SUPREME COURT OF NOVA SCOTIA
Citation: *Krebser v. Boudreau*, 2017 NSSC 29

Date: 20170203
Docket: SY319284
Registry: Halifax

Between:

Max Krebser

Plaintiff

v.

Real Boudreau

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Michael J. Wood
Heard:	October 24, 25, and 26, 2016, in Yarmouth, Nova Scotia
Written Decision:	February 3, 2017
Subject:	Civil Procedure – Joinder of Parties – Stay of Proceedings
Summary:	Plaintiff sued lawyer who migrated property for Ross alleging that it included his lands and that migration was negligently done. Neither Ross nor his successors in title were parties. Defendant lawyer and expert witnesses all testified about the proper interpretation of the recorded deeds and plans. During and after trial Court raised issue of absence of Ross interests from the litigation.
Issues:	Should court decide issue of lawyer's negligence in absence of party whose title had been migrated?
Result:	The parties agreed that the decision could not affect non-parties but disagreed about what should happen. Plaintiff wanted to defer decision until Ross and his successors were joined and defendant wanted decision on negligence. Defendant said

reasonableness of lawyer’s title opinion for migration purposes not the same as deciding ownership.

Expert witnesses reviewed and commented on merits of ownership claims of Plaintiff and Ross. Decision on whether lawyer was reasonable in certifying that Ross had marketable title would require interpretation of same deeds and plans as ownership dispute.

Court concluded that issues were sufficiently connected that claim against lawyer should not be decided without Ross and successors being joined as parties. Proceeding was stayed until this takes place.

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Heard:	October 24, 25, and 26, 2016, in Yarmouth, Nova Scotia
Counsel:	Hugh Robichaud, for the Plaintiff Stephen Kingston, for the Defendant

By the Court:

[1] This litigation involves a parcel of land located at Kemptville, Yarmouth County, Nova Scotia, on the shore of what is now known as Halfway Lake. The southern portion of the property is approximately nine acres, the majority of which consists of a point of land extending into the lake. For ease of reference I will refer to the entire nine acre parcel as the Point.

[2] The plaintiff, Max Krebser, received a warranty deed for the Point in January 2003. His chain of title can be traced back to a deed signed in July 1953 which included a sketch of the Point in addition to a metes and bounds legal description.

[3] Manfred Ross also received a warranty deed for lands at Kemptville, which was signed in February 1987. The legal description in that deed was based upon a 1981 plan prepared by surveyor R.L. Hunt that depicted a 30.8 acre parcel which included the Point.

[4] In June 2005 Mr. Ross retained Anthony Chapman, QC, to migrate his property under the *Land Registration Act*, S.N.S. 2001, c.6. Mr. Chapman was located in Halifax and he retained the defendant, Real Boudreau, who practiced law in Yarmouth, to carry out the migration.

[5] Mr. Boudreau migrated Mr. Ross's property using the legal description in his deed which encompassed the entire 30.8 acre parcel including the Point. Mr. Krebser says Mr. Boudreau was negligent in completing the migration in this fashion and he has suffered damages as a result.

Background

[6] Prior to the migration of the lands in issue the provincial online mapping showed two separate parcels, each with their own unique Parcel Identification Number (PID). The northern portion of the land was described as being owned by Manfred Ross and was referred to by PID 90122326. The Point was shown as being owned by Max Krebser and was referred to as PID 90230822.

[7] When Mr. Ross retained Mr. Chapman to migrate his property under the *Land Registration Act* he told him he owned the entire parcel encompassed by the two PID's and described the dividing line between the northern and southern portions as a "curious division line".

[8] Mr. Chapman requisitioned title searches for the lands described in the Ross and Krebser deeds. As a result of this investigation he concluded that there appeared to be competing chains of title to the Point. In such circumstances his usual practice was to retain a local solicitor to carry out more detailed research. That is how Mr. Boudreau came to be involved. Although Mr. Boudreau carried out the actual migration, he consulted with Mr. Chapman throughout the process.

[9] The initial title searches carried out for Mr. Chapman started at a 1946 deed in the case of Mr. Ross and a 1953 deed for Mr. Krebser. One of Mr. Boudreau's tasks was to take the searches further back. Mr. Boudreau says he was able to trace the titles back to the original 1806 township grant. As a result of this additional research Mr. Boudreau was of the view that Mr. Ross's claim to ownership of the Point was superior to that of Mr. Krebser, but there were still competing chains of title. Mr. Boudreau decided he could not ignore Mr. Krebser and his potential interest in the migration process.

[10] Mr. Boudreau became aware of several plans which were relevant to his work. The first was the sketch attached to the 1953 deed in Mr. Krebser's back title which showed the Point as the lands being conveyed. Another was the 1981 survey plan prepared by R.L. Hunt which showed the entire 30.8 acres as being owned by Mr. Ross's predecessor in title. It did not show a division between the north and south portions. This was the plan from which the legal description in the Ross deed was prepared.

[11] In February 1994 Mr. Hunt prepared a plan of rectification for lands of M. & M. Developments Limited (Mr. Ross's predecessor in title) which showed a dividing line separating the north portion and the Point. The north portion is described as lands conveyed by E.D. Nickerson to M. & M. Developments Limited. The Point is described as being lands of Eileen Nickerson who was one of Mr. Krebser's predecessors in title.

[12] In November 1996 surveyor Gerald A. Pothier did a survey of the lands of Richard M. Hurlbert (Mr. Krebser's predecessor in title). He prepared a plan showing Mr. Hurlbert as the owner of the Point, with Manfred Ross as the owner of the lands to the north. The dividing line between the properties coincides with that found on the rectified Hunt plan and generally matches the 1953 sketch.

