IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Station Road Sewer Association v. Myers, 2008 NSSC 203

Date: 20080623
Docket: SH 297232
Registry: Halifax

Between:

Heather Conrad, Robert Cross, Donna Marie Cross,
Harold Davis, Jacqueline Dunsworth, Emerson Feltham,
Ronald Harnish, John Jerrold Hebb, Susan Hebb,
Arnold Schwartz and Chris Smith
(Collectively referred to as: "Station Road Sewer Association")

Plaintiffs/Applicants

and

Madeline Myers

Defendant/Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: June 12 and 19, 2008, in Halifax, Nova Scotia

Written Decision: June 26, 2008

Counsel: Jill Nette, Ll.B. and Megan Blaikie, Articled Clerk, on behalf of the Plaintiffs/Applicants
Christa Hellstrom, Ll.B. and Alex Keaveny, on behalf of the Defendant/Respondent
Edward Gores, Q.C., on behalf of the Minister of Environment (N.S.), watching brief

By the Court:

[1] Heather Conrad, Robert Cross, Donna Marie Cross, Harold Davis, Jacqueline Dunsworth, Emerson Feltham, Ronald Harnish, John Jerold Hebb, Susan Hebb, Arnold Schwartz and Chris Smith, known collectively as "Station Road Sewer Association" commenced an application on June 10, 2008 for an order declaring that a certain agreement/indenture signed on March 10, 1972 is and remains in full force and effect. I shall hereinafter refer to the several named plaintiffs as the "applicants".

[2] At the same time as starting the application, the applicants also filed an ex parte interlocutory application for:

> 1. an interim injunction pursuant to the *Judicature Act*, R.S.N.S., 1989, c. 240, s. 43(9) and *Civil Procedure Rule* 43.01(3) restraining the Defendant from blocking a septic system located on her land which services the homes of the plaintiffs;
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> 2. an interim injunction pursuant to the *Judicature Act*, R.S.N.S., 1989, c. 240, s. 43(9) and *Civil Procedure Rule* 43.01(3) allowing the plaintiffs on the Defendant's land to do necessary maintenance and repairs to the septic system which services the homes of the plaintiffs; and,
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> 3. costs.

[3] Counsel for the applicants, despite the ex parte nature of the interlocutory application, did provide notice to the defendant, Madeline Myers. I shall hereinafter refer to Madeline Myers as the "respondent".

[4] Counsel for the respondent requested leave of the Court to be heard. The request was granted.

[5] The Court, on its own initiative, adjourned the hearing of the interlocutory application in order to properly review the affidavit and brief filed by the respondent's counsel. This was done with the agreement of the respondent to refrain from shutting down the septic system which services the properties owned or occupied by the applicants. By letter dated May 16, 2008, the respondent had notified the Station Road Septic System Property Owners of her intention to disconnect the pipe to the sewage tank which, if carried out, would have effectively shut down the septic system.

[6] The Court appreciates the respondent's forbearance.

[7] The adjourned hearing took place on Thursday, June 19, 2008. After hearing counsel's submissions on the merits of the interim relief sought by the applicants, the Court was of the mind to reserve judgment until today's date, June 23rd, 2008. Once again, the respondent was willing to forego any action that would have resulted in the shut-down of the existing septic system pending the Court's decision.

[8] On a preliminary motion, counsel for the respondent urged the Court to critically review the affidavit of Heather MacLean Conrad, which was filed in support of the application. It was argued that certain paragraphs, or portions thereof, should be struck for failure by the affiant to indicate the source of the information offered or on the ground that it takes the form of a plea or summation.

[9] **Civil Procedure Rule** 38 provides direction as to the form and contents of affidavits. The content of affidavits used on an application is governed by **Rule** 38.02(1) which states:

> 38.02 (1) An affidavit used on an application may contain statements as to the belief of the deponent with the sources and grounds thereof.

[10] What is proper and, hence, admissible in an affidavit has long been the topic of discussion in legal circles. Generally speaking, the Court has control over its own processes. Specifically, **Rule** 38.11 allows the Court the discretion to "order any matter that is scandalous, irrelevant or otherwise oppressive to be struck out of an affidavit."

