SUPREME COURT OF NOVA SCOTIA
Citation: Dennis v. Langille, 2013 NSSC 42

Date: 20130204
Docket: Tru No. 389821
Registry: Truro

Between:

Clarence Dennis
Appellant

v.

Rickey E. Langille
Respondent

Judge: The Honourable Justice John D. Murphy

Heard: October 3, 2012, in Truro, Nova Scotia

Counsel: Peter Lederman, Q.C., for the appellant
Rickey E. Langille, respondent in person

By the Court:

Overview

[1] In 2011, Mr. Dennis, the Appellant, sold to Mr. Langille, the Respondent, a cottage property on Cobequid Bay. At the time, Mr. Langille was unaware that shore-front properties were vulnerable to erosion. Mr. Dennis, on the other hand, was aware of the danger of erosion, and testified that the property would, on average, lose three feet of shoreline every year. Nevertheless, he did not mention erosion to Mr. Langille in their discussions prior to sale.

[2] Shortly after Mr. Langille purchased the property, a neighbour informed him that erosion was a problem, and Mr. Langille installed an armour rock barrier to defend against the encroaching water. To recover the costs of the barrier, he

brought a claim against Mr. Dennis alleging that he had misrepresented the danger of erosion in the property condition disclosure statement.

[3] In the Small Claims Court, the learned Adjudicator held that the property's susceptibility to shoreline erosion was a major and substantial latent defect not apparent on reasonable observation of the property. He found that Mr. Dennis had a duty to disclose the erosion problem and on March 20, 2012, ordered him to reimburse Mr. Langille $9,775.00 for the cost of installing the armour rock barrier. Mr. Dennis has appealed that decision.

Issues

[4] Small Claims Court appeals are governed by s.32 of the *Small Claims Court Act*, R.S.N.S. 1989, c.430 ("the Act") which gives a right of appeal on grounds of jurisdictional error, error of law, or failure to follow the requirements of natural justice. In this case, the Appellant alleges that the learned Adjudicator erred in law twice: first by permitting submissions on whether the property's vulnerability to erosion was a latent defect when that was not pled; and secondly, by deciding that it was. While the first ground could be characterized as a question of natural justice, in any event the issues fall within the permitted grounds for appeal. The Respondent contests both grounds and raises an issue of his own; he argues that the Notice of Appeal should be set aside since it was not served on him within the time required by the *Small Claims Court Forms and Procedures Regulations*. [NS Reg 17/93 (the *"Regulations*")] I will address these issues in the following order:

(1) Should the appeal be set aside for failure to serve the Respondent with the Notice of Appeal within the thirty days required?

(2) Did the learned Adjudicator err by permitting submissions on whether the property's susceptibility to erosion was a latent defect when that was not pled?

(3) Did the learned Adjudicator err by finding shoreline erosion on the Cobequid Bay to be a latent defect of the property?

Analysis

1. Should the Notice of Appeal be set aside for failure to serve the Respondent with the Notice of Appeal within the 30 days required?

[5] Pursuant to s.22(2)(b) of the *Regulations*, the Appellant was required to serve the Respondent with the Notice of Appeal no later than 30 days after the learned Adjudicator's order was filed. In this case, the order was filed on March 20, 2012, and the Notice of Appeal was filed on March 30, 2012, but the Respondent was not served until April 26, 2012. Additionally, s.22(4) of the *Regulations* provides that: "[t]he appellant shall file proof of service of the Notice of Appeal on the respondent with the prothonotary not later than 7 days after the last day for service of the Notice of Appeal." The registered mail receipt was only filed with the court on May 3, 2012. Counsel for the Appellant acknowledges that he failed to abide by these sections, so the question to be answered is: what are the consequences of that breach?

[6] The Respondent submits that setting the Notice of Appeal aside is appropriate since a "regulation in law or any other institution without an element of accountability or consequence is not a regulation, but merely a suggestion." That is essentially an argument for respecting the Executive's will, but it overlooks s.22(12) of the *Regulations*, which reads:

> 22 ... (12) Noncompliance with this Section shall not render any proceeding void, but the proceeding may be amended, set aside as irregular or otherwise dealt with as the Court may direct.

In my view, that provision should govern the analysis, and it contemplates that non-compliance is not necessarily fatal to the appeal. Instead, the provision vests discretion in the Court to determine an appropriate remedy; it permits setting aside a proceeding but does not mandate it. The Appellant takes a more strident position and suggests that setting aside a proceeding may not be available since doing so would effectively "void" the proceeding. I disagree with that submission; whatever the meaning of "void," it does not erase the explicit statement that setting aside a proceeding is a possible remedy.

