IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *3209292 Nova Scotia Ltd. v. MacDuff*, 2011 NSSC 363

Date: 20111007
Docket: Hfx No. 309982
Registry: Halifax

Between:

3209292 Nova Scotia Limited

Plaintiff

- and -

James Leslie MacDuff and
Robert Coles MacDuff

Defendants

Judge:	The Honourable Justice N.M. Scaravelli
Heard:	June 13, 14, 15, 2011, in Halifax, Nova Scotia
Counsel:	Colin D. Bryson, for the Plaintiff
	James Leslie MacDuff on his own behalf and on behalf of Robert Coles MacDuff

By the Court:

[1] Both the plaintiff and the defendants contend that their respective chain of title grants them ownership of the property in dispute in this action. In the alternative, the plaintiff argues they acquired the property through adverse possession. At trial the plaintiff abandoned its claim for damages. For reasons that follow, I find that the plaintiff has the better chain of title to the property in dispute. As a result, it is not necessary to consider the plaintiff's claim of adverse possession.

Background

[2] This action concerns a parcel of property in Lawrencetown, Nova Scotia, currently identified in the Land Registration System as PIDs 41257262, 41257270 and 41257288.

[3] The parties acknowledge this property has been referred to as Madame Guin Island. The plaintiff asserts it is also known as Conrad's Island. The defendants state that it is Gooseberry Island, as referred to in their deed. There is some debate of whether this property is technically an island, since it is separated from the mainland

by a saltwater marsh. Nothing turns on this issue, so for convenience I refer to the property in dispute as "The Island".

[4] On July 5th, 2007, the plaintiff, 3209292 Nova Scotia Limited, bought a parcel of coastal land by Warranty Deed from Pearl Irene Conrad, Keith Edward Conrad, Gerald Kenneth Conrad, Vernon Donald Conrad, and Reginald Ronald Conrad (Conrad Vendors). Based on a search at the Land Registry a few months earlier, the plaintiff believed that this land, identified as PID# 40692493 in the Land Registration System, included The Island adjacent to the costal land. This deed was recorded in the Land Registry on August 13th, 2007.

[5] The plaintiff's intention was to subdivide, develop and sell property.

[6] Upon learning of the plaintiff's interest in the parcel of land, and prior to the plaintiff's purchase, the defendant, James MacDuff, commissioned a survey based on a deed held by himself and his brother, Robert MacDuff, the co-defendant in this action. The Survey, dated May 26th, 2007, produced by G.R. Myra Land Surveying Limited (Myra Survey), showed that the defendants had title to The Island adjacent to the coastal land that the plaintiffs were considering purchasing.

[7] On September 24th, 2007, James MacDuff approached the Land Programs Office with the Myra Survey. He applied to the Registrar of Deeds to have the Survey registered as a document in the Land Registration System. The Registrar accepted this application and assigned The Island three PID nos. (41257262, 41257270 and 4125788) based on the deed and the Myra Survey. On this basis, James MacDuff and Robert MacDuff were listed as owners of The Island in the Land Registration System.

[8] This change in the Land Registry had the effect of preventing the plaintiff from developing and selling the property.

[9] The plaintiff retained Terrain Group Inc., and specifically Kirk Nutter, to conduct its own survey and analysis of the chain of title (Nutter Survey). Based on the Nutter Survey, supporting the plaintiff's claim, the plaintiff tried to convince the Registrar to reverse its decision. The Registrar refused. The plaintiff also tried to convince the MacDuffs to withdraw their claim to The Island. The MacDuffs refused.

[10] On April 15th, 2009, the plaintiff filed a Notice of Application in Chambers for a Quit Claim Deed. By consent and order dated November 24th, 2009, the Application was converted to an Action.

[11] On September 25th, 2009, the plaintiff filed a Notice of Action and Statement of Claim. The plaintiff claims that the defendants filed an erroneous survey with the Registrar and that the plaintiff has an unbroken chain of title to The Island. In the alternative, the plaintiff claimed that it had adversely possessed The Island. The plaintiff seeks a Declaration that the defendants have no interest in The Island.

Law

[12] When there are competing title chains to a parcel of land, the role of the Court is to carefully analyze the underlying title documents to determine which party has a better chain of title (*MacDonnell v. M&M Ltd.* (1998), 165 NSR (2d) 115, at para. 30 (CA). The question is not which party has the best absolute title to the land, but rather, which party has the best relative title to the land, as between the parties?

