IN THE SUPREME COURT OF NOVA SCOTIA
Citation: United Parishes of St. George and St. Patrick v. Guy, 2006 NSSC 178

Date: 20060612
Docket: S. H. No. 185929
Registry: Halifax

Between:

The Rector and The Wardens of the United Parishes
of St. George and St. Patrick

Plaintiff

v.

Daniel G. Guy

Defendant

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	By written submissions dated February 7, February 20 and March 13, 2006
Decision on Costs:	June 12, 2006
Counsel:	Alan G. Hayman, Q. C. for the Plaintiff John T. Shanks, for the Defendant

By the Court:

[1] This is the Court's decision on costs to the successful plaintiff. The most helpful way to introduce this matter is to reproduce the operative portions of the library sheet as follows:

> **"Subject:** Real Property - Adverse Possession - Laches
>
> **Summary:** The Plaintiff, The Rector and the Wardens of the United Parishes of St. George and St. Patrick ("The Church") alleges that the Defendant, Daniel G. Guy ("Mr. Guy") is claiming a significant portion of their land located at Hartz Point, Shelburne County, Nova Scotia. Mr. Guy's property is adjacent to the Church property and borders it on the West side. The Church contends the boundary line between the two properties has always been a straight light running in a North and South direction. Mr. Guy contends the eastern boundary line of his property veers to the East some 20 degrees at a point approximately 1460 feet from the shore of Birchtown Bay. This line (The "Hunt Line") was first officially documented in a survey performed by Robert L. Hunt,

which plan is dated October 1 - 8, 1971. This disputed line creates a 13 to 14 acre triangular piece of land (The "disputed land") bordering on the North Shore of Birchtown Bay. The disputed land contains a significant amount of shore line, some 1,100 feet, with a rather large and attractive sandy beach. Needless to say, this contested piece of land would have some considerable value in today's shoreline properties market.

Issue: 1. What was the historical location of the boundary line?

2. If the historical location of the boundary line was as contended by the Church, has Mr. Guy acquired a possessory title to the disputed land?

3. If the historical location of the boundary line was as contended by Mr. Guy, has the Church acquired a possessory title to the disputed land?

4. If the historical location of the boundary line was as contended by the Church, has the Church been guilty of such laches as to be barred or estopped from now

advancing or enforcing its historical title and right to ownership of the disputed land?

Result: Found historical paper title with the Church. Found the prerequisites for adverse possessory title not established. Found evidentiary basis to satisfy the requirements for a laches or estoppel defence not established. Judgment for the Church."

As can be seen from the above noted library sheet, the hearing of this matter took five days. After the trial ended, the defendant made a motion to amend its pleadings on the basis of the evidence heard, and this raised a new defence which had to be responded to by the plaintiff. As a result, post-trial submissions were not concluded until three months after the evidence closed.

Positions and Argument:

[2] The plaintiff takes the position that because the dispute concerned a 13 acre piece of land, it is not feasible to ascertain an "amount involved'. It argues that it should receive 75% of the fees incurred of approximately $91,000.00 on a billed time basis, plus disbursements of some $10,000.00. The total costs claimed by the plaintiff is approximately $78,000.00. The plaintiff

argues that anything less would not represent a substantial contribution toward its legal costs in pursuing the action. The plaintiff has cited a number of Nova Scotia Supreme and Court of Appeal decisions. The principle of "substantial contribution" appears to be accepted by our courts, however, what exactly that phase means is by no means clear. In support of its position, the plaintiff relies heavily on the case of Williamson v. Williams, [1998] N.S.J. No. 498 (C.A.) Where Justice Freeman said the following at paragraph 25:

> "25 In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances."

[3] The defendant argues that the "amount involved" is the first approach the court should take, if at all possible. This action would of course be subject to the tariff existing prior to September 1, 2004, and not the current tariff. In support of its position, the defendant relies on cases such as MacNeil v. Attorney General of Nova Scotia and Kevin Chisholm, a November 26,

1998 decision of Justice Goodfellow, and Duggan v. Attorney General of Nova Scotia et al, 2004, NSSC 144, a decision of Justice Moir, both of this court. In both those cases the court used the approximate value of the land in dispute to arrive at an "amount involved" and used the existing tariff to set costs.

[4] The defendant contends that since he purchased the entire land for $320,000.00, and because the disputed land is only a minor portion of that land, that the amount involved should be less than the purchase price for the whole. It suggests approximately 45% of the purchase price because the shore front is more valuable than the back land. Using the defendants calculations, the amount involved would be $144,000.00 and, applying the tariff existing at the time, would amount to costs of $8,695.00. The defendant points out that even if the purchase price for the entire property was used as the amount involved, it would only warrant costs of $14,000.00. It should be noted, as pointed out by the plaintiff, that the cases cited above by the defence were quieting titles actions and their complexity and entire trial process, eg. discovery, motions, etc., is not clear.

[5] I find that using an amount involved as argued by the defendant would be inadequate or insufficient in the circumstances. Justice Freeman in Williamson, supra, said the following at paragraphs 27, 28 and 29:

> "27 What is clear is that costs determined according to the tariffs of $14,180 are insufficient in the present case. It is recognized that full restitution is not possible. That would require an award of solicitor and client costs, which, as noted above, are not available, despite the dissenting opinion of Mclachlan, J. in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.) at 301.
>
> 28 It is difficult to avoid the conclusion that cases such as the present one require that a middle ground be found, between party and party costs determined under the present tariffs and solicitor and client costs, which affords at least a degree of recognition of the principle of restitution.
>
> 29 Under the old *Costs and Fees Act* anomalies could be avoided by resort to an award of costs in a lump sum. The discretion to award lump sum costs was retained when the tariffs were established. *Rule 63.02 (1)(a)* gives a trial judge discretion to "award a gross sum in lieu of, or in addition to any taxed costs". Practice has focused on the tariffs but this rule, although sparingly used, is still available".

Conclusion:

[6] I agree with the defendant that it was probably not necessary to have two such experienced counsel for the plaintiff on this case. I also agree with the plaintiff that it would be inappropriate to award costs on an amount involved and that a lump sum is warranted in order to fix a reasonable amount of contribution toward the legal costs of the plaintiff. I favour the approach

recommended by Justice Freeman, in Williamson, supra, and the court must strive to find a just middle ground in cases such as these. The present case was somewhat complex, made even more so by the pre-trial, trial and post-trial motions of the defendant and by late actions or motions of the defendant. This proceeding required extensive discoveries and five days of trial. The amount suggested by the defendant would barely cover the cost of one counsel attending at trial.

[7] I find that costs of $30,000.00, to the plaintiff, would represent a substantial and reasonable contribution towards its costs in the circumstances of this case. I also award disbursements of $9,793.39. I note that the plaintiff only charged for the attendance expenses of one counsel at trial, and therefore, no adjustment is warranted on that account. I have reduced the amount of the invoice to Turner Surveys by $414.00, which is interest, the reason for which is unexplained and the rate is more that three times the pre-judgment interest rate.

[8] The plaintiff shall therefore have total costs and disbursements of $39,793.39.

Boudreau J.