[7] No authority was presented which addresses how a Court should exercise its discretion in a situation where a notice of appeal was filed on time but there was a delay in service; however, guidance is provided in case law addressing extension of time limits to file a notice of appeal. In this appeal both time limits are prescribed within the same subsection of the *Regulations*. In **Clark v. Canzio** 2003 NSSC 252, 220 NSR (2d) 256, this Court considered a situation where the appellant's solicitor mistakenly filed the notice of appeal with the Small Claims Court, only discovering that she needed to file it with the Supreme Court five days after the deadline. In determining whether to grant an extension of time, Justice LeBlanc applied the same test that is used at the Court of Appeal, which was restated in **Hennick v. Children's Aid Society of Cape Breton** 2003 NSCS 84, 217 NSR (2d) 114:

> The court is to be satisfied that (a) the applicant had a *bona fide* intention to appeal while the right to appeal existed; (b) the applicant had a reasonable excuse for the delay in not launching the appeal within the prescribed time; and (c) appeal has sufficient merit in the sense of raising a reasonably arguable ground. See *Nova Scotia (Attorney General) v. Mossman et al.* (1994), 133 N.S.R. (2d) 229 (C.A.). This three part test is not to be applied inflexibly. As Hallett, J.A. pointed out in *Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 at 14, the court must ask on such an application whether justice requires the application to be granted. [*Ibid* at para.10 (emphasis in original), cited in ***Clark v. Canzio**, supra* note 9 at para.12]

More recently, the test has increasingly focused on that residual ground of doing justice in the case. As stated in **Farrell v. Casavant**, 2010 NSCA 71 at para.17, the three parts of the test are "more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted." The Court of Appeal confirmed the importance of the factors considered in the three-part test, but noted that other relevant considerations include the length of the delay and the presence or absence of prejudice.

[8] In my view, the same factors should guide the discretionary power in s.22(12); if Mr. Dennis can satisfy this analysis, then the appeal should be allowed to proceed.

Did the Appellant have a bona fide intention to appeal?

[9] The Appellant filed the Notice of Appeal within time, which is clear evidence that he possessed a *bona fide* intention to appeal before the deadline.

Was there a reasonable excuse for failing to serve the Respondent?

[10] The Appellant's counsel acknowledges his own error but argues that it was an honest mistake. In part, he blames the "lousy drafting" of the *Regulations*. He complied with s.32 of the Act by filing the Notice of Appeal on March 30, 2012, and in his view that section appeared to be a "comprehensive code of how to appeal." However, s.32(2) specifically states that a "notice of appeal filed pursuant to subsection (1) shall be in the prescribed form," and it is s.22(1) of the *Regulations* that prescribes the form. As such, s.32 of the Act is not as disconnected from s.22 of the *Regulations* as the Appellant's lawyer asserts. Moreover, common sense dictates that you have to tell the other party that you are appealing a decision. In this regard, the Appellant submits that the Respondent knew that an appeal was planned and asserts that he had sent a letter, but that was not established by evidence and the Respondent denied it in his brief and in his oral submissions. As such, I am not satisfied that counsel has provided a reasonable excuse for not consulting the *Regulations*.

[11] Although it does not absolve counsel for the oversight in not consulting the *Regulations*, it should be noted that there was confusion with respect to calculating time limits when this appeal was launched. Even if he had referred to the *Regulations*, interpreting the number of days within which the appeal had to be filed and served involved uncertainty. Traditionally, determining a period of days prescribed for doing something after an event meant counting every day except the day of the event (*Interpretation Act*, R.S. c.235, s.19(l)). However, *Civil Procedure Rules* were revised in 2009 to exclude certain days, including Saturdays and Sundays, from the calculation of time limits. As deadlines for filing and serving many appeals are governed by *Civil Procedure Rules*, some litigants and counsel incorrectly presumed that the longer periods prescribed by the revised Rules applied universally. The time limits in the Act and not the 2009 Rules prevailed when this appeal was launched, but it is noteworthy that had deadlines prescribed by the Rules been operative, the appeal would have been served in

time. It is also significant that on May 10, 2012, very shortly following the relevant dates in this case, *Civil Procedure Rule 94.02(5)* was amended to exclude Saturdays and Sundays when calculating time periods for appeals under statutes such as the Act. Accordingly, had the learned Adjudicator's decision been rendered a short time later, the time taken to serve Mr. Dennis' appeal and file proof of service would have been within the prescribed limited. Counsel's mistake should be considered in that context.

