NOVA SCOTIA COURT OF APPEAL

Citation: *778938 Ontario Limited v. Annapolis Management, Inc.*, 2020 NSCA 19

Date: 20200303
Docket: CA 485331
Registry: Halifax

Between:

778938 Ontario Limited

Appellant

v.

Annapolis Management, Inc. and Ruby LLP

Respondents

Judge: The Honourable Justice Peter M. S. Bryson

Appeal Heard: January 28, 2020, in Halifax, Nova Scotia

Subject: Trespass; permanent injunction; equitable damages

Summary: While renovating its building, Annapolis extended its roof 18 feet above the roof of the adjacent building owned by 778938 Ontario Limited (Starfish). There was some trespassing on Starfish's roof by Annapolis workers. There was also a risk of increased snow load on Starfish's roof as a result of snow accumulating against Annapolis's new wall. Starfish brought an application for a permanent injunction restraining trespass and nuisance for the anticipated snow load, pending strengthening of its roof by Annapolis. The application judge dismissed the application finding that the trespass had caused no damage and was not ongoing. The snow load issue could be addressed in damages. Starfish appealed, arguing that the judge ignored the presumptive remedy of an injunction in the case of trespass and nuisance. Starfish also argued that the judge erred in finding that serious harm would result to Annapolis by the granting of the injunction.

Issues: Should an injunction have been granted for trespass or nuisance?

Result: Appeal dismissed. Neither irreparable harm nor balance of convenience need be considered for permanent injunction because the matter is being resolved on its merits. Nevertheless, a discretion remains to refuse an injunction in special circumstances. Although an injunction is the presumptive remedy for trespass and nuisance, in exceptional cases the applicant may be left to its remedy in damages. The presumption of the remedy of an injunction is stronger than trespass, but if the trespass is temporary, trivial, unintentional, inadvertent, or is unlikely to be repeated, courts have declined to award an injunction. Canadian courts have applied the four-part test for refusing an injunction in cases of both trespass and nuisance, following the English Court of Appeal in *Shelfer v. City of London Electric Lighting Company*, [1895] 1 Ch. 287 (C.A.) where:

1. The injury to the applicant is small;
2. Damage to the applicant can be estimated in money;
3. A small damages payment would be adequate compensation for the applicant;
4. It would otherwise be oppressive to grant the injunction.

Alternatively, a similar result may occur applying the criteria established by the Newfoundland and Labrador Court of Appeal in *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46. The application judge did not err in exercising his discretion to refuse an injunction. Nor did the application judge make any clear and material error in finding that Annapolis would suffer serious harm if an injunction were granted.

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Judges:	Bryson, Fichaud and Scanlan, JJ.A.
Appeal Heard:	January 28, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $5,000.00 per reasons for judgment of Bryson, J.A.; Fichaud and Scanlan, JJ.A. concurring
Counsel:	Dillon Trider and Emma MacIntosh, for the appellant Peter Planetta, for the respondent

Reasons for judgment:

Introduction

[1] The appellant, an Ontario numbered company carrying on business as Starfish Properties, appeals dismissal of its application for a permanent injunction against the respondent for trespass and nuisance caused by development of the respondent's property (2019 NSSC 36).

[2] Starfish owns a 4-storey building at 1566 Barrington Street in Halifax known as the "Attica" building. Annapolis Management, Inc. is the general partner of Ruby LLP ("Annapolis"). Annapolis owns 1572-1574 Barrington Street, known as the National Film Board building. The Attica and NFB buildings share a common boundary perpendicular to Barrington Street and coincidental with Attica's wall.

[3] The Attica and NFB buildings enjoy a heritage character which both parties have commendably tried to preserve. Their roofs were formerly the same height but in 2018 Annapolis conducted renovations which included extending the height of its building by 18 feet above the Attica roof level. This risked increased snow load on the Attica roof, because snow no longer was able to blow across both roofs but would collect against the new NFB building wall.

[4] The parties corresponded back and forth for about 18 months. Annapolis offered to pay for any strengthening of the Attica building roof occasioned by the anticipated increase in snow loads. The parties never concluded an agreement. Annapolis rejected Starfish's demand to stop work pending reinforcement of Attica's roof. Nevertheless, Annapolis confirmed that it would plan and implement the reinforcement work.