[11] There has been a great deal of ink put to paper over the alleged inappropriate content of affidavits. The leading case on the topic is the decision of the Honourable Justice John M. Davison of this Court in **Waverley (Village Commissioners) et. al.** v. **Nova Scotia (Minister of Municipal Affairs)** 1993, 123 N.S.R. (2d) 46. The Court in that case reviewed the principles pertaining to the uses of affidavit evidence. It also provided direction on what is and is not acceptable content. In summary:

> 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.

2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.

3. Affidavits used in applications may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".

4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.

5. The affidavit must state that the affiant believes the information received from the source.

[12] Counsel referred to this decision as well as others which have adopted or endorsed the approach laid down by Justice Davison. Applying these principles, I have concluded that certain portions of the applicant's affidavit should be struck. I will deal with them in the order of their appearance:

Paragraph 1: This first paragraph should stipulate that the affiant has personal knowledge of the matters deposed to **except where stated to be based on information and belief**. While it does state that the affiant has "personal knowledge of the matters herein set forth" the additional words "except where stated to be based on information and belief" are missing. I agree with counsel for the respondent that these words should have been included but I do not share her view that the entire paragraph should be struck as a result. It is more important that the affiant use this phrase in each of the paragraphs where the matter deposed to is based on information garnered from some other source, provided the source is identified and, further, provided the deponent believes that which is being proffered. Leaving the phrase out of the introductory paragraph, although not recommended, does not require that it be struck. It will, therefore, remain as drafted.

Paragraphs 4, 5, 6 and 9: The same criticism applies to all or portions of these four paragraphs. Although the affiant states in paragraph 2 that she has lived on Station Road in Hubbards for almost her entire life, there is nothing contained in the affidavit to enable the Court to determine just how long that might actually have been.

Some of the facts contained in these paragraphs are not based on personal knowledge but, rather, on information. The source or sources of this information is not provided nor is the affiant's stated belief in the information so provided and being passed on. This is required in order for the Court to assess its reliability and to give it the weight it deserves. Applying the principles from the **Waverley** decision the first full sentence of paragraph 4 is struck. I am satisfied that the affiant from her personal knowledge would know the approximate width and location of the property in relation to the Station Road from being a long time resident of the area. As such, the second sentence in paragraph 4 shall remain.

The affiant states in paragraph 5 that "I am further informed", but does state by whom. She must provide her source. By not doing so, the Court cannot accept any portion of this particular paragraph. It is therefore struck in its entirety.

As to paragraph 6, how would the affiant know that Mr. MacLean gave permission to install the system "in full consultation with the County of Halifax." Was she privy to these discussions? The affidavit does not say. The Court should not guess as to how she would have known this. The paragraph is struck in its entirety.

The only portion of paragraph 9 which I am prepared to keep is, "the members of the Association are totally reliant on the system for their sewage needs". I am satisfied the affiant would have personal knowledge of this in her capacity as president of the organization and based on living there her entire life. The remaining portions of paragraph 9, however, should be struck.

Paragraphs 24, 25, 26 and 27: Counsel for the respondent points out that paragraphs 24 to 27 all contain hearsay allegations yet the affiant fails to state her belief in the information being provided. Perhaps if the introductory paragraph had contained the phrase "except where stated to be based on information and belief", the Court could overlook this deficiency but, since paragraph 1 does not state this, I must strike all four paragraphs in their entirety. Paragraphs 25 and 26 also do not identify the source of the information. One could speculate that it was Ms. Dunsworth , but the Court should not have to guess who the source might be. Paragraph 27 also contains double hearsay in that the affiant attempts to relay what was said to Ms. Dunsworth by a third party. If this information was required in support of the application, it should have been included in an affidavit either from the original source or in Ms. Dunsworth's affidavit, but not in Ms. Conrad's.

Paragraph 28: Counsel for the respondent also requests that this paragraph be struck. As president of the association, the affiant can speak on behalf of the group. The contents of this particular paragraph need not be struck and so it shall be retained.

Paragraph 30: Paragraph 30 was criticized for containing inappropriate expressions of opinion and also that it takes the form of a plea or summation. Counsel for the applicant only agreed that the second full sentence should be struck. The Court has decided to strike all of the paragraph save for the last sentence which is neither opinion nor does it take the form of a plea or summation. It is a statement of fact which the affiant would have knowledge of. Indeed, one can infer this from the notices sent by Ms. Myers to the members of the "Station Road Septic System Property Owners" on April 25, 2008 and May 16, 2008, in which she declares that the 1972 agreement (as she refers to it), has been breached and sets a deadline for the shut-down of the system.

