 conversation, which evidence on its face is not persuasive

because of its ambiguity. This is particularly so in the face of the evidence of Christians that he had told MacDonald from the outset (in 1989) that cutting of timber was to take place only to the west of the Collins Road.

The appellants' counsel has argued that the appellants should not suffer from counsel's failure to ask a witness questions. He argues that the trial judge ought to have used **Rule** 31.09 to permit the rebuttal evidence of Mr. Hill.

Rule 31.09 states:

> "31.09. Where through an accident, mistake or other cause a party fails to prove any material fact or document, the court may, subject to such terms as may be just,
>
> (a) on a trial without a jury, proceed with the trial subject to the fact or document being subsequently proved in such manner and at such time and place as the court directs;
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> (b) on a trial with a jury,
>
> (i) adjourn the trial and require the attendance of the jury upon a date to be fixed by him;
>
> (ii) direct the jury to find a verdict as if such fact or document had been proved before them, and the verdict shall take effect on such fact or document being subsequently proved as directed by him, and if not so proved, judgment shall be entered for the opposite party unless the court otherwise orders."

This was a civil trial with a jury. Counsel did not request an adjournment. Furthermore, the **Rule** is not intended to cover a set of circumstances as existed in this case but intended to cover technical mistakes on non-controversial matters. For example, where a party has failed to put in a document, the existence of which was always acknowledged by the opposite party. (**Venoit v. Maritime Life** (1976), 22 N.S.R. (2d) 84).

The common law respecting the circumstances under which rebuttal evidence may be allowed governs the situation that confronted the trial judge in this case. In **Rothwell v. Woodworth** (1984), 62 N.S.R. (2d) 178 the trial judge had allowed a party to adduce new evidence after all the evidence had been heard and the trial judge had reserved his decision. On appeal, this Court held that it is beyond question that a trial judge has the discretion to allow additional evidence to be adduced any time before judgment has been entered. In refusing leave to appeal the Court stated at paragraph 5:

> "It is too well known to require citation of authority that this court should not interfere with the exercise of discretion by a trial judge unless he has erred in principle or his discretion has been exercised in such a way as to result in a patent injustice. That is not the case here. We find no error in principle on Judge Hall's part nor a patent injustice."

In my opinion the learned trial judge did not err in principle. He applied the well known rules respecting the admission of rebuttal evidence. Nor did the exercise of his discretion result in a patent injustice to the appellants.

In my opinion this appeal ought to be dismissed with costs to the respondents of $1,000 plus disbursements.

Hallett, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.

C.A. No. 119148

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Appellants	)	
- and -	)	REASONS FOR JUDGMENT BY:
PETER CHRISTIANS and BARBARA CHRISTIANS	)	
	)	HALLETT, J.A.
Respondents	)	