[13] In *Metlin v. Kolstee*, 2002 NSCA 81, at paras. 65-66, 207 NSR (2d) 27 [*Metlin*], the Court of Appeal considered the principles applicable to interpreting deeds. The Court of Appeal accepted the following recitation from *Saueracker v. Snow* (1974), 14 NSR (2d) 607 at para. 20 (SC TD):

> The general principles applicable to the interpretation of a deed are...:
>
> > 13. *Construction. - General Rule.* The Court must, if possible, construe a deed so as to give effect to the plain intent of the parties. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrarily overborne by any presumption. The intention of the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it, and effect should, if possible, be given to every word of the document. Where, judging from the language they have used the parties have left their intention undetermined, the Court cannot on any arbitrary principle determine it one way rather than another. Where an uncertainty [still remains] after the application of all methods of construction, it may sometimes be removed by the election of one of the parties. The Courts look much more to the intent to be collected from the whole deed than from the language of any particular portion of it.
>
> > 24. *Extrinsic Evidence.*
> >
> > *Patent and Latent Ambiguities.* An ambiguity apparent on the face of a deed is technically called a patent ambiguity - that which arises merely upon the application of a deed to its supposed object, a latent ambiguity. The former is found in the deed only, while the latter occurs only when the words of the deed are certain and free from doubt, but parol evidence of extrinsic or collateral matter produced the ambiguity - as, if the deed is a conveyance of "Blackacre", and parol evidence is adduced to show there are two places of that name, it of course becomes doubtful which of the two is meant. Parol evidence

> therefore in such a case is admissible, in order to explain the intention of the grantor and to establish which of the two in truth is conveyed by the deed. On the other hand, parol evidence is uniformly inadmissible to explain an ambiguity which is not raised by proof of extrinsic facts, but which appears on the face of the deed itself. A subsequent will cannot be used to construe an earlier deed of settlement nor as evidence that testator intended to include an additional person among the beneficiaries under the settlement.
>
> *Extrinsic Evidence as to Latent Ambiguities Generally.* Extrinsic evidence is always admissible to identify the persons and things to which the instrument refers.
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> Provided the intention of the parties cannot be found within the four corners of the document, in other words, where the language of the document is ambiguous, anything which has passed between the parties prior thereto and leading up to it, as well as that concurrent therewith, and the acts of the parties immediately after, may be looked at, the general rule being that all facts are admissible to interpret a written instrument which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as tend only to show that the writer intended to use words bearing a particular sense are to be rejected.

Where there is ambiguity in the deed, the Court of appeal accepted the following passage from *McPherson v. Cameron* (1866-69), 7 NSR 208 at 212:

> ...The question is how he is to get there, for neither the course nor distance given in his grant will take him there, without the alteration of one or the other. The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake; *Davis v. Rainsforth*, 17 Mass., 2010. On this principle the things usually called for in a grant, this is, the things by which the land granted is described, has been thus marshalled: *First*, the highest regard had to natural boundaries; *Secondly*, to lines actually run *and corners actually marked* at the time of the grant; *Thirdly*, if the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established; *Fourthly*, to courses and distances, giving preference to

> the one or the other according to circumstances; *Greenleaf on Evidence* p. 441, n. 2, and the case there referred to.

[14] In *MacDonald v. McCormick*, 2009 N.S.C.A. 12, 274 N.S.R (2d) 258, the Court of Appeal reaffirmed the discussion found in *Metlin*.

Analysis

[15] Both parties agree that the chain of title to The Island starts with a Crown Grant of Land in the mid to late 1700s. At that time there was two divisions of the land between 20 land owners who divided the land amongst themselves. Two of those recipients were Benjamin Green and Reverend John Breynton.

[16] The plaintiff submits that Mr. Green received the land that included The Island. The defendants submit that Reverend Breynton received the land that included The Island. The Crown Grant of Land and its subsequent division was surveyed in 1784. Unfortunately, the survey was lost and only reproductions remain.

[17] The plaintiff's chain of title begins in 1827 with a Court-ordered partition of Mr. Green's land. The Petition was brought by Susana Green, the wife of Mr. Green,

upon his death. The Court Order, dated July 2, 1827, references a survey dated January 22, 1823 and states that Mrs. Green is to receive "the five lots marked "L" on the General Plan hereto annexed and also a part of lot number eight afore described and delineated on the plan of that lot hereto annexed".

[18] Interest in this land was conveyed within the Green family through a number of deeds before ending with Henry Green. The land was then transferred to a number of different owners by deed and foreclosure. In 1890, the land was transferred by Quit Claim Deed to the Conrad family. This deed references the land allotted to Mrs. Green and stipulates, "said parcels consisting of five lots marked "L", part of lot number eight marked "L" on the January 22, 1823 survey. The deed also includes a meets and bounds description for the "part of lot number eight". In 1891, a Sheriff's Deed transferred the property to the Conrad family. This deed includes the previously mentioned "five lots marked "L" and part of lot number eight marked "L" description.

