SUPREME COURT OF NOVA SCOTIA
Citation: Prest Bros. Ltd. v. Myers, 2011 NSSC 175

Date: 20110505
Docket: Hfx. No. 270674
Registry: Halifax

Between:

Prest Bros. Limited, a body corporate

Plaintiff

-and-

Gary Bruce Myers

Defendant

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: March 21-23, 2011 at Halifax, Nova Scotia

Written Decision: May 5, 2011

Counsel:
Counsel for the Plaintiff - David Cameron
Counsel for the Defendant - Brian Casey

Wright, J.

INTRODUCTION

[1] This action involves a protracted land title dispute between the plaintiff Prest Bros. Limited and the defendant Gary Myers over a 25 acre tract of remote woodland property located near Head of Jeddore, Halifax Regional Municipality.

[2] The disputed lands consist of two contiguous lots straddling both sides of the lower end of the Salmon River (the “river”) where it flows from the south end of Salmon River Lake (formerly known as Jeddore Lake and herein referred to as (the “lake”) to an inlet from the sea known as the Pascal Branch of Head of Jeddore Harbour.

[3] The lot lying on the west side of the river consists of 15 acres while the lot lying on the east side of the river consists of 10 acres. It is common ground between the parties that both these lots were part of the Crown grant to Colin Mitchell dated November 20, 1824 as shown on Crown Grant Sheet No. 75. The 15 acre lot lying on the west side of the river is therein described as Lot 2 (hereinafter referred to as “Lot 2") while the 10 acre lot lying on the east side of the river is therein described as Lot 3 (hereinafter referred to as “Lot 3").

[4] Lot 1 of that Crown grant, originally consisting of 225 acres, lies distantly at the north end of the lake (hereinafter referred to as “the upper lot”). The land title dispute between the parties does not extend to the upper lot but it does form part of the surrounding circumstances.

[5] It should be noted at the outset that the primary remedy sought by the plaintiff in this action is a Declaration that it is the owner of Lots 2 and 3 as against the defendant only. This is not a Quieting of Title action where a party seeks a Certificate of Title from the court which binds everyone. Rather, the plaintiff seeks only a Declaration of rights and consequential remedies as between it and the defendant. Essentially, the consequential remedies sought are a mandatory injunction requiring the defendant to remove a trailer and related personal property which the defendant placed on Lot 2 in or about 2002 (and restraining the defendant from continuing to trespass on Lots 2 and 3), along with an order for general and special damages.

ISSUES

[6] Against this background, several issues arise which are framed in the plaintiff's pre-trial brief as follows:

(1) Has the plaintiff established a chain of paper title to Lots 2 and 3, thereby establishing itself as the true owner?

(2) Can the defendant establish title through adverse possession of the property?

(3) Is the plaintiff entitled to a Declaration of its rights as against the defendant only?

(4) To what remedies is the plaintiff entitled?

ISSUE #1 - Paper Title

[7] There is no dispute over the back title to Lots 2 and 3. It devolved through a series of conveyances, after the Crown Grant, to Peter Phillip Myers, the great-great-grandfather of the defendant, in the late 1870's. Both lots were still owned by Peter Myers at the time of his death which occurred sometime between 1919

(when his Will was signed) and 1921 (when his Will was recorded in the Registry of Deeds). It is from that point on that the chain of title to Lots 2 and 3 is in dispute, since neither lot was specifically mentioned in the Will.

[8] It is common ground between the parties that Peter Myers had eight children, seven of whom survived him. The surviving children were James Myers, Charles Myers, Isabelle Day, Orlando Myers, Elizabeth Bayers, Ellen Dooks and Bertha Williams. The testator was pre-deceased by a son William Myers who left him surviving at least two children, Chester Myers and Marshall Myers.

[9] The absence of a specific devise of Lots 2 and 3 in this Will raises a thorny issue for determination by the court. The position of the plaintiff is that title to Lots 2 and 3 passed under the residue clause of the Will to son Charles when the Will is properly interpreted in context and the presumption against intestacy applied. The position of the defendant is that title to Lots 2 and 3 thereby devolved to the heirs of Peter Myers as a partial intestacy, pursuant to the provisions of the *Descent of Property Act* then in effect. The defendant further argues that subsequent deeds from various heirs of Peter Myers upon which the plaintiff relies for its chain of title (which will be reviewed later in this decision) contain legal descriptions which are so vague and uncertain as to be ineffective to convey title to Lots 2 and 3 along the way.

[10] To resolve this issue, a close examination of the provisions of the Will must be made in trying to ascertain the meaning intended by the testator in the residue clause, considering all the provisions of the Will in the light of the surrounding

circumstances.

[11] The drafter of the Will is unknown but it appears to be homemade. It begins by devising five specified pieces of real property. The first is that of the testator's homestead to his son Charles subject to a life interest in favour of his wife Margaret, with the direction that Charles shall provide for her medical attendance when required and maintain her comfortably as the testator did during his lifetime.
[12] The Will then goes on to devise four other specific pieces of real property (none of which relate to Lots 2 and 3) to sons Orlando and James and two grandsons of son William.

[13] The Will then contains several bequests of specific shares of stock in named corporations to various of his children (some consisting of one share only), followed by cash bequests of $1,000 to son James and to wife Margaret.

