IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Anderson v. Evans 2005NSSC 50

Date: 20050201
Docket: SH 238019
Registry: Halifax

Between:

Cameron Robert Anderson

Plaintiff

v.

Ross Evans

Defendant

Judge:	The Honourable Justice David W. Gruchy
Heard:	January 31, 2005, in Halifax, Nova Scotia
Oral Decision:	February 1, 2005
Written Decision:	March 7, 2005
Counsel:	Cameron Anderson, for the plaintiff Gordon Proudfoot, for the defendant

Gruchy J.: (Orally)

[1] This is an application for interim injunction in an action for permanent injunction commenced on January 4, 2005, which was also the date of this application.

[2] The plaintiff is the owner of a cottage and lot at Martinique Beach in the County of Halifax, Nova Scotia. The defendant owns property abutting upon the plaintiff's lot. The defendant has commenced the construction of a "guest cottage" on a portion of his lot. The plaintiff claims that he has a prescriptive easement for parking upon the area where the defendant is constructing his building and has commenced this action to prevent the continuation of the construction.

[3] Some years ago, shortly after the defendant had acquired his property, the plaintiff commenced a Quieting Titles application concerning the land of the defendant and other lands. Eventually agreements were struck and executed among the parties of that application whereby conveyances and undertakings were exchanged and the plaintiff abandoned and discontinued that application. The plaintiff has taken the position, however, that while he has abandoned his claim of ownership over the lot in question herein, he did not abandon his claim for a prescriptive parking easement.

[4] The parties have filed numerous affidavits with respect to this application. Much of that affidavit evidence concerns the merits of the action, as opposed to this application, but which, arguably, might be considered with respect to the apparent strength or weakness of the plaintiff's ultimate case.

[5] I keep very much in mind that the granting of an interim injunction entails a drastic remedy given at the risk of infringing upon the rights of a defendant before trial, and I quote from *Sharpe on Interlocutory Injunction*s *and Specific Performance*:

> An Ontario Divisional Court judgment also emphasized the drastic nature of injunctive relief, the court agreed with the view expressed by Saunders, J.,
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> ...granting leave to appeal:
>
> > Whether an injunction is termed or interlocutory, the effect is the same. The Court is exercising its civil power to restrain the activities of citizens. The injunction is an extraordinary remedy and should only be granted in accordance with settled principles. It follows that those principles should be adhered to even if the

> injunction is for a relatively short time, although time may have an impact on the weight of the various factors.

[6] Justice Sharpe continued in his text:

> The court went on to discuss the element of urgency observing that if the urgency of the situation is such that all that can be put before the motions court judge is conflicting affidavits, that can be considered in relation to assessing the strength of the plaintiff's case. However, the court added the following cautionary note:
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> > One might well question the urgency of some situations and whether they are to some degree self-created and imposed for tactical reasons. It is appropriate for a motions court judge to take this into consideration. It should be kept in mind that the plaintiff chooses the time of launching the lawsuit and any attendant motion for injunctive relief. Urgency will of course affect the nature and extent of material (of both sides); but the material should be scrutinized to an appropriate degree to establish whether the injunction - even on an interim basis should issue.

[7] At the commencement of the hearing of this application, I identified to the plaintiff numerous paragraphs in his various affidavits and supplementary affidavits, which I found objectionable pursuant to *Civil Procedure Rule 38.02* and as addressed by various cases of this Court, including especially *Waverley (Village Commissionaires) et al. v. Nova Scotia Minister of Municipal Affairs* (1993), 123 N.S.R. (2d) 46, and others. Upon hearing consent of the plaintiff the various paragraphs to which I had referred were struck.

[8] For the purpose of this decision I will not deal in depth with what may well be material issues at the eventual trial of this matter. I am mindful that it is not advisable to make findings of fact or of credibility based solely upon affidavit evidence. For this reason and others I will take care not to do so.

