SUPREME COURT OF NOVA SCOTIA
Citation: Guest v. MacDonald, 2012 NSSC 452

Date: 20121217
Docket: Hfx No. 396139
Registry: Halifax

Between:

Richard Guest and Lynn Guest

Applicants

v.

Edward Forbes Grant MacDonald and Aisha MacDonald

Respondents

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: December 12, 2012

Written Release: Transcribed, edited, and signed on January 9, 2013

Counsel: Allen C. Fownes, for applicants
Christopher Madill, for respondents

Moir J. (Orally):

[1] *Introduction.* The parties are next door neighbours on Sheldrake Lake in Hubley. Despite having homes on a lake along the South Shore, the neighbours have a miserable relationship. The misery comes from disputes about a right of way, a driveway by which vehicles pass over the MacDonald lot to get to the Guest lot.

[2] The Guests started this proceeding by notice of application to obtain a declaration of their rights over the driveway, an injunction against obstruction, damages for nuisance and battery, damages for the cost of repairing the right of way, and punitive damages. The MacDonalds deny having done anything to obstruct the driveway except they acknowledge "placing inverted speed bumps" on it, that is to say they dug trenches across the driveway to prevent speeding. They also deny the allegation of battery and they claim that Mr. Guest and his son assaulted Mr. MacDonald.

[3] The MacDonalds move to convert the application into an action. They say that they will then file a defence and mount a counterclaim.

[4] *Facts.* The MacDonalds bought their lands from the Guests in two pieces. One lot was conveyed in 1995, the other in 1998. At the time, there was a gravelled driveway leading over the lands bought by the MacDonalds to the home of the Guests.

[5] A subdivision plan had been prepared and filed before the purchases. It shows a twenty-five foot easement bisecting the MacDonald lots at the north and leaving a small strip of unencumbered land between the easement and the northern boundaries. The actual driveway does not adhere to the deed. At some point it passes to the north of the easement as described, closer to the northern boundaries of the MacDonald lands.

[6] This discrepancy should not be a cause for controversy. The Guests mount an alternative claim for a right of way as deeded, but their primary claim is that they have a right of way over the driveway including where it deviates from the deed. Mr. MacDonald swears "the Respondents have no objection to the Applicants' continued use of the gravelled driveway". Further, the MacDonalds thought the right of way was where the driveway goes, they built their home and

developed their land on that assumption, and to move the driveway to conform with the deed "would destroy the character of the Respondents' property".

[7] Taking the parties at their word, their interests coincide and they should be able to sort out the problem of a discrepancy between description and use with the help of a conveyancing lawyer and, perhaps, a surveyor.

[8] The real problem is with the use of the driveway by the Guests and attempts to control the use by the MacDonalds. I do not have the complete picture on this, but it appears that the MacDonalds have young children whose safety is thought to be at peril because of the way some drive and the Guests are infuriated by unilateral attempts to obstruct or curtail their driving.

[9] Everything else seems to be secondary. According to Ms. MacDonald, the Guests' behaviour "since approximately 2005 has been extremely hostile, unpredictable and aggressive." For present purposes, I can assume that the experience is mutual. There are allegations of verbal abuse and physical assaults. Parties are under peace bonds. The animosity is known to the police, who have been called to Sheldrake Lake more than once.

[10] Such is the cloud over the day to day life of these neighbours, and their children, on a lake along the South Shore.

[11] *Rule 6 - Choosing Between Action and Application*. The application, particularly the variety called application in court, is a new procedure meant to provide "a flexible and speedy alternative to an action": Rule 5.01(4). However, as that Rule also says, the application is not for every circumstance. It is suitable for some disputes, but not others.

[12] So, Rule 6.01 gives the party who starts a proceeding the right to choose to do it by action or application, and Rule 6.02 gives a judge a discretion to reverse the choice. The rest of Rule 6.02 attempts to give us some guidance for making the choice and for exercising the discretion.

[13] Proportionality is the broad principle that guides the exercise of this discretion: Rule 6.02(6). In weighing the relative cost and delay of the two kinds of proceedings, one compares the new application with the newly streamlined action: *Monk v. Wallace*, 2009 NSSC 425 (Murphy J.) at para. 15.