[14] The last bequest in the Will is that of all of the testator's farming implements to sons Orlando, Charles and James.

[15] Direction is then given in the Will to executors Charles and Orlando to pay all legacies to the named beneficiaries within three months of the testator's death. Son Charles is then directed to pay all expenses such as funeral expenses, headstone and recording of the Will.

[16] Immediately thereafter, at the end of the Will, the final words of disposition

read as follows:

> And after all paid any money left shall go to my said son Charles.

[17] The question is how this final clause should be interpreted by the court, having regard to the overall context of the Will and the presumption against intestacy. Should it be construed on a narrow interpretation of "money" or construed more flexibly as a residue clause intended to gift all remaining assets of the estate to son Charles, including Lots 2 and 3?

[18] The task of the court, as earlier touched upon, is to ascertain the meaning intended by the testator considering all the provisions of the Will in light of all the surrounding circumstances. In other words, what are the expressed intentions of the testator?

[19] As a general principle, the testator's intention is to be gathered from a consideration of the Will as a whole and not solely from the words used. The ordinary meaning rule and other rules of construction are entirely subservient to the context of the Will (see *Feeney's Canadian Law of Wills*, 4th ed. (2000) at section 10.60).

[20] When construing a Will, the court must look at the Will itself as the primary evidence of intention. Parenthetically, in a situation where the testator's intention cannot be ascertained from the Will itself, then evidence of the surrounding circumstances known to him when he made the Will is admissible (there being no such evidence in this case).

[21] Although a common starting point is consideration of the ordinary meaning of the words used in a Will, it is well recognized that a different meaning may result from the context or other admissible aids to construction. Thus, the ordinary meaning of a word used in a Will must be modified by the context of the Will as a whole, read in the light of the circumstances known to the testator at the time the Will was made. The meaning of a particular word is not what the law says it is, but rather is the testator's subjective meaning (see *Feeney*, *supra*, at section 11.14).

[22] Another operating principle in the interpretation of Wills is the presumption against an intestacy. If a Will is capable of two constructions, one of which will result in the disposal of the whole estate, and the other of which will result in a partial intestacy, the courts will prefer the former. This is so unless it clearly appears that the testator intended part of his or her estate to go on an intestacy (see *Feeney*, *supra*, at section 10.74).

[23] With that summary of the general principles of interpretation at play here, I now turn to the judicial approach to the interpretation of the word "money" which is at issue in the present case.

[24] The common law on the interpretation of the word "money" as used in testamentary instruments has changed over the years. Up until 1943, the word "money" was generally given a more narrow and technical meaning that merely encompassed cash and bank accounts.

[25] That all changed, however, in 1943 with the seminal decision of the House

of Lords in *Perrin v. Morgan*, [1943] A.C. 399 where the court set the compass for a more liberal interpretative approach. The court emphasized that the word "money" is not always employed in the same sense and should not be given a rigid and technical meaning. Rather, the court emphasized that the fundamental rule in construing the language of a Will is to put on the words used the meaning which, having regard to the terms of the Will, the testator intended. The court then went on to say (at p. 407) that "The word may be used to cover the whole of an individual's personal property - sometimes, indeed, all of a person's property, whether real or personal".

[26] The *Perrin* case has since been consistently followed by Canadian courts, including our own (see, for example, *Martel v. Samson* (1966) 52 M.P.R. 272). Indeed, the observation is made in *Feeney, supra*, at section 10.7 that there has been a growing trend in Canada to apply a more liberal approach to determining the intentions of the will-maker.

[27] Although relatively uncommon, I have been referred by counsel for the plaintiff to two case examples where the word "money" used in a Will was liberally interpreted to include real estate. Those cases are *Re Price*, 1954 CarswellOnt 398 and *Re Brooks Estate*, 1969 CarswellSask 25. The latter case, in turn, relied on an earlier decision in that same court which was reviewed as follows (at para. 34):

> On the other hand in In *Re Ruller Estate* (1945) 3 W.W.R. 133, it was stated that the word "money" in a will may, in a proper case, include realty. The existence of a will, especially when it was prepared by the testator himself or a layman, is accepted by the Courts as indicative of an intention on the part of the testator to dispose of all his

> property and they will endeavour to so construe the language used, in the light of the context, as to give effect to that intention. The Courts are adverse to finding a partial intestacy unless constrained so to do. The words used in that case "any monies left after paying my debts" were found to be wide enough to include land and it was the testator's intention to dispose of all that was left.

[28] In reaching the conclusion that the testator, in disposing of “half of my money”, meant one half of all his properties (including realty), the court in *Brooks* again applied the fundamental principle of interpretation stated as follows (at para. 37):

> In the case of a will, if the intention is shown, the mode of expression of that intention, and the form and language of the will, are unimportant. The only principle of construction applicable without qualification to all wills, which overrides every other rule of construction, is that the intention of the testator is collected from a consideration of the whole will taken in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that intention. *Vide: Halsbury*, 3rd Edition, Volume 39, p. 973-975.

[29] There are, as one would expect, other decided cases in which the testamentary use of the word “money” has been interpreted as not including real property owned by the testator. It is not particularly useful to extensively canvass the case examples, however, because as the courts have consistently recognized, the context of the Will in its entirety and in light of the particular circumstances of the case are of far greater assistance in ascertaining the testator’s intention than looking at other case precedents.

