C.A. No. 114005

NOVA SCOTIA COURT OF APPEAL
Cite as: Fraser v. Marshall, 1995 NSCA 167

Chipman, Freeman and Pugsley, JJ.A.

BETWEEN:

JOYCE K. FRASER	)
	the appellant appeared
	) in person
	)
	)
	W. Brian Smith
	) for the respondent
Appellant	)
	) Appeal Heard:
- and -	) September 25, 1995
	)
	) Judgment Delivered:
GERALDINE ANNE MARSHALL, sole executrix and Trustee under the Last Will and Testament of John George Stanhope	) October 4, 1995
	)
Respondent	)

THE COURT: Appeal dismissed with costs in the amount of 40% of the trial costs taxed, together with disbursements per reasons for judgment of Chipman, J.A.; Freeman and Pugsley, JJ.A. concurring.

CHIPMAN, J.A.:

This is an appeal from a judgment of the Supreme Court determining an application by the respondent under the **Quieting Titles Act**, R.S.N.S. 1989, c. 382 for a certificate of title to lands on the western side of the Cariboo Mines Road, Upper Musquodoboit, Halifax County. The trial judge awarded the respondent a certificate of title to the land under the **Act**, an injunction restraining the appellant Fraser from entering upon the land and costs.

The land in question is a triangular piece of land on the western side of the Cariboo Mines Road measuring approximately 372' x 194' x 374'. There is a dwelling house located on the southern side of the property. That portion of the property in dispute between the parties consisted of most of the land to the north of the dwelling. The late John Stanhope was the father of the respondent. He purchased the land in question from one Vesta Brown and the respondent claims under a chain of title through her. The appellant who lives nearby claims under a chain of title derived from her father. The issue before the trial judge was the location of the line between the properties described in the two chains of title. The trial judge found that neither party was able to identify the land in dispute as part of the described lands in their respective title deeds. It was obvious from a review of the vague metes and bounds descriptions in the deeds why the parties were unable identify the land in dispute. The issue was therefore resolved by the trial judge on the basis of the evidence of the witnesses on behalf of the parties and the plans and photographs introduced into evidence. Testimony from an expert in photogrammetry and photosensing indicated that the lands in question had been used and fenced since the 1930's in a manner similar to the use of the Brown lands and dissimilar to that of the Fraser lands. This evidence supported the lay witnesses called on behalf of the respondent. The respondent's position was further supported by the evidence of a surveyor who surveyed the property in 1977 and 1985.

After making a detailed review of the testimony of both the expert and lay witnesses, the trial judge accepted the evidence of the respondent's witnesses on points in dispute where it conflicted with that of the appellant's witnesses. He concluded:

> "Upon an examination of the metes and bounds description of the lands in both the Brown and Fraser title documents, due to the vagueness in describing the boundaries, it is impossible to determine which description contains the land in dispute. Evidence of usage and fencing, at least since the 1930's, supports the plaintiff's claim of good documentary title and is inconsistent with the defendant's claim. However, the plaintiff's claim of good title can also be established by the same possessory acts that are consistent with good documentary title."

The trial judge awarded a certificate of title under the **Act** to the respondent, together with an injunction against the appellant from entering the lands or authorizing the entrance on or conspiring to enter upon the lands and costs.

The appellant raises a number of grounds of appeal:

(1) that the judge erred in his findings of fact and failed to consider all of the evidence;

(2) that the judge erred in granting an injunction;

(3) that the judge failed to give adequate assistance to the appellant who represented herself at the trial; and,

(4) that counsel for the respondent has not given prior notice respecting the calling of a witness in rebuttal.

ISSUE ONE:

The determination of the dispute between the parties here was entirely one of fact. The power of this Court in upsetting a conclusion of fact by a trial judge is limited. In **Stein v. The Ship "Kathy K"** (1976), 62 D.L.R. (3d) 1 (S.C.C.), Ritchie, J. made the following often quoted statement:

> "These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which effected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of his function to substitute its assessment of the balance of probability for the findings of the Judge who presided at the trial."

I have re-examined the evidence and considered the arguments of the appellant and the respondent's counsel. The findings of fact were made by the trial judge upon the evidence, both **viva voce** and documentary that was placed before him over a course of a three day trial. The respondent's evidence appears more convincing. The appellant has failed to convince me that there was any error made by the trial judge in the fact finding process.

ISSUE TWO:

Section 3(2) of the **Quieting Titles Act** authorizes the joinder of a claim under the **Act** with any other claim in which the title to or the right to possession of land is in issue. The respondent claimed an injunction in her statement of claim. An injunction is a remedy available and appropriate in cases such as this where parties must be made clearly aware of the significance and impact of the court's decision. It is a discretionary remedy. This Court will not interfere with the exercise of a discretion by a trial judge unless it was shown to be clearly wrong.

ISSUE THREE:

The appellant represented herself at the pre-trial conference and at the trial which commenced two days following. She had previously been represented by counsel and filed a notice of change of solicitor over five months earlier. No transcript of the proceedings at the pre-trial conference was prepared, but it appears that the trial judge, not surprisingly, advised the appellant that she should be represented by counsel. The appellant contended that the trial judge should have given her assistance in bringing witnesses to court. This was not his function. A review of the transcript indicates that the trial judge was sensitive throughout to the fact that the appellant was unrepresented and gave her all of the assistance that she apparently needed. It is apparent from a review of the transcript that the appellant conducted her case well for a person without formal legal training. The appellant conceded on argument before us that she was treated fairly at the trial.

ISSUE FOUR:

The purpose of rebuttal evidence is to provide specific answer to evidence led by the defence. The respondent's rebuttal witness was called to testify with respect to a plan which the appellant introduced into evidence. The rebuttal witness was a person in the employ of the company which had prepared the plan and was called to give evidence respecting the location of a marking on the plan. The respondent was entitled to call such a witness in rebuttal. No objection was made at the time with respect to lack of notice or respecting the admissibility of such rebuttal testimony. The appellant cross-examined the rebuttal witness effectively. In my opinion, the trial judge made no error respecting the conduct of the trial and in particular the calling of the rebuttal testimony.

In my view, the appeal should be dismissed with costs in the amount of 40% of the trial costs taxed, together with disbursements.

J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.

C.A.C. No. 114005

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JOYCE K. FRASER

Appellant

- and -

GERALDINE ANNE MARSHALL, sole Executrix and Trustee under the Last Will and Testament of John George Stanhope

Respondents

REASONS FOR JUDGMENT BY:

CHIPMAN, J.A.