[5] Starfish put a comprehensive draft agreement to Annapolis. Annapolis objected to much of the agreement which contained various open-ended obligations. In the end, the Honourable Justice Kevin Coady faulted Starfish for the impasse:

> [19] Given that the Respondents were always willing to accept responsibility for the reinforcement of the Attica roof, I conclude that Mr. Reznick must accept responsibility for the current state of affairs. ***I find that Mr. Reznick created barriers to an effective working relationship. The main issue has always been the snow load, yet Mr. Reznick sought to achieve other benefits in his draft***

> ***access and indemnity agreement.*** He could easily anticipate that those terms would be problematic given that the Respondents had already rejected the financial clauses in its June 17, 2018 correspondence.
>
> [Emphasis added]

[6] In September 2018, Starfish brought an application, amended in December, seeking an injunction for alleged trespass on its roof and anticipated nuisance from the expected increased snow loads. In particular, Starfish sought to restrain Annapolis from completing the wall adjacent to their common boundary "until such time as the required reinforcements or repairs are performed on the Attica "roof".

[7] Starfish also sought damages but the proceeding was bifurcated and damages were to be determined in a later proceeding. That has not taken place.

[8] Although Justice Coady agreed with Starfish that Annapolis had trespassed on its roof and that the increased snow load would constitute a nuisance, he declined the remedy of a permanent injunction because he found that Starfish had consented to the trespass or alternatively, the trespass was trivial. The additional snow load was a matter that could be resolved by reinforcing the roof of the Attica building. If that were done by Starfish, presumably it would have a damage claim against Annapolis for that expenditure.

[9] On the other hand, the judge found that granting an injunction would result in a "partially-constructed NFB building". Financial losses would be immediate and substantial. Further, "the applicant's [Starfish's] bargaining position would be greatly enhanced on issues common to both parties. The Respondent [Annapolis] would be in a situation where they would need to accept whatever the Applicant dictated … [g]ranting a permanent injunction would be disproportionate to the enjoined activity. In other words, the cure would be worse than the disease".

[10] In its factum Starfish reduced the issues to two, alleging that the judge erred by:

1. Refusing the presumed remedy of an injunction for trespass; and
2. Refusing an injunction to prevent further work on Annapolis's property until the anticipated snow load nuisance had been addressed by reinforcement of the Attica roof;

[11] Starfish's arguments will be addressed in the order it makes them.

Should an injunction have been issued for trespass?

[12] The judge refused a trespass injunction for two reasons; first because Starfish had acquiesced in use of its roof by Annapolis's workers when constructing the NFB building wall; second because the trespass was trivial and caused no harm. Moreover, at the time of the hearing, the wall (although not the NFB roof) had been completed. There was no indication of any ongoing trespass.

[13] Acquiescence is an appropriate consideration when deciding whether to afford an applicant an equitable remedy. The judge summarized:

> [25] I am satisfied that the Respondents regularly used the Attica roof as a work platform to do work on the NFB property. I have found a couple of factors that relate to these activities. Harry McClocklin is the Site Manager for the NFB construction. He testified that, on occasion, his workers went on the Attica roof for purposes that benefitted the Attica building. Further, he testified he was of the view the Applicants were not bothered by that level of intrusion. Mr. McClocklin provided the following evidence:
>
> > I was not aware of any agreement to access the Attica building but I was never told to not go on the roof at all. We needed to go on the roof to do certain things.
>
> I was impressed with Mr. McClocklin's testimony. I found him to be forthright. I found that his testimony best described the reality of the situation. ***That reality is that when the parties were working together such access went unnoticed. When the parties were in conflict such access got noticed and acted upon by the Applicant. This observation is supported by the fact that on August 3, 2018, the Applicant consented to the Respondents going on the roof to erect structures that would limit debris falling onto the Attica roof***.
>
> [Emphasis added]

[14] There was evidence of a qualified permission to use the Attica roof during the summer of 2018. Accordingly, this Court should not interfere with the judge's factual finding in that period. But more fundamentally, it is unnecessary to decide whether acquiescence was fully made out in this case because the result can be supported on the alternative ground that any damage to the Attica roof was trivial, and there was no ongoing trespass at the time of hearing. The judge preferred the evidence of Annapolis's site supervisor to that of Starfish's vice-president. The judge concluded "the quantity of debris [on the Attica roof] has been overstated. I further find that damage to the membrane of the roof has not been established".

[15] Starfish challenges these findings, arguing that Annapolis workers had used the Attica building roof as a "work platform". Two replies can be made. First, the evidence supported and the judge found that no real harm had been done to the Attica roof. Second, and more significantly, NFB's wall had been completed at the time the application was heard. An injunction is a prospective remedy and there was no evidence that trespassing was ongoing or likely to recur. Both these findings favour a remedy in damages.

[16] Starfish argues that the judge assimilated trespass and nuisance in his analysis and therefore applied the wrong law. Trespass involves direct interference with possession, use, and enjoyment of land; nuisance involves indirect interference (*Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, ¶84-86; *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 76, ¶24).