[30] Bearing the foregoing principles in mind, I now return to the interpretation to be made of the Will of Peter Philip Myers.

[31] At first blush, it may appear to be counter-intuitive to extend the scope of the word “money”, given its meaning in the ordinary sense, to include all the

remaining assets of the estate, including Lots 2 and 3. However, in my view, the contents of the Will taken in its full context evidence a strong intention by the testator to dispose of all of the property which he owned at the time of his death and a strong intention to make proper arrangements for the maintenance and comfort of his wife after his demise.

[32] The court has no evidence before it as to what other assets might have formed the residue of the estate. What we do know, however, is that the testator left to his wife only a life interest in their home and a cash bequest of $1,000. Coupled with that arrangement, however, was the charge he imposed on his son Charles to provide for her medical attendance as required and to maintain her comfortably as he had done during his own lifetime.

[33] Given the overall scheme of the Will, including the charge imposed upon his son Charles, I conclude that the phrase “any money left shall go to my said son Charles” was intended to operate as a residue clause. Everything points to an intention on the part of the testator to dispose of the residue of his estate. In my view, therefore, it would be inconsistent with that intention to construe the Will as creating a partial intestacy. Rather, it would be more consistent to construe the Will as creating a residue clause under which any other property the testator owned at the time of his death was to pass to his son Charles to better enable him to discharge the responsibility of maintaining the testator’s wife during her lifetime as directed.

[34] I conclude, therefore, that this is a proper case for the application of the

presumption against intestacy. Once the court is satisfied, having regard to the terms and the context of the Will, that the testator intended to dispose of all estate assets, there should not be an intestacy if there is any other reasonable alternative (see, for example, *Canada Permanent Trust Co. v. Murphy* 1976 CarswellNS 288).

[35] Here, in my view, there does exist another reasonable alternative by interpreting the word "money" as being embodied in a residue clause which should be liberally interpreted to include all remaining assets of the estate to give effect to the gathered intention of the testator.

[36] With that liberal interpretation of the subject clause of the Will, I find that title to Lots 2 and 3 was thereby devised to Charles Myers as of the date of his father's death which occurred sometime between 1919 and 1921.

[37] This legal outcome was obviously not one contemplated by Charles Myers at the time. Thus, several years later, in 1936, he obtained two quit claim deeds from some of his siblings.

[38] The first was a deed from his brother James which purported to convey all of the grantor's interest in lands "being part of the Estate of Peter Myers of the Head of Jeddore and situate, lying and being at or near the Salmon River Waters at the Head of Jeddore Harbour".

[39] The second quit claim deed purported to convey the interest of the grantors Bertha Williams and Isabella Day (sisters of Charles) to lands "situate, lying and

being at or near the Salmon River Waters at the Head of Jeddore". It should be noted that the grantors initially listed in this deed included brother Orlando and sisters Elizabeth Bayers and Ellen Dooks. However, the former two names were scratched out and none of those three siblings were signatories to the deed. Ellen Dooks did, however, provide a written receipt to her brother Charles in 1944 acknowledging payment of twenty-five dollars for all her interest in lands at Salmon River (Bertha Williams and Isabelle Day gave similar receipts in 1936).

[40] There were no further title instruments of relevance until 1945 when Charles Myers gave a warranty deed to his sons Sandy E. Myers and Peter J. Myers as grantees. That deed was prepared on a printed form and contained the usual operative words of conveyance of that era for the described lands.

[41] The handwritten legal description in the deed includes four lots. It is common ground between the parties that the first two described lots are extraneous to this proceeding. I will therefore reproduce the legal description omitting any reference to those two lots. It reads as follows:

> ALL those lots pieces and parcels of Land and Premises situate lying at Salmon River Waters Five Shares owned by the Grantor Charles D. Myers and more particularly described as follows ... Lot No. 3 - near Salmon River Lake containing Fifteen acres more or less - Bounded on the (blank) by lands owned by Webber's - Lot No. 4 on the East side of said Salmon River Bounded on South by Crown lands containing Fifteen 15 acres more or less - said lands being part of lands being owned by the late Peter Myers. (emphasis mine)

[42] The footing for this reference to five shares is easily understood. I infer that Charles Myers then believed that he held title to only five out of eight shares of the subject lands, namely, that derived by the quit claim deeds from siblings James,

Bertha and Isabella and that derived through the receipt from his sister Ellen (in addition to his own interest). I have earlier concluded in this decision, however, that the residue clause contained in the Will of the late Philip Myers should be interpreted as including Lots 2 and 3 whereby title to those lots passed to Charles in its entirety.

[43] How then should this 1945 deed from Charles Myers to his sons Sandy and Peter Myers be interpreted by the court as to the extent of the title conveyed?

[44] It is argued by counsel for the plaintiff that the court ought to give effect to the gathered intention of the maker of a deed and that considering all the surrounding circumstances here, it was the intention of Charles Myers to convey to his sons the entirety of whatever interest he had in the lands described in the deed. The argument continues that if the court were to find that Charles Myers acquired full title to Lots 2 and 3 under the residue clause of his father's Will (and the court has so found), then the 1945 deed should be interpreted as serving to convey that full title to sons Sandy and Peter Myers.

[45] I cannot accede to that argument. The question is not what the grantor may have intended to do by signing the deed, but what the meaning is of the words used in the deed; that is to say, what is the expressed intention of the grantor?