[19] The land was transferred a number of times within the Conrad family before finally being transferred to the Conrad Vendors who ultimately sold it to the plaintiff.

[20] On the basis of this chain of title, the plaintiff argues that they have a clear and unencumbered title to The Island.

[21] The defendants submit that the January 22, 1823 survey of Mr. Green's land erroneously included The Island. The defendants further submit that this error was recognized by the surveyor and that The Island was not included in subsequent transfers of the land. The defendants put forward a number of reasons in support of this submission:

1. The Mortgage Deed transfer between Joseph Green and Robert Noble (50/224 July 7, 1828) lists the included five pieces as those pieces labelled in red ink as "widow's dower" or "dower" and The Island is not so listed.

2. There is nothing in Deed 50/224 that describes a peninsula or island as part of the mainland, and The Island described is to the East when it should be to the North.

3. On the January 22, 1823 Plan, the marshes and The Island were distinguished by a different colour than the mainland.

4. The land described in the Deed Transfer (283/106 May 26, 1891) to the Conrad family was for 311 acres and should have been for 360 acres if it included The Island.

5. A Court-ordered sale of Henry Green's land in 1851lists two islands (one of which is The Island) as distinct from the mainland property.

[22] The defendants' chain of title begins in 1852, with a transfer of land from William Crook, who has two sons, John and William Crook. The deed (101/337 November 10, 1852) includes a number of parcels of upland and marshland. The deed also includes the East half of an Island called Gooseberry Island. There is no survey plan associated with this deed.

[23] In 1852 William Crook and Margaret Crook transferred the West half of Gooseberry Island to John Crook as well as a number of marsh lots (Deed 101/341 November 10, 1852). The various parts of Gooseberry Island are then transferred within the Crook family on a number of occasions.

[24] Later transfers within the Crook family and between the Crook family and the Governors of Acadia University describe the Northeast portion of Gooseberry Island as being two chains North-South and two chains twenty links East-West, joined by the shoreline.

[25] In 1936, the West and Southeast portions of Gooseberry Island were transferred from Alexander David Crook to Gertrude L. Crook to Leslie Coles MacDuff, the defendants' father. The Quit Claim Deed (727/454 April 2, 1936) describes the

Southeastern portion as being three chains North-South and ten chains twenty links East-West, joined by the shoreline. Measurements for the Western half of Gooseberry Island were not provided.

[26] In 1993, the defendants acquired the Western half and Southeast portions of Gooseberry Island by Quit Claim Deed (5562/1142 May 11, 1994). The defendants did not acquire the Northeast portion, it was transferred by the Governors of Acadian University, Breton H. Easton and Horis L. Beckwith (369/691 February 16, 1904). There is no information before the court of subsequent transfers of that portion of land.

[27] The defendants submitted that Gooseberry Island is The Island in dispute in this Action and that they have clear title to this parcel of land. The plaintiff submits that Gooseberry Island is not The Island in dispute in this Action because the description of Gooseberry Island does not match the geography of The Island.

[28] At trial the Court heard ordered oral evidence for the plaintiff from Dean Benedict and Robert LeBlanc. The Court heard evidence for the defendants from Gary Parker, Glen Myra and James Leslie MacDuff. The Court also received three Title

Abstracts, survey evidence, Engineering Report prepared by CBCL Limited and an Affidavit and Expert Report from Kirk Nutter, all by consent of the parties.

[29] The Court rejected the Expert Report of Brian Cuthbertson on the basis that it contained legal opinion on title, which is a question of law for the trial judge [*MacDonell v. M & M Developments Ltd.*, [1997] N.S.J. No. 286 (SC)]. The Court explained to the parties that factual elements of Mr. Cuthbertson's report could be admissible if the parties so agreed.

[30] Dean Benedict is the Registrar of Crown Lands with the Land Services Branch of the Department of Natural Resources. Mr. Benedict testified on the Crown Index Sheets placed in evidence. Mr. Benedict stated that markings on the Index Sheets could not be used as evidence of ownership and that it would be necessary to consider the source documents. For example, a marking of "Rev. Breynton" with an arrow pointing to a parcel of land was not evidence that Reverend Breynton owned the land, unless the source documents confirmed ownership.

[31] Kevin Blaze is the Deputy Registrar General from Mapping with Service Nova Scotia. He explained why the Registrar changed The Island's online mapping system

from a peninsula to and island and back to a peninsula. Mr. Blaze also testified that the Registrar changed ownership of The Island to the MacDuffs on the basis of the Myra Survey that James MacDuff presented to the Registrar.