[12] Additionally, the oversight in not consulting the *Regulations* was solely that of counsel. Clearly, Mr. Dennis had instructed his lawyer to conduct the appeal, and it was reasonable to rely on counsel to follow the correct procedure. In that regard, it is arguable that Mr. Dennis has a reasonable excuse, even if his lawyer does not. In **Clark v. Canzio**, Justice LeBlanc engaged in similar reasoning at paras.15-16.

Does the appeal have sufficient merit?

[13] In my view, it does. The question whether a property's susceptibility to erosion is a patent or a latent defect is an appealable question of law, and it is reasonably arguable that the learned Adjudicator erred in deciding it was latent. The other ground of appeal is less arguable, but I will address that later.

Was the respondent prejudiced by the delay in service?

[14] The Respondent admits that he had actual notice on April 26, 2012, about one week after the deadline. The appeal was heard on October 3, 2012, and I do not find that the minor delay of one week out of nearly six months caused any prejudice to the Respondent.

Does justice require an extension of time?

[15] In my view, justice in this case requires an extension of time. Even if counsel's oversight were imputed to Mr. Dennis and the Appellant deemed not to have a reasonable excuse, the delay in service was inconsequential, and refusing the extension would deny the Appellant the opportunity to appeal a substantial order on meritorious grounds. As such, the balance of convenience favours the

Appellant and it would be unfair to set aside the Notice of Appeal. The Respondent's request that the appeal be set aside is therefore refused.

2. Did the learned Adjudicator err by permitting submissions on whether the property's susceptibility to erosion was a latent defect when that was not pled?

[16] This ground of appeal was not addressed by the Appellant in his brief, nor did he raise it in oral submissions, so the Respondent may be correct when he asserts that this "is no longer an issue of contention."

[17] In any event, this ground is without merit, whether construed as alleging a denial of natural justice or an error of law. In **Popular Shoe Store Ltd v. Simoni**, [1998 CanLII 18099, 163 Nfld & PEIR 100, 24 CPC (4th) 10 (NLCA) (**Simoni**)] the Newfoundland Court of Appeal addressed the problem of insufficient pleadings in the Small Claims Court, and noted that:

> Particularly in Small Claims Court, where claimants, as here, are often unrepresented, a liberal approach ought to be taken to the pleadings that are presented so as to ensure that access to proper adjudication of claims is not prevented on a technicality. [...] If a claimant by his or her pleading or evidence states facts which, if accepted by the trier of fact, constitute a cause of action known to the law, the claimant should *prima facie* be entitled to the remedy claimed if that is appropriate to vindicate that cause of action. The only limitation would be the obvious one that if the case takes a turn completely different from that disclosed or inferentially referenced in the statement of claim, thereby causing prejudice to the other side in being able properly to prepare for or respond thereto, the court may either decline to give relief or allow further time to the other side to make a proper response.

Simoni stands for the proposition that an adjudicator is entitled to grant a remedy if the evidence makes out a cause of action, even if that cause of action was not specifically pleaded. If necessary, he or she can adjourn the proceedings to cure any prejudice to the other party that results from surprise. The decision has been followed in Nova Scotia on numerous occasions, [See eg, **Nichols v. MacIntyre**, 2004 NSSC 36 at paras.17-19, 221 NSR (2d) 137; **Oasis Motor Home Rentals Ltd. V. Thomas**, 2001 NSSC 45 at para.19, [2001] NSJ No.112; **Ace Towing Ltd. V. TG Industries Ltd.**, 2008 NSSC 65 at para.16, 371 NSR (2d) 72.] It also reflects the objective set out in s.2 of the Act to adjudicate claims within its

monetary jurisdiction "informally and inexpensively but in accordance with established principles of law and natural justice."

[18] The learned Adjudicator's reasons at pp.7-9 of his Summary Report disclose no error in how he identified the question of latent defect as being material to the case. In his words, "[t]he case from the start was directed towards the question of whether or not there was a latent or patent defect and what, if any, duty of disclosure there was." Both parties addressed the issue at the hearing, and "[t]here was never any objection from Defendant's counsel and in fact the conduct of the Defendant's case and Defendant counsel's arguments evidenced an awareness of the issue." [Summary Report p.8] Moreover, the matter was adjourned for a month in order to address whether vendors can be liable for not disclosing a latent defect; therefore, even if the Appellant had initially been surprised there was ample opportunity to address the issue when the hearing continued. There is no merit to this ground of appeal.