[9] As this is an application for interim injunction the parties, of course, have referred specifically to *R.J.R. MacDonald Inc. v. Canada,* [1994] 1 S.C.R. 311 and the various tests for such a remedy as enunciated by the Supreme Court of Canada. Both parties submitted that *R.J.R. MacDonald* prescribes a three step process:

1. Is there a serious issue to be tried?

2. Will there be irreparable harm occasioned to the plaintiff in the absence of an interim injunction?

3. What is the balance of convenience as between the parties and as may be affected by an interim injunction?

[10] I prefer a five step process which I have gleaned from *R.J.R. MacDonald,* and *American Cyanamid,* [1975] A.C. 396 and various learned papers to which I have referred. They are as set out in *American Cyanamid* and as referred to by Sharpe J., in his test *"Injunctions and Specific Performance"*. Mr. Justice Sharpe set forth the text as follows and referred to a decision of Lord Diplock in *American Cyanamid.* He said:

> Lord Diplock went on to set out a step-by-step formula as the appropriate way to determine whether an interlocutory injunction should be granted. More detailed consideration of each step follows under specific headings but it will facilitate discussion of the strength of case factor to summarize the formula here. First, as indicated, the court is to ask whether the plaintiff has presented a case which is not frivolous or vexatious but which presents a serious case to be tried. Second, will damages provide the plaintiff with an adequate remedy? If so, no injunction should be granted. If not, third, would the plaintiff's undertaking in damages provide adequate compensation to the defendant, should he or she succeed at trial, for loss sustained because of the interlocutory injunction? If so, then there is a strong case for an interlocutory injunction. Fourth, where there is doubt as to the adequacy of the respective remedies in damages, the case turns on the balance of convenience. Fifth, at this point, according to Lord Diplock, weight may be placed on the court's prediction of ultimate success, but only in certain cases.

[11] Sharpe then quoted from Lord Diplock and continued:

> In other words, the strength of case consideration of the traditional approach is stood on its head. Under the *Cyanamid* approach, the strength of the case comes into play, initially, only to the extent of determining that the plaintiff's claim is not frivolous or vexatious. The core test to be applied is balance of convenience. It is only where the court cannot properly assess balance of convenience that the relative strength of the parties' cases may be taken into account and then, only where one side of the case is clearly stronger.

[12] I will now address each of these various steps.

1. Is there a serious case to be tried and which is not frivolous or vexatious?

[13] It appears to me that there are various issues to be tried and which I would not consider frivolous or vexatious. By this expression I mean something close to a "reasonable prospect of success." By way of examples only of the issues to be addressed at trial, the plaintiff has produced affidavit evidence to the effect that for many years an area in what is now the

defendant's property was used for parking. At this point in the proceeding neither the time nor quality, nor quantity of that parking has been clearly identified, but which questions may well be issues at trial. The plaintiff claims that he and/or his predecessors in title had open, continuous and notorious possession of a part of a defendant's property for a period in excess of 20 years. The defendant disputes this claim and there are conflicting affidavits with respect to that subject.

[14] The defendant claims that the settlement of the Quieting Titles application taken by the plaintiff and the abandonment and discontinuance of that action, together with the resulting agreements as between the parties raises, in effect, the defence of an estoppel or what the defendant characterizes as an abuse of process and which will require evidence at the time of trial.

[15] In addressing this particular step I have kept in mind the Supreme Court's description as follows:

> What then are the indicators of a "serious question to be tried"?
>
> There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The Judge on the application must make a preliminary assessment on the merits of the case.... once satisfied that the application is neither vexatious nor frivolous the motions judge should proceed to consider the second and third tests even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

2. Will damages, in the event that they are found to result from the defendant's activities, provide the plaintiff with an adequate remedy?

[16] This is the well known irreparable harm consideration. The Supreme Court of Canada described this consideration as follows:

> At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
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> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which can either cannot be quantified in the monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss

> of natural resources will be the result when a challenged activity is not enjoined. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be relevant consideration.

[17] It is clear that I should avoid taking a narrow view of irreparable harm. But the Courts have also stressed that evidence of irreparable harm must be clear and not speculative. (See *Whitecourt Roman Catholic Separate School District # 94 v. Alberta* (1995), 30 Alt. L.R. (3d) 225 and *Syntex Inc. v. Novapharm Limited* (1991), 36 C.P.R. (3d) 129.