[46] This point of law was recently dealt with by the Nova Scotia Court of Appeal in *Knock v. Fouillard*, 2007 NSCA 27 where Justice Fichaud put it this way (at para. 27):

> Third, the court's first task is to determine whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes, motives or recollections. The primary source is the document, not the psyche....
>
> In the process of interpretation, a court may not utilize the parties' subjective wishes, motives or intent to alter the unambiguous and objectively manifest intent in the deed's wording (citations omitted).

[47] This passage was later quoted and applied by the Nova Scotia Court of Appeal in *MacDonald v. McCormick*, 2009 NSCA 12. In that decision, Justice Saunders added (at para. 73):

> When the words of a deed are not ambiguous, either in themselves or when applied to the land in question, the intention of the original grantor is to be taken from the words of the description in the deed. No further rules of interpretation are required.

[48] It is also clear from these decisions and others that the court should construe the document as a whole, giving meaning to all its words to the extent possible. It therefore matters not that the words of limitation “Five Shares owned by the grantor Charles D. Myers” are found within the legal description of the lands being conveyed, rather than being attached to the operative words of conveyance.

[49] Bearing the foregoing principles in mind, I conclude that the court is bound to give effect to the plain meaning of the words of limitation used by the grantor which manifest an intention, objectively viewed, to convey only a 5/8 interest in Lots 2 and 3.

[50] The evidence before the court does not adequately trace the further disposition of the remaining 3/8 interest in these lots. Presumably (although the court makes no finding in this regard) they formed part of the estate of Charles

Myers and devolved to his heirs whether by Will or by intestacy.

[51] As for the devolution of the 5/8 interest in Lots 2 and 3, Sandy Myers and Peter J. Myers died in or about 1957 and 1972 respectively. Sandy, in his Will, left all his real and personal property to his wife Cora Mae Myers. Similarly, Peter J. Myers left all his real and personal property under his Will to his wife Annie Harriet Myers.

[52] Such was the state of affairs when the plaintiff entered the scene in 1973. The plaintiff company, whose president still today is Murray Prest at age 85, operates a lumber business with extensive land holdings in the Eastern Shore area of Nova Scotia. Mr. Prest himself has been in the lumber business for virtually all of his post-war career and demonstrated an intricate knowledge of the history of several properties in the area with which we are concerned.

[53] That may well explain why Mr. Prest received a letter from Harriet Myers (recently widowed as aforesaid) sometime in 1973. That letter lead to a meeting between Mr. Prest and both Cora Myers and Harriet Myers at which Mr. Prest heard them express their concern over certain land dealings in the area involving Eddys, of which they were aware. Their concern was over the location of those lands and whether it affected the interest in lands they knew that they had through their husbands' estates. As Mr. Prest put it, the widows knew they had an interest in property but they were not sure what it was.

[54] At that meeting, Mr. Prest was given certain documents to review which

consisted of the three unrecorded deeds above described (two from 1936 and one from 1945), receipts in favour of Charles Myers from Bertha Williams, Isabelle Day, and Ellen Dooks respectively, and a map. Mr. Prest became interested in acquiring title to the properties described in those deeds and he agreed to assist the widows in determining exactly what property they owned and where their properties were located. He also assisted them by recording the three deeds above mentioned in the Registry of Deeds.

[55] Upon reading the deeds, Mr. Prest observed the reference in the 1945 deed to five shares owned by the grantor Charles Myers. This lead him to make inquiries about the other three shares which took him to the door of Milton Myers, who was a nephew of Charles. Milton Myers was known to Mr. Prest as someone using camps in the area of the upper lot at the north end of the lake and was thought to be a good source of information. Indeed, he was. Milton Myers provided Mr. Prest with information about the Myers family tree subsequent to the death of his grandfather Peter Philip Myers, which Mr. Prest charted on the back of an envelope.

[56] Mr. Prest's objective was to ascertain whether or not there were other living heirs who might have an interest in the subject lands. Although Milton Myers did not claim an interest, he referred Mr. Prest to Merlin Myers, a son of Charles, as another possible source of information. Mr. Prest met with Merlin Myers who likewise did not claim an interest and did not provide Mr. Prest with any additional information.

[57] After satisfying himself where the four lots described in the 1945 deed were located (including Lots 2 and 3), Mr. Prest ultimately struck an agreement with Cora and Harriet Myers to buy those properties in the name of his company Prest Bros. Limited. Accordingly, a warranty deed was prepared and executed by Cora Mae Myers and Annie Harriet Myers in favour of Prest Bros. Limited under date of August 25, 1973 incorporating the same legal description as found in the 1945 deed, but without any reference to five shares or any other words of limitation. Mr. Prest also caused an addendum to be added to the legal description, reciting that the lands being conveyed were those shown on a plan of the area dated November 30, 1900 (with a book and page reference) and were the same lands which had been conveyed in 1945 by Charles Myers to Sandy Myers and Peter Myers.

[58] Mr. Prest remained concerned at the time, however, about the outstanding 3/8 interest which he believed to lie with the heirs of Orlando Myers, Elizabeth Bayers and William Myers, none of whom joined in any prior deeds of conveyance. This lead him to obtain quit claim deeds in 1973 from Marshall Myers (a son of William Myers) and James Fulton Bayers (a son of Elizabeth Bayers). From what he was able to determine from his inquires, they were the only other living heirs under those two branches of the family. Mr. Prest further testified that no one else except the defendant Gary Myers has ever claimed an interest against Prest Bros. Limited in respect of either Lot 2 or Lot 3.