[17] Starfish emphasizes that no damage need be proved to establish trespass. There is no reason to conclude that the judge was confused about the difference between nuisance and trespass because the risk of trespass had disappeared by the time of the hearing. The nuisance-trespass distinction had become academic at that point. But Starfish is right that the law is more generous in favouring an injunction for trespass, although it is the presumptive remedy for both: Sharpe, *Injunctions and Specific Performance*, 5th ed (Toronto: Thomson Reuters Canada Limited, 2017) §4.590; *Maxwell*, ¶34-35.

[18] As *Maxwell* explains at para. 40, "equitable discretion to grant an injunction is usually—but not invariably—exercised to vindicate property rights". Sharpe elaborates at §4.10:

> Where the plaintiff complains of an interference with property rights, injunctive relief is strongly favoured. This is especially so in the case of direct infringement in the nature of trespass. … The discretion in this area has crystalized to the point that, in practical terms, the conventional primacy of common law damages over equitable relief is reversed. Where property rights are concerned, it is almost that damages are presumed inadequate and an injunction to restrain continuation of the wrong is the usual remedy.

[19] Later, Justice Sharpe adds at §4.590:

> Where there is a direct interference with the plaintiff's property constituting a trespass, the rule favouring injunctive relief is even stronger than in the nuisance

> cases. Especially where the trespass is delivered and continuing, it is ordinarily difficult to justify the denial of a prohibitive injunction …

[20] On the other hand, courts have refused an injunction where the trespass is temporary or trivial, or unlikely to be repeated or where it was unintentional and inadvertent: *Leader v. Moody* (1875), L.R. 20 Eq. 145 at 153; *Bertram v. Builders' Association of North Winnipeg* (1915), 23 D.L.R. 534 (Man. K.B.); *Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Assn.*, 2008 BCSC 1676; and *Jarnouin v. Parvais* (1997), 122 Man.R. (2d) 223 (Q.B.).

[21] *Maxwell* was a case of an interlocutory injunction in which irreparable harm and balance of convenience had to be considered. Not so here when a permanent injunction is sought. Nevertheless a discretion to refuse an injunction remains. Sharpe proposes an intriguing approach in cases of modest and temporary trespass which cause little or no damage:

> §4.640 … Viewed broadly, the cases under consideration may be seen to involve the exercise of conflicting property rights rather than unilateral invasion or appropriation. Where there is no question of permanent appropriation of property, nor serious inconvenience or harm which could not be compensated in damages, it is not at all obvious that the absolute autonomy of an owner should inevitably be vindicated over the reasonable needs of a neighbour. It should not be forgotten that refusing an injunction does not deny the right altogether.

[22] The Nova Scotia Supreme Court inherited the equitable jurisdiction to award damages in lieu of an injunction from the *Chancery Amendment Act*, 1858, 21 & 22 Vict., c. 27, better known as *Lord Cairns' Act*, s. 2 of which said:

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, ***if it shall think fit***, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.
>
> [Emphasis added]

[23] Although *Lord Cairns' Act* was repealed in 1883, the jurisdiction to award equitable damages was preserved by s. 5 of the repealing statute: 1883, 46 & 47 Vict., c. 49 and see *Leeds Industrial Co-operative Society Limited v. Slack*, [1924] A.C. 851 at p. 862. Accordingly, the English High Court's jurisdiction was passed

to the Nova Scotia Supreme Court in the *Nova Scotia Judicature Act*, 1884, R.S.N.S 1884, c. 104, at s. 8.1:

> The Supreme Court shall have within this Province the same powers as were formerly exercised by the Courts of Queen's Bench, Common Pleas, Chancery and Exchequer, in England; and also such and the same powers as were on the ***nineteenth day of April, A.D. 1884***, exercised in England by the Supreme Court of Judicature, save in respect of Probate and Surrogate Courts.
>
> [Emphasis added]

[24] Leaving a plaintiff to a claim in damages for trespass may not mean those damages will be nominal. In the context of this case, common law damages would represent actual injury to Attica's property. The judge found any actual damage was minimal. In contrast, equitable damages would be a substitute for a foregone injunction. They are prospective and may include such things as any diminished value of the claimant's property, or the lost opportunity to bargain for access that would otherwise be a trespass (*Maxwell*, at ¶40 citing English authorities). For example, in *Jaggard v. Sawyer*, [1994] EWCA Civ 1, the English Court of Appeal affirmed a refusal to grant an injunction, and upheld an award of damages for trespass, representing the estimated cost of securing a right-of-way over an existing private road (see also: *Coventry et al v. Lawrence et al*, [2014] UKSC 13, ¶128-131).

