

NOVA SCOTIA COURT OF APPEAL

Citation: McBride v. Carmichael, 2004 NSCA 110

Date: 20040921

Docket: CA 217184

Registry: Halifax

Between:

Daniel McBride and Roddy Weagle

Appellants

v.

John Carmichael

Respondent

Judge(s):

Roscoe, Oland, Fichaud, JJ.A.

Appeal Heard:

September 17, 2004, in Halifax, Nova Scotia

Held:

Leave to appeal granted. Appeal dismissed with costs fixed at \$1000 including disbursements, to be costs in the cause of the main action.

Counsel:

appellants, not represented by counsel
James P. DiPersio, for the respondent

Reasons for judgment:

[1] Daniel McBride and Roddy Weagle seek leave, and if granted, appeal from an interlocutory order and decision of Justice Merlin Nunn of the Supreme Court granting an interim injunction restraining them from cutting wood and otherwise interfering with land, the title to which is the subject of dispute with the respondent.

[2] The respondent commenced an action in trespass claiming to have good title to 107 acres of land in Whitburne, Queens County, upon which the appellants have been clearing roads and cutting wood. The appellants have defended the action and Mr. McBride claims to have good title to a 69-acre parcel within the boundaries of the land claimed by the respondent.

[3] Upon application by the respondent for an interim injunction pending trial, Justice Nunn, applying the usual three prong test, found that there was a serious issue to be tried, there would be irreparable harm to the land if the injunction was not granted, and that the balance of convenience favoured the respondent. He declined to inquire into the specific details of the title dispute, indicating that the merits of each parties' claim was a matter to be determined at the trial.

[4] The appellants in their written and oral argument assert that the Chambers judge erred by not allowing cross examination of the lawyer who searched the respondent's title or his surveyor. They are also concerned that the order did not include the specific direction of Justice Nunn that they could remove and sell the logs already cut, as long as a record of the profits were kept for future accounting. Other issues, more a matter of form of the order than of substance, were not pursued at the hearing of the appeal.

[5] The lawyer who searched the respondent's title did not file an affidavit in support of the application for the injunction. His certificate of title was attached to the respondent's affidavit as an exhibit. The appellants made no request to Justice Nunn to cross examine the respondent or his surveyor.

[6] On an appeal of this nature, involving an interlocutory discretionary order, this Court may only intervene if we are persuaded that wrong principles of law have been applied, there are clearly erroneous findings of fact or if failure to

intervene would give rise to a patent injustice. See: **AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd. et al**, 2003 NSCA 126; [2003] N.S.J. No. 432 (QL).

[7] I am not persuaded of any such error in this case. It is clear from the record that both parties have an arguably valid claim to the lands in question, and that cross examination directed to which chain of title was superior was not appropriate or necessary at the interim injunction stage of the proceeding. With respect to the permission to remove the previously cut timber, counsel for the respondent indicated during the hearing of the appeal that he would either consent to a variation of the Supreme Court order or that the parties would make arrangements to settle this issue between themselves.

[8] I would grant leave to appeal, but dismiss the appeal with costs fixed at \$1000 including disbursements, to be costs in the cause of the main action.

Roscoe, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.