3. Did the learned Adjudicator err by finding the rapid shoreline erosion on the Cobequid Bay to be a latent defect of the property?

Standard of Review

[19] This is a question of law; as such it must be reviewed on a standard of correctness. **[Brett Motors Leasing Ltd v. Welsford** (1999), 181 NSR (2d) 76 at para.14 (SC) (**Brett Motors)]** Although decided before the Supreme Court of Canada’s extensive analysis in **Dunsmuir v. New Brunswick** 2008 SCC 9, **Brett Motors** continues to provide an accurate statement of the required standard of review in this case. [See **Economical Mutual Insurance Co. V. Rushton** 2008 NSSC 237, at paras.4-9] If the learned Adjudicator erred on this point, then his decision is not accorded deference.

Law

[20] Before assessing whether the learned Adjudicator erred, it is necessary to recognize how the law distinguishes patent and latent defects. In **Cardwell v. Perthen** 2007 BCCA 313 (**Cardwell**) the British Columbia Court of Appeal approved the following definition at para.44:

> Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property...in general, there is a fairly high onus on the purchaser to inspect and discover patent defects.

Halsbury's Laws of England provides that:

> "[p]atent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase." [Halsbury's Laws of England, vol.42, 4th ed. (London, UK: Butterworths, 1980) at 44, para.45]

That definition has been applied in a number of cases [See eg **Gesner v. Ernst,** 2007 NSSC 146 at para.45, 254 NSR (2d) 284, [2007] NSJ No. 211 (QL); **Willman v. Durling**, 249 NSR (2d) 48, [2006] NSJ No. 368 (QL); **Haviland v. Pickering**, 2011 SKPC 144 at para.14].

[21] Victor Di Castri, Q.C., defines patent defects somewhat differently in The Law of Vendor and Purchaser:

> A patent defect which can be thrust upon a purchaser must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. […] A latent defect, obviously, is one which is not discoverable by mere observation. [Victor Di Castri, The Law of Vendor and Purchaser, vol.1, loose-leaf (consulted on 2 November 2012), (Toronto, ON: Carswell 1988) at s.236]

Di Castri eschews the inquiry requirement and emphasizes visual inspection, and a number of cases have also applied a similar definition. [See eg **Thompson v. Schofield**, 2005 NSSC 38 at para.18, 230 NSR (2d) 217; **Jenkins v. Foley**, 2002 NFCA 46 at para.26, 215 NFLD & PEIR 257, [2002] NJ No.216 (QL); Halsbury's

Laws of Canada - Misrepresentations and Fraud, (Markham, ON: LexisNexis Canada, 2008) "*Caveat emptor*", HMP-25]

[22] Nova Scotia case law does not definitively indicate which definition is preferred in this province; however, the British Columbia Court of Appeal effectively reconciled them with the following analysis in **Cardwell** at para.48:

> ... The cases make it clear that the onus is on the purchaser to conduct a reasonable inspection and make reasonable inquiries. A purchaser may not be qualified to understand the implications of what he or she observes on personal inspection; a purchaser who has no knowledge of house construction may not recognize that he or she has observed evidence of defects or deficiencies. In that case, the purchaser's obligation is to make reasonable inquiries of someone who is capable of providing the necessary information and answers. A purchaser who does not see defects that are obvious, visible, and readily observable, or does not understand the implications of what he or she sees, cannot impose the responsibility - and liability - on the vendor to bring those things to his or her attention.

The obligation to make reasonable inquiries arises out of the visual test as a way to ensure that the test is applied objectively; as such a defect is patent if it is objectively discoverable on a reasonable inspection of the property.

Decision of the learned Adjudicator

[23] The learned Adjudicator states his findings on this point at p.6 of his summary report:

> I determined that with regard to our particular situation the erosion problem was a latent defect. The Claimant standing on the beach and looking at the bank had no awareness of erosion. High tide was 35' from the bank. The Claimant had no awareness of the meteorological conditions which could conspire to cause substantial erosion.

He expanded on this at p.7 of his summary report:

> It would appear that what might not be a problem along the Province's south shore or eastern shore, is in fact a real and significant problem along the Cobequid/Fundy Shore. This was a situation of a latent defect, that is the susceptibility of the property to coastal erosion, which, with respect [to] this

> property anyway, was not observable standing on the beach and looking at the property, especially by a "city person" unfamiliar with even the concept of coastal erosion.

It is this decision that the Appellant argues discloses an error of law.