[25] It is plain that Starfish was prepared to bargain for access to its roof—to be paid for the trespass and to permit mitigation of the snow load nuisance. Accommodating trespass was no longer required at the time of the hearing. There was no evidence of continuing trespass which had been temporary and caused no harm to Starfish's property. The judge was entitled to exercise his discretion as he did. He applied no wrong principles in doing so. Accordingly, this Court will not second guess him.

Should a snow load nuisance injunction have been granted?

[26] Next, Starfish says that an injunction should have been granted to prevent anticipated snow load nuisance on the Attica roof caused by the raising of the height of the NFB building.

[27] Starfish asserts the judge erred in law by applying the test for an interlocutory injunction which involves the three-part *American Cyanamid* test established by the House of Lords and approved by the Supreme Court of Canada

in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199. Starfish says that the judge wrongly relied on *Northumberland Fisherman's Association v. Patriquin*, 2015 NSSC 30 which followed the Newfoundland and Labrador Supreme Court decision in *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2012 NLTD(G) 175. That decision was overturned by the Newfoundland and Labrador Court of Appeal in 2014 NLCA 46, in which the Court rejected irreparable harm and balance of convenience as relevant considerations in a claim for a permanent injunction.

[28] A permanent injunction may follow successful proof of one's cause of action. Subject to equitable remedial discretion, no balancing of interests is required because the loser has no right to balance—the winner has succeeded on the merits. Of course, there remains a discretion about the available equitable remedy. In contrast, the merits typically remain unresolved in an interlocutory setting, when an injunction may be granted to preclude frustration of a meaningful remedy for the plaintiff. In such cases, irreparable harm and balance of convenience only assess the relative injury to the parties caused by issuing or refusing an injunction, pending determination of the merits—not harm flowing from resolution of the merits.

[29] *Nalcor* will be considered further below. For now it is only necessary to note that the judge did not make the error attributed to him. At no point does he apply the *American Cyanamid* 3-part test. His citation of *Northumberland Fishermen's Association* in ¶34 of his decision acknowledges a difference between interlocutory and permanent injunctions. The judge cited this Court's decision in *Maxwell*, which also distinguishes between interlocutory and permanent injunctions. The judge observed:

> [35] The real issue is whether a permanent injunction is the appropriate remedy
> …

[30] Starfish argues that once a nuisance has been established, the preferred remedy should be an injunction but acknowledges that this will not always be so. Starfish refers to *Shelfer v. City of London Electric Lighting Company*, [1895] 1 Ch. 287 (C.A.) for an example of the balancing that sometimes occurs in nuisance cases.

[31] *Shelfer* establishes that injunctions for nuisance may be refused where:

1. The injury to the applicant is small;

2. Damage to the applicant can be estimated in money;
3. A small damages payment would be adequate compensation for the applicant;
4. It would otherwise be oppressive to grant the injunction.

[32] Despite the discretionary considerations described in *Shelfer*, an injunction was nevertheless granted in that case. The facts are instructive. The London Electric Lighting Company—surely a relative novelty at the time—built an electrical generating station adjacent to a public house known as the Waterman's Arms, operated by Mr. Shelfer. The station created noise, vibration and clouds of steam which occasionally engulfed the pub. The pub also suffered some structural damage. Shelfer did not prove any economic loss. The trial judge declined a permanent injunction and ordered an assessment of damages. The Court of Appeal overturned the judge, reiterating the rule that, absent inequitable behaviour, a successful plaintiff in a nuisance action should be entitled to an injunction to restrain an ongoing nuisance. In *Shelfer* the defendant provided public electric lighting to a large part of London. That did not excuse the nuisance or prevent issuance of an injunction. However, the injunction was suspended for some time presumably to permit the company to abate the nuisance (see [1895] 2 Ch. 388 and *Sharpe*, §4.250 and following).

[33] *Shelfer* was a nuisance case in which the presumptive remedy of an injunction is weaker than in trespass. But Canadian courts have considered *Shelfer* in a trespass context in *Bellini Custom Cabinets v. Delight Textiles Limited*, 2007 ONCA 413, ¶41-44; *Vaz v. Jong*, [2000] O.J. No. 1632 (Ont. S.C.J.); *Pagliuca v. Paolini Supermarket Ltd.*, [2006] O.J. No. 4887, aff'd 2007 ONCA 617.