[13] The Court is now in a position to consider the redacted affidavit filed in support of the application, along with the several affidavits filed on behalf of the respondent who opposes the granting of an interim injunction.

THE TEST FOR AN INTERLOCUTORY INJUNCTION

[14] The Court's authority to grant an injunction comes from the *Judicature Act*, R.S.N.S., 1989, c. 240, (as amended). **Civil Procedure rule** 43 governs the application which, in the case of an urgency, may be made ex parte under Rule 43.01(2). Under subsection (4) of this Rule, the Court, on an application for an interim or interlocutory injunction may grant, refuse or otherwise deal with it on such terms as are just.

[15] The leading case on interim or interlocutory injunctions is that of **R.J.R. MacDonald Inc.** v. **Canada (Attorney General)**, [1994] 1 S.C.R. 311 (S.C.C.). This decision confirmed a long line of cases that had accepted the decision of the House of Lords in **American Cyanamid Co.** v. **Ethicon Ltd.**, [1975] A.C. 396. It established the appropriate test for an interlocutory injunction which is basically a three step process:

1. Is there a serious issue to be tried?

2. Will there be irreparable harm occasioned to the applicant should the interim injunction not be granted?

3. What, as between the parties, is the balance of convenience?

[16] In the case of **Anderson** v. **Evans**, [2005] N.S.J. No. 87; 231 N.S.R. (2d) 26 (N.S.S.C.), Gruchy, J. of this Court, stated at paras. 10 and 11:

> 10 I prefer a five step process which I have gleaned from R.J.R. MacDonald, and American Cyanamid, [1975] A.C. No. 396 and various learned papers to which I have referred. They are as set out in American Cyanamid and as referred to by Sharpe J., in his test [sic] "Injunctions and Specific Performance". Mr. Justice Sharpe set forth the text as follows and referred to a decision of Lord Diplock in American Cyanamid. He said:
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> > Lord Diplock went on to set out a step-by-step formula as the appropriate way to determine whether an interlocutory injunction should be granted. More detailed consideration of each step follows under specific headings but it will facilitate discussion of the strength of case factor to summarize the formula here. First, as indicated, the court is to ask whether the plaintiff has presented a case which is not frivolous or vexatious but which presents a serious case to be tried. Second, will damages provide the plaintiff with an adequate remedy? If so, no injunction should be granted. If not, third, would the plaintiff's undertaking in damages provide adequate compensation to the defendant, should he or she succeed at trial, for loss sustained because of the interlocutory injunction? If so, then there is a strong case for an interlocutory injunction. Fourth, where there is doubt as to the adequacy of the respective remedies in damages, the case turns on the balance of convenience. Fifth, at this point, according to Lord Diplock, weight may be placed on the court's prediction of ultimate success, but only in certain cases.
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> 11 Sharpe then quoted from Lord Diplock and continued:
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> > In other words, the strength of case consideration of the traditional approach is stood on its head. Under the Cyanamid approach, the strength of the case comes into play, initially, only to the extent of determining that the plaintiff's claim is not frivolous or vexatious. The core test to be applied is balance of convenience. It is only where the court cannot properly assess balance of convenience that the relative strength of the parties' cases may be taken into account and then, only where one side of the case is clearly stronger.

[17] Whether a three-step process is followed or, the more involved five-step process preferred by Justice Gruchy, the Court must be satisfied that unless an injunction is granted the applicant's rights will be nullified or impaired by the time of trial (Reference **Anderson** v. **Evans**, *supra*, at para. 24).

[18] In light of the case that is before me, I will follow the five-step process preferred by Justice Gruchy.

Question 1: Is there a serious case to be tried which is not frivolous or vexatious?

[19] The parties agree that there is a serious issue involved. I will not spend much time on this point other than to say the Court also concludes the same.

Question 2: Will damages provide the plaintiffs (the applicants herein) with an adequate remedy?