[59] Part of the argument advanced by the defendant is that the legal descriptions contained in the deeds forming the plaintiff’s chain of title are so vague and so incomplete that it cannot be said with sufficient certainty that they actually pertain

to Lots 2 and 3. Granted, these descriptions leave much to be desired but legal descriptions of this ilk are commonly found in deeds of that era when they were prepared by untrained people. The court must nonetheless strive to determine what lands were intended to be conveyed in those instruments.

[60] The court is assisted in this regard by an expert opinion report provided by the plaintiff obtained from J.D. Gerald Parker of Parker Research Limited. Mr. Parker's report under date of December 21, 2010 was entered in evidence by agreement without the need of cross-examination. Mr. Parker's qualifications were agreed to by counsel, and accepted by the court, as enabling him to qualify as an expert in the field of property title searching, and capable of giving opinion evidence on the subject of land titles, title abstracts and chains of title.

[61] After preparing a complete abstract of the chain of title upon which the plaintiff relies, Mr. Parker stated that he had no hesitation in concluding that Lots 2 and 3 have as their root of title the Colin Mitchell Crown grant and that they are the lands described in the deeds providing a chain of title into Prest Bros. Limited. He acknowledged that the descriptions may be vague, but that there are recitals provided which support his conclusions.

[62] It should be noted that the defendant also provided an abstract of title provided by his expert, Kate Cameron of Title Questatlantic, which suggests that Lot 2 was included in a conveyance from the personal representative of the Estate

of Orlando Myers to Byron O. Myers in 1944. However, I am satisfied by the rebuttal report provided by Mr. Parker, supported by the testimony of Mr. Prest who is familiar with the area, that that trustees' deed does not concern Lot 2. Rather, it pertains to a piece of property lying to the south of Lot 2 that abuts the northern boundary of lands originally granted to James Day and Thomas Crowe. In any event, I have already determined earlier in this decision that Orlando Myers did not acquire a partial interest to Lots 2 and 3 upon the death of his father. Rather, full title thereupon passed to Charles Myers under the residue clause of the Will.

[63] I accept the expert opinion evidence of Mr. Parker, supported by the credible evidence of Mr. Prest with his expansive knowledge of land holdings in the area, that Lots 2 and 3 were effectively conveyed in the deeds forming the chain of title upon which the plaintiff relies. It follows that I find that the plaintiff has established paper title to Lots 2 and 3 all the way from the Crown grant in 1824 to its own deed from Cora Myers and Annie Harriet Myers in 1973 under which it acquired a 5/8 title interest.

[64] The defendant Myers, on the other hand, has no paper title of any consequence. By his own admission, there are no title documents on which he can rely until his own creation of a warranty deed in 1988 pertaining to Lots 2 and 3, naming his father Bruce and himself as grantors and himself as sole grantee.

[65] In explaining how this deed came about, Mr. Myers testified that he had always understood from his father that Lots 2 and 3, as well as the remainder of the

upper lot, were “family property”. He knew that his grandfather Milton Myers (son of James Myers) had long used a camp which he had built somewhere on the upper lot back in 1950's.

[66] One day in 1988, Gary Myers and his father Bruce decided to visit the Provincial Lands and Maps Office (as he described it) to check the records pertaining to Lots 2 and 3. They were, as he put it, on a mission to try to ascertain which family members had an ownership interest in these lots and whether the family members had done anything with it.

[67] What they learned was that the land records showed the ownership of Lots 2 and 3 to be “unknown”. Mr. Myers said that he and his father were then referred to the Municipal Tax Assessment Office to make a similar inquiry, only to be informed that no one was paying taxes on these two lots. Mr. Myers testified that he informed the personnel at the tax assessment office that he would be willing to pay the taxes whereupon it was recommended to him that he get a deed prepared. Mr. Myers then retained a lawyer to prepare and record the deed above mentioned which is dated April 29, 1988.

[68] There are no further instruments of title pertaining to Lots 2 and 3 until 2009 (about a year after discovery examinations took place in this proceeding). At that time, the defendant gathered up and recorded nine quit claim deeds pertaining to Lots 2 and 3, all of which (except one) are said to be from heirs of Orlando Myers (the other is said to be from an heir of Ellen Dooks). It is asserted by the defendant that these deeds serve to convey to him most, but not all, of the interest which

supposedly devolved to Orlando Myers on a partial intestacy under the Will of Peter Philip Myers back in 1921.

[69] With my earlier finding that no such partial intestacy occurred, these 2009 quit claim deeds are ineffective to convey any title whatsoever to the defendant Myers. They appear to be a belated attempt on his part to establish an interest as a co-tenant of Lots 2 and 3 with the plaintiff.

[70] With the admission by the defendant that he has no paper title to rely on apart from the self serving 1988 deed aforesaid and these 2009 quit claim deeds (none of which are of any consequence), it follows that the only way that the defendant can establish title to Lots 2 and 3 is by proving a claim of adverse possession against the plaintiff.