[32] Gary Parker is a land surveyor. No expert report was filed with the court by Mr. Parker. Mr. Parker testified why a previous survey of The Island would have identified it as a peninsula rather than an island.

[33] Glen Myra is a land surveyor. He testified that he surveyed The Island on the basis of a Title Abstract (Exhibit 15) provided to him by the defendant, James MacDuff. Mr. Myra could not explain how this Abstract was prepared; it is not signed by anyone. On this basis of this Abstract and subsequent survey, Mr. Myra concluded that the MacDuffs were the rightful owners of The Island.

[34] On cross-examination, Mr. Myra stated that he reviewed the underlying source documents for the Title Abstract that he followed. He stated that he did not review the plaintiff's chain of title because no Title Abstract was given to him for the Conrad property.

[35] Mr. Myra was then led through a series of discrepancies between his survey based on the Title Abstract and the underlying source documents. Item number 14 on the Title Abstract included a description for the Northeast portion of Gooseberry Island that was not in the relevant deed. Item number six on the Title Abstract included an East-West distance for the Northeast portion "10 chains", the relevant deed only stated "two chains". A similar error was found in Item number seven and number eight.

[36] Mr. Myra was asked on a number of occasions whether he reviewed the source documents associated with the Title Abstract, and on each occasion he confirmed that he had reviewed these documents. Mr. Myra was then asked in the following exchange on how he concluded that the Northeast portion of The Island was 10 chains East-West:

> Mr. Bryson: On what basis could you choose 10 chains over two chains?
>
> Mr. Myra: I really don't know.

[37] Mr. Myra was also asked whether he considered if the Title Abstract for Gooseberry Island was actually for an island of the same name, located to the North

of The Island in dispute in the Action. Mr. Myra stated, that he had not considered this possibility.

[38] In this case, there is ambiguity as to whether each party's chain of title conveys ownership of The Island. The determinative question is whether The Island was part of the "dower" lands of Ms. Susana Green conveyed to the Conrad Vendors, or whether it is in fact Gooseberry Island which has been passed down through the Crook family to the MacDuffs.

[39] Both parties referred to Plan B-8-3(Exhibit 19) which purports to show the original Crown Grant in the 1700s. This Plan is not identified in any of the relevant deeds to this Action. Moreover, while the Associated Crown Index Sheet has an arrow linking Rev. Breynton to The Island, I accept Mr. Benedict's evidence that such markings are not evidence of ownership and that it is necessary to consider the source documents. As such, very little weight can be placed on Plan B-8-3 and the Crown Index Sheet.

[40] Both parties submitted expert reports prepared by a surveyor. These surveyors surveyed The Island against the respective Title Abstracts in this Action.

[41] Mr. Nutter surveyed the property conveyed by the Conrad Vendors to the plaintiff, including The Island in dispute in this Action which adjoins the mainland Conrad property. He then overlaid the survey with the January 22, 1823 survey identified in the plaintiffs' chain of title. On the basis of this overlay, Mr. Nutter formed the opinion that The Island was included in the "dower" lands of Susan Green, identified in the January 22, 1823 survey. Mr. Nutter was not called as a witness because his report was admitted by consent of the parties. As such he was not cross-examined in court.

[42] Mr. Myra surveyed Gooseberry Island on the basis of the Title Abstract provided to him by the defendant, James MacDuff. Mr. Myra did not identify any original monument. He started by identifying a North-South line that would bi-sect The Island in half. He marked the Western portion as Lot A in the survey. Mr. Myra then proceeded three chains North along this line and then East 10 chains, 20 links to delineate Lot B on his survey. Lot C was identified as the remaining portion of land given dimensions of approximately 10 chains North-South, and 10 chains 20 links East-West.

[43] Mr. Myra admitted that the Title Abstract he was following did not accord with the underlying source documents. He also admitted that he did not consider the plaintiff's Title Abstract for the possibility that the defendants' Title Abstract was for an island to the North named Gooseberry Island. Mr. Myra could not explain why Lot C on his plan was given the dimensions 10 chains (North-South) by 10 chains 20 links (East-West). He accepted that these dimensions were inconsistent with the source documents.

[44] There is an obvious apparent internal inconsistency in the defendants' Title Abstract. The North-East portion of Gooseberry Island borders the South-East portion. The Southern boundary of Lot C is 2 chains, 2 links in the correct Title Abstract. The Northern boundary of Lot B is 10 chains, 20 links. These distances should be the same.