[14] Keeping an eye on Rule 6.02(6), one has to see some presumptions supplied by Rule 6 as rebuttable. Rule 6.02(3) provides for two kinds of circumstance in which a rebuttable presumption favours an application, the first of which may influence the determination of the motion in this case:

> substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application.

There are some causes which, by their very nature, give rise to this presumption, such as shareholder oppression: *Jeffrie v. Hendriksen*, 2011 NSSC 292 (Pickup J.)

[15] Rule 6.02(4) similarly provides for rebuttable presumptions in favour of an action. The MacDonalds rely on both. Rule 6.02(4)(a) reads "a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right".

[16] This preserves the long standing principle that a litigant in Nova Scotia is not deprived of a right to a jury trial except for cogent reasons: *Keeping v. Portage La Prairie Mutual Insurance Co.*, 2009 NSSC 362 (Coughlan J.) at para.

6 to 9. The courts guard the *prima facie* right to trial by jury provided, in certain circumstances, by the *Judicature Act*: *Monk v. Wallace*, para. 18; *Langille v. Dzierzanowski*, 2010 NSSC 379 (Kennedy C.J.).

[17] At para. 8 of *Keeping*, Justice Coughlan recalls some of the reasons traditionally accepted as cogent:

> Examples of such reasons include: where the case involves issues of law rather than fact, or where the issues of fact are negligible or so closely interwoven with issues of law to be inseparable, where the case involves scientific or technical issues that cannot be conveniently presented to the jury, or where the evidence is extensive or complex.

[18] This is not to say that cogency is a concept frozen in time. The cost of litigation today is beyond comparing with the cost of litigation half a century ago when Chief Justice Ilsley gave his reasons in *MacNeil v. Hill the Mover (Canada) Limited* (1961), 27 D.L.R. (2d) 734 (N.S.S.C. *in banco*). That was from a time long before the crisis in civil litigation caused by cost and delay.

[19] The Rules themselves are capable of weighing in on cogency. They are not confined to the purely procedural. They can affect substantive rights. See *Judicature Act*, s. 47 (3A).

[20] As Mr. Fownes points out, the Rules themselves abrogate the right to a jury trial in favour of economy. In addition to excluding juries from determining applications in Rule 53.08 and preferring the proponent of an application over the proponent of an action in Rule 6.02(2), Part 12 - Actions Under $100,000 excludes juries from determining claims for lower amounts of damages and claims for other remedies valued similarly.

[21] The Rules support the view that, depending on the circumstances of the claims between the parties, the relative cost and timing of trial by jury and determination by application may provide cogent reasons to deprive a party of the right to a jury trial. Or, to stick with the language of the Rule, relative cost and delay may show that it is not unreasonable to do so.

[22] The MacDonalds also rely on the second presumption in Rule 6.02(4), which arises when it is established that:

> (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

This presumption touches on an essential difference between actions and applications. Also, it cannot be understood apart from a party's disclosure obligations in either kind of proceeding.

[23] The application provides judicial management, and assignment of dates for the hearing, at the beginning. The action, with some exceptions such as case management, leaves the litigation in the hands of the parties until one of them calls for trial dates. Judges who give directions at the beginning of applications, and judges who set trial dates, need as much information as can be given to measure the amount of time required for the hearing or trial and when the parties will be ready. But, the judge who gives directions also needs to be able to set a path over a short distance for disclosure, production of affidavit evidence, discovery, out-of-court cross-examination, and so on. The presumption in this Rule recognizes that an application has a problem with a party who legitimately holds cards close to the chest.

[24] As Justice Warner pointed out in *Kings (County) v. Berwick (Town)*, 2009 NSSC 398 (Warner J.) at para. 21, the presumption in Rule 6.02(4)(b) concerns "information about witnesses that a party should not be required to disclose before

trial, not information which, at this time, is not available." The later may be a subject for inquiry under Rule 6.02(5)(a), which we shall come to.

[25] The presumption is about disclosure obligations, and it cannot be understood except in light of the Rules for disclosure and discovery. Rules 15.02, 16.03, and 17.02 provide the basic disclosure obligations for documents, electronic information, and real evidence. All three apply in "a defended action or contested application". The presumption in Rule 14.08(1) is that full disclosure is "necessary for justice in a proceeding". That applies to both actions and applications. See the definition of "proceeding" in Rule 94.10.

