IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Silver Sands Realty Ltd. v. Nova Scotia (Attorney General), 2007 NSSC 292

Date: 20071019
Docket: S.H. 261348
Registry: Halifax

Between:

Silver Sands Realty Ltd.

Plaintiff

v.

The Attorney General for the Province of Nova Scotia
The registrar General of Land Titles and Service Nova Scotia and Municipal Relations

Defendants

Decision on Admission of Walker Opinions

Judge:	The Honourable Justice Gerald R P Moir
Heard:	16, 17, 18, 19, and 20 April 2007 at Halifax
Counsel:	Mr. James D MacNeil and Mr. Robert L Miedema for the plaintiff Mr. Alexander Cameron, for the defendants

Moir, J.:

[1] For the most part, the following was delivered orally at trial. In this writing, the oral reasons are edited, and some additional rulings are given at the end.

[2] Silver Sands Realty Limited is suing the Attorney General and the Registrar General of Land Titles for various remedies, including a declaration that Silver Sands Realty Limited owns Cow Bay Lake, and damages against the Registrar for issuing a stop order against bringing subdivided portions of the lake under the new land title system.

[3] The Attorney General and the Registrar wish to offer the opinions of an experienced and respected lawyer practising in the area of real property law, Ms. Catherine Walker, QC.

[4] Ms. Walker has prepared an abstract going back to the crown grant, a booklet abstracting plans, and a booklet of conveyancing documents. She has also prepared an extensive report on a narrative helpful to following her abstract and her statement of opinions. No objection is made to the abstract or the narrative. The objection is to the admissibility of the statements of opinion.

[5] The main opinions are expressed as follows, in the beginning of the report:

> 1. Silver Sands does not have an uninterrupted chain of title from a Crown Grant to its Cow Bay Lake Properties and described herein as Parcel SS-1;

2. The relevant crown grant did not include the land covered with water known as Cow Bay Lake; and

3. Title to Parcel SS-1 is not marketable, at least to the extent that it purports to include land covered with water known as Cow Bay Lake, and that strip of land 16.5 feet in width and described in Book 6666 at Page 493 as being approximately 7200 feet in length.

[6] The opinions are reformulated at the end of the narrative, in which Ms. Walker states:

> The area of land described in the Enoch Bean Crown grant is inconsistent with a conclusion that the bed under Cow Bay, and therefore Cow Bay Lake, is included [The Enoch Bean Crown grant is the original crown grant in issue in this case];
>
> That there is a gap in title from the Crown grant to the present owner, from 1790 - 1821;
>
> There is no title of Silver Sands in the strip of land described as being 16.5 feet in width and 7200 feet in length;
>
> There is no claim filed at the Registry of Deeds for title based on possession of Cow Bay Lake;
>
> The body of water known as Cow Bay Lake is vested in Her Majesty in the right of the Province of Nova Scotia.

[7] Those are the main opinions expressed and offered by the province as evidence in this case. As I said, there are also opinions expressed through the course of the narrative and it seems to me fairly easy to tell in the narrative when it is dealing with an opinion and when one is dealing with an explanation helpful for understanding the abstract.

[8] The plaintiffs' objections engage the necessity and relevance principles expressed in *R.* v. *Mohan*, [1994] 2 S.C.R. 9. In my opinion, the objection is rightly made on the basis of the necessity principle, and I do not need to refer to relevance.

[9] In *Lunenburg Industrial Foundry and Engineering Ltd.* v. *Commercial Union Assurance Company of Canada*, [2004] N.S.J. 525 (SC), Justice Warner succinctly traced modern developments on the exceptional admission of expert opinions as evidence. He stated this about necessity:

> [14] The second Mohan prerequisite replaced the earlier standard of helpfulness" established by *R.* v. *Abbey* [1982] 2 S.C.R. 24, with a requirement of necessity. At paragraph 22, Sopinka, J., said:
>
> > The word helpful" is not quite appropriate and sets too low a standard ... What is required is that the opinion be necessary in the sense that it provide information which is likely to be outside the experience and knowledge of a judge or jury ... the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature ... [t]he subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge".
>
> [15] These statements were put in the form of questions by the Ontario Court of Appeal in *R.* v. *K.(A.), (supra)*, at paragraph 92, as follows:
>
> > (a) Will the ... evidence enable the [court] to appreciate the technicalities of a matter in issue?
> >
> > (b) Will it provide information which is likely to be outside the experience of the [court]?

> (c) Is the [court] unlikely to form the correct judgment about a matter in issue if unassisted by the expert opinion evidence?

The Alberta Court of Appeal in *R.* v. *R.A.N.* (2001) 277 A.R. 288 at paragraph 17 made the same point.

> [16] The necessity criteria has been extensively canvassed by the Supreme Court of Canada again in *R.* v. *D.D.* [2000] 2 S.C.R. 275 by both the minority and majority and is succinctly summarized in paragraph 57 of the majority decision which reads in part as follows:
>
> > ... When should we place the legal system and the truth at such risks by allowing expert evidence? Only when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. As *Mohan* tells us, it is not enough that the expert evidence be helpful before we will be prepared to run these risks.

The last reference was adopted by the majority from D. Paciocco Expert Evidence: Where Are We Now? Where are we going?" (1998), pp. 16-17. The risk to which Professor Paciocco is the risk of attornment" to expert opinion. He also, in the adopted passage, referred to another danger of expert evidence: the distracting and time-consuming thing that expert testimony can become".

[10] Justice Warner also commented on the rehabilitation of the ultimate issue" principle as follows:

> [26] The Plaintiffs also objected to the admissibility of Mr. Wolfe's opinion because it deals with the ultimate issue" before the Court.