[45] One possibility that could explain this discrepancy is that the line that bisects the island in the defendants' Title Abstract is not a straight line. The relevant deed describes the Western boundary of Lot B and Lot C as John Crooks "Line". This suggests a straight line, but it is possible that it meant a jogging property line. This possibility was not canvassed by the parties. It is also possible that there is an error

in the meets and bounds description of the deed of the in the defendants' Title Abstract, either for the Northeast portion or the Southeast portion.

[46] Even if the Court were to accept some hypothetical explanation for the erroneous East-West measurement of Lot C in Mr. Myra's survey, there is still a problem with Mr. Myra's North-South measurement for Lot C. Mr. Myra surveyed the North-South line of Lot C as 10 chains, even though the relevant deeds put this distance as 2 chains. Even if the West boundary of Lot C were not straight, it would still have to be no more than 2 chains North-South. Mr. Myra provided no explanation for his estimation of this distance. He agreed that what he surveyed did not accord the relevant deeds.

[47] The defendants argued that Mr. Myra's errors with respect to Lot C did not impact his expert opinion because they were not claiming ownership of Lot C. I disagree.

[48] Mr. Myra concluded that the survey he prepared from the defendants' Title Abstract was comparable to the physical geography of The Island in dispute. However, Mr. Myra's survey was fundamentally flawed. He was clearly following an erroneous Title Abstract provided to him by the defendants. Mr. Myra provided no

explanation for the meets and bounds figures that he assigned in his survey. He agreed that his measurements did not accord with the relevant deeds. Further, Mr. Myra did not consider the plaintiff's Title Abstract for the possibility that the defendants chain of title was for an island named Gooseberry Island to the North of The Island in dispute.

[49] It is true that the defendants have no claim to the Northeastern portion of Gooseberry Island, but this cannot explain how Mr. Myra assigned a distance of 13 chains North-South for The Island in the defendants' chain of title. The defendants' chain of title supports only the 5 chains.

[50] For the reasons discussed, I find that the Myra Survey was fundamentally flawed. By contrast, the plaintiff's survey prepared by Mr. Nutter was not impugned.

[51] Mr. Nutter's survey of The Island overlayed with the January 22, 1823 survey plan was included as part of the plaintiff's chain of title. The overlay is not a perfect match, but I am satisfied it is close enough, particularly given the historical nature of the survey included in the plaintiff's chain of title. As such, I assign more weight to the survey and expert opinion of Mr. Nutter.

[52] The defendants argue that the January 22, 1823 survey was flawed and that it misconstrued the fact that Susana Green did not own The Island. Even if I were to accept this argument, it does not bolster the defendants' chain of title to The Island, but would merely serve to impugn the plaintiff's claim. The defendants would still be left with a chain of title that does not match the physical geography of The Island. In any event, I do not accept the defendants' argument.

[53] It is true that the mortgage transfer between Joseph Green and Robert Noble (50/224 July 7, 1828) lists the included five pieces with those pieces labelled in red ink as "widow's dower" or "dower", but The Island is so labelled even if the marshland connecting The Island with the mainland is not. It is not fatal that Document 50/224 does not describe a peninsula or island since the plaintiff's chain of title references a survey plan that does include a peninsula or island. For the same reason, the fact that the deed transfer (283/106 May 26, 1891) to the Conrad family should have been for 360 acres rather than for 311 acres is not fatal. The fact that a Court-ordered sale of Henry Green's land in 1851 lists two islands (one of which is The Island) as distinct from the mainland property is not fatal since the land that Susan Green owned could have been sold as a separate parcel.

[54] In this case the Court is tasked with determining ownership of an island for title chains which originate in the 1700s. The historical nature of the title chain almost guarantees a certain degree of imprecision.

[55] The defendants' survey was fundamentally flawed. The defendants' chain of title is for an island much smaller than The Island in dispute in this Action. By contrast, the plaintiff's survey is consistent with a comparable survey included in its chain of title. I am not satisfied that the defendants have impugned the plaintiff's chain of title.

[56] Upon careful analysis of the relevant documents, between parties to this Action, I find, on a balance of probabilities, that the plaintiff has the better chain of title to The Island. The defendants may have a claim to an island named Gooseberry Island, however I am not satisfied that this is The Island in dispute in this Action. This finding is determinative for the Action.

[57] As a result, the Court declares that the defendants have no interest in The Island identified in the Land Registry as PIDs 41257262, 41257270 and 41257288.

[58] The plaintiff is entitled to its costs.

[59] If the parties are unable to agree on the issue of costs, they may make written submissions with 30 days of this decision.

J.