[26] Rule 18 - Discovery makes provision for discovery subpoenas in actions and applications. The discovering party has the right to hear answers to any question that asks for relevant information or that has investigative value. The same goes for Rule 19 - Interrogatories.

[27] The broad rights to disclosure and discovery are qualified by Rule 94.09(1), which permits a party to choose to withhold information "for the sole purpose of impeaching a witness". The choice comes with a high price.

[28] Rule 94.09(2) reads:

> All of the following apply to a party who chooses to withhold a document, not answer a question, or withhold other information for the sole purpose of impeaching a witness:
>
> > (a) the party cannot use the witness who is subject to impeachment as an affiant on a motion, or seek to call the witness to give direct evidence on a motion;
> >
> > (b) the party cannot call the witness who is subject to impeachment as a witness for the party at a trial or hearing, unless the presiding judge permits otherwise;
> >
> > (c) the party may only offer the withheld document or make use of the withheld information to impeach credibility, and it cannot be used by the withholding party to prove any fact in issue other than credibility;
> >
> > (d) the party must immediately disclose the document or immediately provide the answer or the information, when the party decides not to use it or becomes aware the witness is not to be called.

[29] When gaging whether it is unreasonable to force disclosure of information within the "such as" part of the presumption in 6.02(4), the court has to ascertain whether the party is going to pay that price. In this case, Mr. Madill had no difficulty advising us, in open court, of the kinds of witnesses his clients have in mind. Otherwise, resort to Rule 85.06(2) may have been necessary.

[30] The first part of the presumption applies also to a party who wishes to hold a card close to the chest, unless it is forced out at discovery.

[31] Such a card could not be a relevant document, electronic information, or real evidence to which disclosure obligations attach. It would have to be information only accessible through discovery. Again, a judge hearing a motion to convert an application to an action cannot determine whether it is unreasonable to require disclosure, unless the judge knows what is being held back. Again, resort to Rule 85.06(2) may be necessary.

[32] Rule 6 is complicated. In addition to requiring us to apply a principle of proportionality and layering that with competing presumptions, it offers four factors. Rule 6.02(5) reads:

> On a motion to convert a proceeding, factors in favour of an application include each of the following:
>
> (a) the parties can quickly ascertain who their important witnesses will be;
>
> (b) the parties can be ready to be heard in months, rather than years;
>
> (c) the hearing is of predictable length and content;

> (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

[33] The first three of these factors are consistent with a distinction that seems to be emerging from the authorities. We appear to distinguish cases in which the parties need much time to complete investigative work and those in which investigation could be wrapped up in months. Despite the argument made in *Langille v. Dzierzanowski*, see para. 23, proportionality does not appear to depend on complexity or the amount involved. *Kings (County) v. Berwick (Town)* involved much complexity and a large amount. Justice Murphy in *Monk* and the Chief Justice in *Langille* were more concerned about the investigative work still to be done in those medical malpractice cases: *Monk* at para. 20 and *Langille* at para. 23.

[34] The last of the four factors needs to be understood in light of the proposition that cross-examination, rather than the rule against leading on direct, is the main tool for testing credibility: *Kings (County) v. Berwick (Town)*, para. 40 and 42; *Jeffrie v. Hendriksen*, para. 49 and 57.

[35] *Determination*. The presumption about the erosion of substantive rights applies in this case on two levels. The Guests assert a right to a driveway without trenches across it. Each day that goes by before determination is a day on which the asserted right is lost forever. The loss concerns the enjoyment of one's home, a loss that cannot be measured well by damages.

[36] On a more abstract level, the parties are living under a strain that infringes their enjoyment of their homes. The strain will be relieved by declaratory and injunctive relief that determines any quarrel over the metes and bounds description and, more importantly, settles with precise detail the proper use of the right of way and makes it clear what things are misuses of the land and the right. Each day that goes by is a day on which the parties' enjoyment of their homes is diminished.

[37] A residential dispute over the location and use of a right of way may be one of those causes that, in Justice Pickup's words, give rise to the presumption "by their very nature".