[18] On the basis of the plaintiff's evidence alone, I conclude that at worst if the defendant deprives the plaintiff of his alleged prescriptive right to parking, the result would be inconvenience to him but not irreparable harm. Without deciding the issue, there appears to be adequate room around the plaintiff's own or available property on which he may park vehicles. Should the plaintiff be successful in his claim of prescriptive parking easement he may arguably have suffered an inconvenience, but which could be quantified in monetary terms or which could be cured by an Order for the defendant to remove an offending structure.

[19] I also conclude for the same reasons that there is no urgency involved in this particular application which is an essential requirement for an interim injunction. A mere potential inconvenience to the plaintiff does not present urgency.

3. Will the plaintiff's undertaking with respect to damages which may be suffered by the defendant by the granting of the interim injunction provide adequate compensation to the defendant in the event of the defendant's success at trial?

[20] In the text, *Injunctions and Specific Performance*, at para. 2.470, the learned author said:

> Concomitant with the question of irreparable harm is the requirement of the plaintiff's undertaking in damages. It is well established that, as a condition of obtaining an interlocutory injunction, the plaintiff must give an undertaking to pay to the defendant any damages to the defendant that the defendant sustains by reason of the injunction, should the plaintiff fail in the ultimate result. The rationale for the undertaking is to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined. In the event the defendant succeeds at trial, the interlocutory injunction will have prevented the defendant from acting in accordance with his or her legal rights.

> The undertaking in damages shifts all or part of that risk to the party who is asking for a pre-trial remedy, the plaintiff.

In the case before me the plaintiff has not offered an undertaking in damages. (For the sake of brevity I will not cite the authorities relied upon by Sharpe in his text.) The absence of the plaintiff's undertaking, however, is not a deciding factor in the outcome of his application.

4. When the foregoing questions result in a doubt as to the adequacy of the various remedies, then I should focus on the question of the balance of convenience as between the parties.

[21] When the foregoing questions result in a doubt as to the adequacy of the various remedies, then what is the balance of convenience as between the parties? It is necessary to put this factor into context by reference to the predecessor of *R.J.R. MacDonald - American Cyanamid Company v. Ethicon Limited*, [1975] A.C. 396. In the latter case Lord Diplock said, "It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises."

[22] As I have concluded that there will not be irreparable harm occasioned to the plaintiff in the absence of an interim injunction, I will not dwell on the matter of a balance of convenience. It is clear that the matter of irreparable harm and balance of convenience are related. Aside from monetary loss or gain to the parties, it is necessary to consider the impact upon them resulting from the granting or the withholding of an injunction. The injunction requested herein by the plaintiff would deprive the defendant of the use of his property. The refusal to grant an injunction would cause the plaintiff, arguably, if he is successful, an unwarranted inconvenience. Mr. Justice Sharpe posed the question arising as follows, "Which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits?" I conclude that the possible deprivation of the defendant's enjoyment of his property outweighs the potential inconvenience to the plaintiff.

5. Only if necessary, I may consider and give a prediction of ultimate success in the action.

[23] Prediction of ultimate success. In view of my conclusions as expressed above, I decline to express any view as to the strengths and weaknesses of the parties' cases.

[24] During submissions the plaintiff, in effect, urged that I maintain the status quo of the parties until trial. But as Mr. Justice Sharpe said in his text at para. 2.550 (8), "Properly understood, the phrase merely restates the basic premise of granting an interlocutory injunction, namely, that, the plaintiff must demonstrate that, unless an injunction is granted, his or her rights will be nullified or impaired by the time of trial." I do not perceive that such will be the case. The property will still exist and the defendant will have voluntarily undertaken the continued risk of constructing a building despite an outstanding injunction application.

[25] This application for an interim injunction is dismissed.

[26] Costs will be in the amount of two thousand dollars ($2,000.00) plus any disbursements which may be proved and reasonable disbursements.

[27] Finally, I am going to make a remark to you, irrespective of the strengths and weaknesses of the case, it appears to me that you are on the road to destroying the economic value of properties if you continue this way. I would think that between reasonable people you can get together and arrange for a parking lot that will accommodate all the parties. I have enough information now before me to believe that if people are reasonable, if parties are reasonable they will come to a reasonable conclusion.

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Gruchy, J.