ISSUE #2 - Adverse Possession Claim

[71] Counsel for the defendant concedes in his pre-trial brief that the evidence of adverse possession in this case is thin but maintains that it is all that the property admits of and is therefore sufficient to give the defendant title to the exclusion of others. In support of that contention, reference is made to the following passage from the well-known text *Law of Real Property* (3rd ed.) by Anger & Honsberger (at paras. 29-19 and 29-23):

> Whether there has been sufficient possession of the kind contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute. Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct

> which the proprietor might reasonably be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession...
>
> Title by possession to wild or uncultivated land can be shown otherwise than by actual enclosure. The test in cases of land unsuitable for cultivation or other easily proved use is that such acts should be shown as would naturally be done by the true owner if in possession. It has been held that where a bona fide purchaser, under a defective title, claims a whole lot of which a portion is cleared and while cultivating such portion treats the wild and uncultivated part as owners usually do, there is evidence to sustain title by possession to the whole, and that, in such a case, payment of taxes on the whole is an important fact.

[72] As to the time frame for establishment of the possessory title claimed, it is first to be noted that this action was commenced by the plaintiff on September 13, 2006. Having regard to the 20 year limitation period for the commencement of such an action prescribed by s. 10 of the *Limitations of Actions Act*, it is submitted on behalf of the defendant that it is therefore incumbent upon him to prove sufficient acts of possession during the preceding 20 year period which takes us back to September of 1986.

[73] Counsel for the plaintiff has referred the court to a number of cases on the law of adverse possession, particularly in relation to lands of a remote woodland character. For the sake of brevity, I need only refer to the recent decision of the Nova Scotia Court of Appeal in *Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39 which contains a comprehensive analysis of the law of adverse possession. The following passages are particularly useful to the analysis in the present case:

> 12. What must be proven in order for a squatter to establish adverse possession as against a true owner was clearly stated by MacQuarrie, J. in Ezbeidy v. Phalen (1958), 11 D.L.R. (2d) 660 (N.S.S.C.) at p. 665:

> ... where there is a contest between a person who claims by virtue of his title, as the defendant does here, and a person who claims by long adverse possession only, such as the plaintiff must rely on here, there is first of all a presumption that the true owner is in possession, that the seisin follows the title. This presumption is not rebutted or in any way affected by the fact that he is not occupying what is in dispute. In order to oust that presumption it is necessary to prove an actual adverse occupation first which is exclusive, continuous, open and notorious, and after that has been proved, the position is that the owner is disseised and the other person is in possession. If that person who is in adverse possession continues openly, notoriously, continuously and exclusively to exercise the actual incidents of ownership of the property, that possession in time ripens into title: cf. Lord Advocate v. Lord Lovat (1880), 5 App. Cas. 273.
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> In Des Barres v. Shey (1873), 29 L.T. 592, Sir Montague Smith, delivering the judgment of the Judicial Committee, said, p. 595:
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> > 'The result appears to be that possession is adverse for the purpose of limitation, when an actual possession is found to exist under circumstances which evince its incompatibility with a freehold in the claimant.'
> >
> > Cf. Halifax Power Co. v. Christie (1915), 23 D.L.R. 481, 48 N.S.R. 264.
> >
> > What the person in adverse possession gets is confined to what he openly, notoriously, continuously and exclusively possesses. Possession of a part is not possession of the whole as between an actual possessor and an actual owner.
> > Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is, the person who claims to be in possession must exercise these rights with the intention of possessing. Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary with the different circumstances and physical conditions of the property possessed. [emphasis added]

13. In Anger and Honsberger Real Property. 2nd ed., 1985 at p. 1515 the necessary possession to extinguish title is said to be:

> ... "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known or which might have been known" to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is "equivocal, occasional or for a special or temporary purpose". [emphasis added]

14. In Lynch v. Nova Scotia (Attorney General), [1985] N.S.J. No. 456 (T.D.), Hallett, J., as he

then was, noted:

> [7] The legal concept which allows a person to acquire possessory title good against the holder of the legal title is based on the premise that a legal owner cannot stand aside and allow a trespasser or co-tenant to make improvements to the property and pay the taxes over many years and then come in and claim it, even though he could see the other was in possession. As a safeguard to the legal owner, the courts have insisted that the possession be of the quality described before the legal owner's title is extinguished; otherwise there could be great injustices if by doing sporadic, unobservable acts on the land a person could acquire possessory title. Hence the care which should be taken by a court before a finding is made that the title of the legal owner to woodland in particular, is extinguished as the acts relied upon are very often sporadic in nature and unobserved by the true owner yet can qualify as being acts that are consistent with the limited use a person who owns land of that nature would make of such land.
>
> [8] As claims for possessory title extinguish the title of the legal owner pursuant to a limitations Act, the court should only act on very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period. Legal owners should not be dispossessed where land is such that the legal owner would not make a great deal of use of the land, such as wood land, particularly if the claim is made not by a trespasser but by one co-tenant or more against others. Section 12 of the Limitation of Actions Act provides that no person shall be deemed to have been in possession of any land within the meaning of the Act merely by reason of having made an entry thereon. Where the acts of possession relied upon with respect to wood land are the occasional unobserved cutting of logs and firewood from the property, such acts do not improve the property even though they evidence the intention of one co-tenant to possess it exclusively. It cannot be too strongly emphasized that evidence of possession to extinguish title must be of a quality that has been required by the courts for hundreds of years. Each case turns on its own facts. [emphasis added] ...