[20] This involves the irreparable harm consideration. In the **American Cyanimid** case, *supra*, Lord Diplock described it this way at p. 408:

> As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the the [sic] loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

[21] In the **R.J.R. MacDonald** case, *supra*, the Court described "irreparable" at para 64 as follows:

> 65 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples for the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable

> damages to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[22] Counsel for the applicants has argued that there would be irreparable harm suffered by the plaintiffs if an interim injunction is not granted. Counsel for the respondent counters that if the plaintiffs ultimately succeed in their application scheduled for hearing on July 8, 2008, then any resulting harm can be cured and compensated for in monetary damages.

[23] If is clear from the affidavits of Ms. Conrad and the various correspondences, reports and other attachments appended thereto, that a number of individuals will be affected by the respondent's decision to shut down the septic system where it enters her property. Should that occur, the various homes and business would be without adequate sewage disposal. The residents would either have to move to alternate accommodations or, if that option was not available to them, then remain where they are and take the risk of having sewage back up into their homes or business. I have not been provided with any expert evidence or, indeed, evidence of any kind, as to the inherent risks associated with untreated sewage backing-up into a person's home. I do not think this is even necessary. It is common knowledge of which the court can take judicial notice.

[24] In addition, the community of Hubbards is not serviced by municipal water or sewer. Possible water contamination caused by improper handling and disposal of sewage could potentially threaten not only the water supply of those most directly affected by this decision, but potentially other near-by residents as well.

[25] The inconvenience of being forced to relocate can be compensated for in monetary damages. The same cannot be said about potential permanent damage to a person's health. No amount of money will adequately compensate an individual for the impairment of his or her health.

[26] I find there is irreparable harm that could result to the plaintiffs should their application be denied.

<u>Question 3:</u> Would the plaintiffs' undertaking in damages provide adequate compensation to the defendant, should she succeed at trial, for loss sustained because of the interlocutory injunction?

[27] There has been nothing said regarding the plaintiffs' ultimate responsibility for costs should their application fail. They should know that they will likely be called upon to cover at least some portion of the respondent's legal expenses should they not succeed in their suit. If the respondent does ultimately prevail, I am satisfied that any damages suffered by her as a result of granting this interlocutory relief can be compensated in damages.

<u>Question 4:</u> Where there is doubt as to the adequacy of the respective remedies in damages, what is the balance of convenience between the parties?

[28] I have concluded that there could be irreparable harm if the interlocutory injunction is not granted. Irreparable harm and balance of convenience are closely related.

[29] The parties who are lined up on the two sides of this issue have devoted a considerable amount of time and energy trying to come up with a viable solution to this problem. To date, they have not succeeded in resolving their dispute. Temporarily, at least, the matter will likely have to be decided by the Courts. Certainly the status quo is not an option, given the directive sent to the respondent by the Nova Scotia Department of Environment dated April 14, 2008. The applicants are prepared to engage, at their expense, the services of qualified contractors to begin the remedial work needed to alleviate or, at least, ameliorate the problems resulting from the malfunctioning septic system. This work, if undertaken immediately and, provided it meets with government approval, should satisfy the regulators. Any work carried out must be done in a way that minimizes any inconvenience to the respondent. Without venturing into who should ultimately bear the cost of this remedial work, for now any cost should be borne by the applicants as has been the situation for the approximately 36 years since the "Indenture" was first created on June 10, 1972. The balance of convenience supports the granting of the interim injunction to prevent the respondent from taking any steps to shut down the system and to restrain her from preventing the applicants or contractors or workmen engaged by them from entering into her lands to service, repair and maintain it.

Question 5: **If necessary, the Court may consider and give a prediction of ultimate success in the main application?**

[30] I do not think it is necessary to go down this road. I will say one thing, however. It is never too late for the parties to return to the table. A great deal of effort has already been expended trying to find a solution to this growing problem. It will all be for naught if everyone decides to remain entrenched in their respective camps. It would appear that all three levels of government are aware of the problem. Eventually, a more complete fix will have to be implemented. Until then, I would implore you to work co-operatively along with government to try to come up with a long-term and sustainable solution to the problem.

CONCLUSION:

[31] The interim injunction sought by the applicants which would prevent the respondent from doing anything that could shut down the existing septic system and which would prevent the applicants and other legitimate users of the system to, if necessary, go on the respondent's land to do all necessary maintenance and repairs, including using the services of contractors or other qualified workers to effect these repairs, is granted.

[32] Costs of this application will be costs in the cause.

McDougall, J.