[38] The finding about eroding rights trumps the presumptions in favour of an action. Were that not so, I would still be satisfied that this is not a case for

protecting the respondents' substantive right to trial by jury or their procedural right to hold back on disclosure.

[39] It would not be unreasonable to deprive the respondents of their right to a jury trial. In this case, the cost and delay of a jury trial are so much greater than they would be on an application as to be grossly disproportionate to the parties' interests in this case. I will discuss this further in relation to the proportionality principle.

[40] Nor have the respondents demonstrated this to be a case in which it is unreasonable to force early disclosure. Even in cases of secret surveillance and cases of a forgotten prior inconsistent statement, the severe limits in Rule 94.10 present serious problems for the party who withholds disclosure. In this case, the witnesses the respondents wish to hold back are witnesses to a central fact in the claims for trespass to the right of way or for battery.

[41] In my respectful view, these witnesses have value for proving facts in issue besides credibility. Because of that, forcing disclosure would not be prejudicial.

On the milder protection that the exception to disclosure provides, it is most likely that the names of these witnesses will come out at discovery.

[42] The first three factors in Rule 6.02(5) also favour the application. The investigative work required of the parties is limited and easily defined. The issues on the right of way are already clearly defined. There is no need for investigation to find witnesses to the alleged trespass. The Guests have named their witnesses. Presumably, the MacDonalds know who theirs are.

[43] The claim for battery is less important to the Guests than the claims for declaratory, injunctive, and monetary relief related to the right of way. Mr. Guest voluntarily limited his claim for damages for battery to $50,000. He may well receive less than that if he proves the claim. He intends not to present any medical evidence.

[44] The MacDonalds want to counterclaim on allegations that Mr. Guest misused the right of way and that Mr. Guest battered Mr. MacDonald. The MacDonalds say that extensive investigation is necessary, primarily in relation to the allegations, both ways, of battery. Apparently they intend to present expert

medical evidence. However, the events around the alleged batteries are confined by the one year prescription in the *Limitation of Actions Act* and the apparent low level of injuries.

[45] The fourth factor forces us to consider how well credibility can be tested through an application. I accept the MacDonalds' position that credibility will be of central importance and that it is better put to the test in a trial. However, for the reasons expressed by Justice Warner in *Kings (County) v. Berwick (Town)*, I am satisfied that credibility can adequately be tested in this case through cross-examination on affidavits.

[46] As I see it, the principle of proportionality weighs heavily in favour of the application as the procedure for resolving the disputes between the Guests and the MacDonalds.

[47] Important though the issues are to both sides, they are such as demand the less expensive and quicker procedure. We have had enough experience since January 1, 2009 setting cases for trial, giving directions on applications, and

determining costs on both to say that generally a case that is fit for an application is far more quickly determined for far less money than a case that goes to trial.

[48] Mr. Madill makes the points that, in applications, greater expenses are borne at the beginning and, with actions, there is more time to effect a settlement. It is not possible, though, to say how many residential property actions settled because they were dying under the weight of their own cost.

[49] If the reported decisions are any guide, the application is the procedure of choice for disputes over the location and use of rights of way: *Amar v. Fricker*, 2009 NSSC 359; *Carter v. Walford*, 2010 NSSC 213; *Seabright Partners LLC v. Frank George's Island Investments Ltd.*, 2010 NSSC 368; *Myers v. Bradstock*, 2011 NSSC 342; *Shea v. Bowser*, 2011 NSSC 450; *Thompson v. Bauld*, 2012 NSSC 72; *Cobalt Investments Ltd. v. Panko*, 2012 NSSC 34; and *Viehbeck v. Pook*, 2012 NSSC 48. Comparing these decisions with recently decided actions over rights of way started under the old rules, one does not detect that trials are necessary for justice in such cases and one does detect a substantial improvement in the time it takes to get to a determination. For example, *Parnell v. Collicutt*,

2007 NSSC 256; *Rafuse v. Swinimer*, 2009 NSSC 179; and *MacCormick v. Dewar*, 2010 NSSC 211.

[50] *Conclusion.* The motion to convert that application to an action is dismissed.

J.