[34] Although *Shelfer* is not mentioned by the judge in his decision, he applied the essence of this test. He noted that the anticipated harm to Starfish from an increased snow load would compromise its roof. That could be addressed by re-enforcing the roof, something which Annapolis had agreed to do. It is unfortunate the relationship between the parties broke down and apparently that work has not been undertaken by Annapolis. But it could be undertaken by Starfish which would be entitled to seek recovery from Annapolis for any reasonable expenditure mitigating the nuisance risk. The availability of a damages remedy clearly dissuaded the judge from issuing an injunction, as *Shelfer* contemplates.

[35] Alternatively, applying the *Nalcor* criteria would produce a similar result. *Nalcor* involved picketing of an access road to Nalcor's construction site. It is not

clear what Nalcor's cause of action was; the circumstances suggest trespass or nuisance. The Court did not elaborate and queried whether any cause of action had been established. But the Court did go on to provide guidelines for the exercise of discretion when considering whether to grant a permanent injunction involving private rights without describing what they might be:

> [72] I will conclude this analysis by saying that the proper approach to determining whether a perpetual injunction should be granted as a remedy for a claimed private law wrong is to answer the following questions:
>
> (i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);
>
> (ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven ***are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction?*** (If not, the injunction claim should be dismissed);
>
> (iii) ***Is there an adequate alternate remedy, other than an injunction***, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy);
>
> (iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's prima facie entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);
>
> (v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?
>
> (vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[36] On a *Nalcor* analysis, injunctive relief for trespass or nuisance should be refused in this case in accordance with at least these two criteria:

(a) Trespass is unlikely to recur (*Nalcor* criterion No. ii);

(b) A remedy in damages is available for both trespass and nuisance (*Nalcor* criterion No. iii).

Would Annapolis suffer serious harm if an injunction were granted?

[37] Starfish complains that the judge was wrong to conclude that Annapolis would suffer immediate and serious harm if an injunction were granted. Starfish says that no such evidence was actually led by Annapolis. In reply, Annapolis relies upon comment from this Court in *Maxwell*:

> [64] …No evidence was led by Mosaik before the judge on the expense and inconvenience of trying to complete its construction with an injunction in place. Nor was this emphasized in its original submissions. Nevertheless, on the uncontradicted evidence, it is reasonable to infer considerable cost and inconvenience to Mosaik by the granting of an injunction.

[38] There are many cases in which evidence of harm to a respondent should be led in order to satisfy the court of that eventuality. This is not one of those cases. To borrow another phrase from *Maxwell*, the "forced intimacy of urban development" would likely impose additional costs on parties requiring access to walls inches from a common boundary line.

[39] Moreover, as the judge found, the granting of an injunction would have brought construction to a halt on the NFB building. That would inevitably involve delay and it is not an unreasonable inference that Annapolis would incur greater expense from the delay in both completing and then occupying or leasing its renovated premises.

[40] In the absence of clear material error of fact or law, the judge's discretionary decision in refusing injunctive relief should be accorded deference.

Conclusion

[41] Starfish urges that "a strong precedent should be set in this case to tell developers like Annapolis that if they know that their development will cause a danger or a nuisance to their neighbour's property they need to ensure that their neighbour is protected from these dangers or nuisances prior to the development taking place. To decide otherwise would send the message to developers that it is

always better to ask for forgiveness than permission and leave innocent neighbouring property owners chasing developers for damages".

[42] Of course in this case, mitigation of any potential injury from trespass or nuisance required reasonable cooperation from Starfish which the judge effectively found was unforthcoming.

[43] The Court cannot compel intransigent neighbours to agree on terms that would accommodate both if they will not do this for themselves. But it can withhold equitable relief from those whose intransigence would extract an unreasonable price for reasonable forbearance. Without in any way restricting how a future court may consider another such contest, the criteria described in *Shelfer* and *Nalcor* provide helpful guidance for the exercise of the court's discretion and the parties' conduct, particularly in commercial cases where imposing on the proprietary interests of the parties may be less invasive than, say, a case involving residential property.

[44] An injunction remains the presumptive remedy for nuisance and even more so for the direct interference of trespass. In general, owners need not finance their neighbour's development—put otherwise, their property should not be "expropriated" by the defendant or the Court. Nevertheless, *Shelfer* and *Nalcor* may be helpful in guiding the exercise of discretion and, if appropriate, in crafting injunctive relief which respects the interests of both parties, particularly with the flexibility of terms and conditions that the exercise of equitable discretion facilitates.

[45] Here, the judge applied the spirit, if not the letter, of *Shelfer* and *Nalcor*. Accordingly, I would dismiss the appeal, with costs of $5,000.00 inclusive of disbursements.

Bryson, J.A.

Concurred in:

Fichaud, J.A.

Scanlan, J.A.