Application of Authority

[24] Before assessing the primary issue, the Appellant suggested that one ought not even classify "the erosion in question as a defect. It is a fact of nature, occurring in the Bay of Fundy for millions of years." I do not see merit to that argument. The word "defect" does not imply a human source. If, for instance, a property were susceptible to landslides, the fact that landslides are a force of nature hardly means there is not a defect rendering the property unfit for habitation; likewise if a property is rapidly vanishing into the ocean, I see no error in principle in classifying that as a defect in quality. For that matter, a lot of common defects, like wood rot, mould, and cockroach infestations, are also technically forces of nature, though admittedly of the less dramatic variety.

[25] However, that was not the Appellant's primary submission. Instead, the essence of his "argument on this appeal is that [the learned Adjudicator] has distorted the definition of a patent defect" by injecting "an unprecedented element of subjectivity" into it. He claims that the learned Adjudicator made his decision solely on the basis that the Respondent was unaware of the reality of erosion, and he suggests the Adjudicator applied a subjective test where "a 'defect' can be patent or latent depending on the upbringing, background and general state of awareness of the purchaser."

[26] The Respondent disputes that characterization of the learned Adjudicator's decision, and he claims that the test the learned Adjudicator applied was objective and the references to the Respondent's awareness of coastal erosion merely incidental. He notes that there are no visible shore protection mechanisms from anywhere on the property, and that the Adjudicator had merely found that no inspection could reveal 35' in depth of missing land. As he put it at para.13 of his brief:

> A reasonable inspection of the property does not identify that substantial and significant loss of land has occurred on this property over a very short period of

> time as a result of a very unique combination of tide, wind and soil properties that exist distinctively in this area […] For this reason the Adjudicator determined this defect to be latent.

In the Respondent's view, the learned Adjudicator applied an objective test and simply found that the loss of property was not visible and was therefore a latent defect.

[27] I agree with the Appellant that the learned Adjudicator erred by finding that coastal erosion was not observable upon a visual inspection and therefore a latent defect. Application of the proper test to distinguish types of defect reveals that it is patent in this case. The learned Adjudicator's finding of fact that no effects of coastal erosion on the property were visible to the eye is not challenged, but the reality of erosion is necessarily implied by the property's adjacency to the bay, and that is visible to the eye. The Respondent cannot escape that result just because he did not know about erosion and did not understand the implications of a property being on the bay; as the Appellant has correctly submitted, the test is objective. Therefore, even under the milder **Di Castro** test, which does not explicitly require reasonable inquiry, the susceptibility of the property to coastal erosion is a patent defect and the Adjudicator erred by finding otherwise.

[28] That conclusion is only strengthened when one applies a test that also requires reasonable inquiry as suggested in **Cardwell**. At the very least an obligation to make reasonable inquiry should include asking Mr. Dennis, and it would not be unreasonable to expect an inquiry to neighbours. In this case, Mr. Langille did not ask anyone prior to completing the purchase.

[29] The learned Adjudicator's finding that erosion is more rapid along the Cobequid Bay than along the province's other shorelines does not alter this analysis. The fact that the extent of the problem is undisclosed by visual inspection does not make it latent, especially in the absence of inquiry.

Conclusion

[30] I am not prepared to exercise discretion under s.22(12) of the *Regulations* to set aside this appeal merely because the Appellant was six days late in serving the Respondent. All relevant factors considered, the delay was inconsequential and caused no prejudice to the Respondent.

[31] The learned Adjudicator did not err by allowing submissions on the question of latent defects, even though it was not explicitly pled. His conduct of the hearing was entirely appropriate and consistent with the purpose of the Act. However, I conclude that he did err when he decided that the property's susceptibility to erosion was a latent defect. The property's adjacency to the water necessarily implies that it is threatened by erosion, and as that is visible it is a patent defect.

[32] The learned Adjudicator's determination that Mr. Langille could recover the cost of installing a rock armour barrier at the property was based entirely on his conclusion that susceptibility to erosion constituted a latent defect. He did not otherwise conclude that Mr. Dennis made a misrepresentation in the property condition disclosure statement nor did he base his decision on other findings of fact which should not be disturbed on appeal. Accordingly, as I respectfully disagree with the Adjudicator's conclusion that there was a latent defect, the appeal is allowed, and Mr. Langille's claim is dismissed.

[33] Mr Dennis is entitled, pursuant to the Act and *Regulations*, to a barrister's fee of $50.00 and reasonable out-of-pocket expenses incurred in this Court and in Small Claims Court. If the parties are unable to agree on what those are, they may make submissions in writing within 30 days.

J.