20. From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession.

[74] Bearing these legal principles in mind, I now turn to a review of the

evidence in support of the defendant’s claim for adverse possession.

[75] Prior to 1992, the only use that the defendant made of Lots 2 and 3 was for fishing along the river (which he had done since childhood), hunting on occasion (not every year) and clearing debris and fallen trees from the river (of which no detail was given). He had also used trails crossing Lots 2 and/or 3 as a means of access to get to the family camp on the upper lot (although it was acknowledged that these trails were well-worn and generally used by the public at large). This pattern of recreational use by the defendant and members of his family, corroborated by two other family members, dated all the way back to the 1950's.

[76] The defendant’s first overt act of adverse possession of Lots 2 and 3 was the payment of municipal property taxes which he began in 1989 following his visit to the municipal tax assessment office. The defendant has continued to pay such taxes to the present time although, as will be dealt with later in this decision, so has the plaintiff.

[77] There were no camps or other structures built on either Lot 2 or Lot 3 until 1992 when the defendant, together with his father, built a small woods camp on Lot 3 on the shore of a secluded cove on the lake. The construction of that camp lead to an increased frequency of use of the property by the defendant in the 1990's although Mr. Prest did not become aware of its presence until 1995. While in the area checking out a boundary line of a nearby property, Mr. Prest came across the camp and not knowing whose it was, he left a note on the door. The note read that the structure was located on property owned by the plaintiff and asked the owner to

contact him.

[78] About a month later, Mr. Prest received a call from the defendant in response to the note, acknowledging that he had built the camp and claiming to own the land it was on.

[79] Actually, this response was not the first time that Mr. Prest became aware of the defendant's claim to the property. As early as 1992 (the evidence is unclear as to exactly when) Mr. Prest paid a visit to the home of the defendant's father Bruce Myers, at a time when the defendant was also present, after receiving correspondence from a lawyer. Both were made aware of the other's claims in their discussions but the matter was left unresolved.

[80] There was also an exchange of correspondence between Mr. Prest and the defendant during the months of January to March, 1992 in which the plaintiff asserted title to Lots 2 and 3 (as well as a piece from the upper lot) and made overtures about selling the three lots to the defendant. The short letter of reply from the defendant, in collaboration with his father, simply indicated that he would possibly consider such a transaction if the land had water frontage and if the plaintiff would provide any deeds showing the legal boundaries.

[81] Nothing became of those overtures and it appears that the matter simply drifted (apart from the brief exchange in 1995 above mentioned) until 2001. At

that time, another logging outfit named Aqua Log Company ("Aqua") sought to extend a logging road that would extend across Lot 2 so that it could harvest hardwood logs from other lands. Before reaching Lot 2, the proposed road had to first cross other lands owned by two related companies of the plaintiff, namely, Musquodoboit Lumber Co. Limited and Hefler Forest Products Ltd.

[82] Upon being approached by Aqua, Mr. Prest caused both these related companies to enter into written agreements with Aqua, giving it permission, *inter alia*, to build the proposed road across their lands. For some reason, in respect of which Mr. Prest was unable to give a satisfactory explanation, he did not enter into a similar agreement with Aqua for the extension of the logging road over Lot 2. Given all the other evidence in this case, however, I take no adverse inference from his failure to do so on behalf of Prest Bros Limited.

[83] In any event, at about the same time Aqua sought similar permission from the defendant, which he gave by letter dated August 2, 2001. Under that arrangement, the defendant was to be provided with a key for the gate to be constructed at the entrance of the road and indeed, the defendant ended up providing the lock for that gate.

[84] Neither Mr. Prest nor the defendant was made aware by Aqua that the other had been asked for, and given, permission to so extend the road.

[85] The construction of the road took place the following year (2002), extending it virtually through the length of Lot 2 to the shore at the south end of the lake. With that newfound access, the defendant moved a trailer onto Lot 2 some time that year after clearing and leveling the site. He also built a deck onto the trailer and added an old camper for a shed.

[86] When this trailer was first seen by Mr. Prest, he initially assumed that it had been placed there by Aqua. He soon learned, however, that it belonged to the defendant.

[87] Mr. Prest also learned in early 2004 that Lots 2 and 3 were being assessed to the defendant for purposes of municipal property taxes. He thereupon sent a letter to the Director of Assessment under date of April, 2004 asserting his ownership of these two lots since 1973 and requesting that the defendant's name be removed as the assessed owner of these properties.

[88] Some two years later, in September of 2006, this action was commenced. Sometime during the following year (2007), the defendant removed the woods camp from Lot 3 as a "good gesture" toward the plaintiff after consultation with his own lawyer. The trailer and related chattels placed on Lot 2 have remained there since the year 2002.

[89] Although the plaintiff continues to be actively engaged in the logging industry (with the involvement of Mr. Prest's grandchildren), it has never conducted any logging operations on either Lot 2 or Lot 3 since acquiring its title

interest in 1973. The reason, as understood by the court, is that it is not economically justifiable to do so for that size tract of land by itself.