> [27] The Defendant cites paragraph 25 of *Mohan*, paragraph 53 in *R.* v. *D.D.*, and *R.* v. *Burns* [1994] 1 S.C.R. 601, to establish that the ultimate issue" rule no longer exists.
>
> [28] While the court does not accept that *R.* v. *Burns* supports the Defendant's position (McLaughlin J. said expert evidence on matters of fact should not be included"), the above cases, *R.* v. *J.(J.-L.)*, [2000] 2 S.C.R. 600 at paragraphs 37 and 56, and paragraphs 12.70-12.75 in *The Law of Evidence in Canada*, state that courts now recognize that it is not an absolute exclusionary rule barring testimony, but rather a rule that the closer the testimony gets to the ultimate issue, the stricter the court will apply the requirements of relevance and necessity before admitting it.

[11] In my assessment, each opinion expressed by Ms. Walker is something a judge or jury may formulate without the necessity of expert assistance. Ms. Walker's opinions would, indeed, assist with the appreciation of technicalities and provide information outside the experience of the trier of fact, is answer to the first two questions suggested by the Ontario Court of Appeal. However, it is the third question that comes closest to the heart of the necessity principle: Is the [court] unlikely to form the correct judgment about a matter in issue if unassisted by the expert opinion evidence?"

[12] The question of an uninterrupted chain of title can be answered by careful study of the abstract and narrative. No doubt, Ms. Walker can answer this question with greater ease, but there lies the risk for which the rule excluding opinion exists. The responsibility lies with a judge or jury to answer the question by finding the facts. (Also, this is an ultimate issue", and we must especially guard against the risk of attornment.)

[13] Whether the grant includes the lake is a question to be answered by interpreting the instrument in its full context. A judge or jury can do that without assistance. Again, not with the ease or depth of knowledge of an expert conveyancer, but in accordance with the responsibility borne by the trier of fact. (This, too, is an ultimate issue".)

[14] And the same conclusion applies to the marketability of the title claimed over Cow Bay Lake, as well as the reformulated opinions at the end of Ms. Walker's report. Unlike Ms. Walker, a judge or jury needs instruction on the governing law and will find the facts without the facility of the expert. However, also unlike Ms. Walker, the judge or jury have the responsibility to find the facts. They must not be assisted by an expert, unless the assistance is necessary.

[15] Mr. Cameron referred me to *Energy Probe* v. *Canada (Attorney-General)* (1989), 58 D.L.R. (4th) 513 (OCA) and *Hall* v. *Bennett Estate* (2003), 227 D.L.R. (4th) 263 (OCA). These cases show that lawyers are sometimes called as experts on issues that involve questions of law. It does not appear that the issue of admissibility was decided in either.

[16] I will not preclude Mr. Cameron from educing evidence from Ms. Walker as a fact witness concerning what a property practitioner does to assure

marketable title to the Registrar General, and that may include any experience she has had with the need to go beyond a forty year search. It seems to me that that evidence can come in as the evidence of a fact witness who has experienced numerous property transactions and, subject to my hearing further objections at the time the evidence is offered, my inclination would be to admit that as fact evidence, not as expert opinion evidence.

[17] However, all opinions including those expressed in the narrative are excluded.

[18] As a result of the foregoing ruling, which was made during the trial, Ms. Walker's opinion was redacted to remove parts ruled to be inadmissible. The parties were able to agree on all the redactions except for a few. These were submitted for ruling when the main decision is released.

[19] At page four, Ms. Walker stated There is evidence that Cow Bay Lake was a freshwater lake." She provides a reference to a Crown Grant. I agree with counsel for the plaintiff's submission that this is unnecessary to a narrative explaining the abstract. I have ignored the statement, but not the instrument. However, there is far weightier evidence on the nature of Cow Bay Lake.

[20] At page five, Ms. Walker refers to a 1834 plan as showing that, after a gap in title, a person under whom Silver Sands takes title ***claims*** to own 1356

acres". The objection is to the italicized and bold claims", which diminishes the person's possible ownership. If a narrative is to accompany an abstract prepared in accordance with *Ratto* v. *Rainbow Realty Ltd.*, [1984] N.S.J. 501 (SC) the narrative should be neutral. Ms. Walker also says this is the only plan evidencing the claim". This is objected to on the basis that there may be other plans outside Ms. Walker's knowledge. One must take an abstract as including all documents relevant to title. The absence of a reference any other plan is sufficient. Sometimes, it may be helpful to note the absence in a narrative. However, I decided that proof of a mere gap in title does not detract from the plaintiff's claim to rescind the stop order, as the order was made on the Crown's claim to ownership. So, these references became irrelevant to my conclusion.

[21] At page six, Ms. Walker points out that a reference in a description to possession by a predecessor is not corroborated by further statements on the records of the Registry of Deeds. This may be an example of a situation where a narrative can supplement the silence of an abstract. However, it played no part in the decision I made.

[22] At page 7, Ms. Walker discusses an application made in 1919 by a predecessor in title of Silver Sands, Mr. Stanford. The application was for

permission from the government to use a watercourse, Cow Bay River. The application was supported by documents upon which Mr. Stanford founded his chain of title. Ms. Walker disagrees with the asserted chain, and states her reasons at some length. Justice Hood determined, as a preliminary question of law, that the application did not give rise to an issue estoppel: *Silver Sands Realty Limited* v. *Nova Scotia (Attorney General)*, [2006] N.S.J. 534 (SC). I have not considered the chain of title assertions of Mr. Stanford as carrying any weight. Further, the discussion is not necessary for understanding Ms. Walker's abstract.

[23] Ms. Walker's abstract and redacted narrative were most helpful and I am grateful for the care she devoted to them.

J.