[90] As a result, Mr. Prest has made only sporadic visits to Lots 2 and 3 over the years for purposes of cruising the timber stands (for example, assessing the damage in the wake of Hurricane Juan) and checking on boundary lines with adjoining properties. He was also there to observe Aqua's road building operation and has looked around the property for the presence of camps and trailers. He has never kept a record of the number of his visits but estimates an average of once a year at best.

[91] Mr. Prest maintains, however, that Prest Bros Limited has paid the municipal property taxes on Lots 2 and 3 ever since they were acquired in 1973 through a combined assessment of those lots with a piece from the upper lot (all having formed part of the original Colin Mitchell grant and combined as 100 acres). It was only in 1996 when the LRIS system was introduced in Nova Scotia that Lots 2 and 3 were assigned their own PID numbers with resulting separate assessments. It appears therefore that both parties have been paying municipal taxes on Lots 2 and 3 for a considerable time (possibly under different tax classifications).

[92] There is not enough evidence before the court to make a conclusive determination of whether Lots 2 and 3 were actually included in the 100 acre assessment referred to by Mr. Prest. However, it is not necessary for the court to do so for purposes of this decision. Whether the plaintiff has been paying

municipal property taxes on Lots 2 and 3 since 1996 or all the way back to 1973 as Mr. Prest believes, is not a critical factor in the analysis.

[93] On the whole of the evidence I have recited, I have no hesitation in concluding that the defendant has not met the burden of establishing sufficient acts of adverse possession to prove possessory title to Lots 2 and 3. First of all, the recreational use made of these lots by the defendant prior to 1992 certainly did not constitute sufficient acts of adverse possession, if for no other reason than the fact that such use (sporadic as it was) could have been made by any member of the general public. There was no exclusivity or continuity of such use.

[94] Beyond that, even if the defendant's acts of possession beginning in 1992 with the building of a woods camp on Lot 3, followed by the placement of a trailer on Lot 2 in 2002 (combined with the payment of property taxes since 1989), could be said to be sufficient given the nature of the property (a questionable proposition given the legal requirements for possessory title), there is no getting around the fact that the defendant does not meet the 20 year requirement under the statute. On that ground alone, the defendant's claim for possessory title was doomed to fail, this action having been commenced in 2006.

ISSUE #3 - Entitlement of Plaintiff to a Declaration of Rights against the Defendant

[95] As noted earlier, the plaintiff does not seek a Certificate of Title under the *Quieting of Titles Act*. Rather, it seeks only a Declaration of rights (as enabled by Civil Procedure Rule 38.07(5)) and consequential remedies between it and the

defendant.

[96] There are a number of prior decisions from this court where such declaratory relief has been granted in actions involving title disputes between two parties without proceeding under the *Quieting of Titles Act* (see, for example, *The Board of Trustees of Common Lands v. Tanner*, 2005 NSSC 245). Indeed, an earlier motion in the present action brought by the defendant in 2009 for an order requiring the plaintiff to amend its Statement of Claim to plead and comply with the *Quieting of Titles Act* was dismissed. Accordingly, the propriety of the remedy of declaratory relief sought by the plaintiff is no longer in issue.

ISSUE #4 - Remedies

[97] The plaintiff seeks three main remedies in this action, summarized as follows:

(1) A Declaration that it is the owner of Lots 2 and 3;

(2) A mandatory injunction requiring the defendant to remove the trailer and all his personal property from Lot 2 and further restraining the defendant from continuing to trespass upon both Lots 2 and 3; and

(3) General damages for trespass and loss of enjoyment of the property, and special damages for the stumpage value of approximately 76 tonnes of wood which has been removed from Lot 2.

[98] In light of my earlier findings, the plaintiff is entitled to a Declaration that it is the owner of a 5/8 interest in the title to Lots 2 and 3. The defendant has no title to these lots, either by conveyance or adverse possession.

[99] Since the defendant is not a co-tenant in any way, the plaintiff is also entitled to a mandatory injunction requiring the defendant to permanently remove the trailer and all other of his personal property located on Lots 2 and 3. The time frame for compliance with this order will be 90 days from the date of the order for judgment to be issued in this matter, in similar fashion as the *Tanner* decision.

[100] In further keeping with the *Tanner* decision, I decline to order a secondary injunction restraining the defendant from continuing to trespass on Lots 2 and 3 since there is likewise no evidence here to show that he would likely disregard the court's declaratory order or that the court's continuing supervision would be necessary. It is presumed that the defendant will comply with the order for judgment to be issued in this matter.

[101] As for general damages for trespass, counsel for the plaintiff proposes an amount of $15,000 as compensation for the inconvenience which the elderly Mr. Prest has been put to over the past 15 years. Mr. Prest appears to have coped with this matter rather well over the years, experienced as he is in the forestry and logging business and I conclude that only a nominal award of general damages for trespass is appropriate. Those damages are hereby fixed at $500.

[102] The special damages claim is for the sum of $1,976 representing the stumpage value of approximately 76 tonnes of wood which has been removed from Lot 2 along the river. Mr. Myers firmly denied that he had ever cut any wood on these lands (except for some firewood for his own personal use) and the plaintiff is

unable to provide any evidence to prove otherwise. In the absence of such proof or any other basis upon which such an inference might be properly drawn, the special damages claim is denied.

[103] The plaintiff will be entitled, however, to its party and party costs of this action. If counsel cannot reach their own agreement on costs, I would ask that written submissions be submitted within 30 days of the release of this decision.

J.