[13] Mr. Boudreau reviewed all of these plans, as well as the title searches, and concluded that he was not able to determine the issue of ownership of the Point as between Messers Ross and Krebser. He felt this would require a court hearing to

resolve. After consultation with Mr. Chapman he decided the best course of action was to migrate the entire property in the name of Mr. Ross but add a textual qualification identifying Mr. Krebser's interest. Both Mr. Chapman and Mr. Boudreau testified that the purpose of the textual qualification was to preserve Mr. Krebser's rights and in particular his ability to make an *in rem* claim to the Point.

[14] On October 14, 2005, Mr. Boudreau took the first step in the migration process which was to file Form 1, Request for PID Assignment, under the *Land Registration Administration Regulations*. The effect of this was to request that the mapping for Mr. Ross's PID 90122326 be changed to encompass the lands previously shown as Mr. Krebser's PID 90230822. That form included the following additional comments:

> We are aware that there may be someone else claiming title to the southern portion of the lands however we claim that our title is superior. Migration of the property will include a tq to that effect.

[15] Service Nova Scotia granted the request and as a result Mr. Krebser's PID disappeared from the provincial mapping system.

[16] On November 21, 2005, Mr. Boudreau submitted an application for registration of Mr. Ross's ownership of PID 90122326. Included in the package was a copy of Mr. Boudreau's abstract of title showing the Ross chain of title, his Opinion of Title based upon the abstract as well as various other documents. There was a copy of Form 29, Statement of Registered and Recorded Interests, which included the following textual qualification on title:

> The title of Manfred Ross may be subject to the rights, if any, of Max Krebser in that portion of the lands described in a Deed from Richard M. Hurlburt to Max Krebser recorded at the Registry of Deeds Office at Yarmouth, Nova Scotia, on April 9, 2003 in Book 650 at Page 735.

[17] Mr. Boudreau's application for registration was accepted with the result that Mr. Ross's title to the entire parcel was migrated subject to the textual qualification which was shown on the parcel register.

[18] In 2007 Mr. Krebser became aware of the Ross migration when he checked Property Online and could find no reference to his land or PID. He retained legal counsel and was ultimately successful in having the Registrar General agree to restore his PID 90230822 encompassing the Point. The Registrar General's

agreement was subject to certain understandings set out in his email of June 25, 2009, sent to Mr. Krebser's legal counsel. It reads:

> I acknowledge receipt of your email of June 24, 2009 directed to Ms. Zwicker, of our office.
>
> We will notify the mapper for that region and request that she reactivate the PID previously created in response to your Request for PID assignment. The PID number is 90230822. This is being done on the understanding that you will be proceeding to register title on behalf of your client, Max Krebser, and that you will be including in the parcel register a textual qualification noting that the area of land to which you are certifying is included in the description in the parcel register of the lands registered to Manfred Ross, as proposed by Ms. Zwicker in her email of May 26, 2009.
>
> When the mapping changes are made, a public comment will added to the parcel register for the lands owned by Manfred Ross, indicating that the legal description does not match the mapping graphics.

[19] As of the date of trial Mr. Krebser had not migrated his title under the *Land Registration Act*.

[20] These proceedings were commenced by Mr. Krebser against Mr. Boudreau in October 2009.

Expert Evidence

Ian H. MacLean, QC

[21] Mr. MacLean prepared an expert report for the plaintiff. His qualifications were admitted and his report entered as evidence. He was not required to attend for cross-examination. The stated purpose of his report was to provide an opinion with respect to what a reasonably competent lawyer would do in relation to the migration of the Manfred Ross property.

[22] Mr. MacLean reviewed the survey plans and abstracts of title and came to the conclusion that the 1981 Hunt plan should not have been used as the basis for the parcel description. The migration should have been based upon the rectified plan which means it would not include the Point. Mr. MacLean expressed the opinion that there was no evidence on the public record to support the 1981 plan and that it had been discredited by Mr. Hunt's subsequent plan of rectification.

[23] Mr. MacLean disagreed with the use of a textual qualification to cast doubt about the area of land encompassed by a parcel in a circumstance where there was no reasonable doubt about the proper description. Based upon his review of the title information Mr. MacLean did not believe this was a case of competing titles but rather a matter of using an erroneous description for the migration. He concluded that Mr. Boudreau did not meet the standard of a reasonably competent lawyer in relation to the migration of the Ross property.

Catherine S. Walker, QC

[24] Ms. Walker filed an expert report on behalf of the defendant. Her qualifications were accepted, but she was required to attend for cross-examination.

[25] Ms. Walker's report expresses the opinion that the migration carried out by Mr. Boudreau met the standard of care of a reasonable and prudent solicitor with two exceptions. The first was the use of a short form description referring to the 1981 Hunt plan. This plan did not comply with the applicable regulations because it was not approved through the municipal subdivision process. Mr. Boudreau was also wrong in stating that there was compliance with the *Municipal Government Act*, S.N.S. 1998, c.18, because there was no approved plan. Ms. Walker goes on to state that neither of these deficiencies affects the appropriateness of the migration. Instead of a short form description the full metes and bounds description should have been used.

[26] Ms. Walker reviewed all of the title information and noted in her report the requirement that Mr. Boudreau's Opinion of Title must confirm that the abstract demonstrated marketable title for the property pursuant to the *Marketable Titles Act*, S.N.S. 1995-96, c.9. She expresses the opinion that Mr. Boudreau satisfied this standard. In her analysis Ms. Walker provides her interpretation of the significant deeds in each chain of title and agrees with Mr. Boudreau's assessment that Ross and Krebser have competing titles to the Point. She disagrees with Mr. MacLean's contrary conclusion.

[27] In cross-examination Ms. Walker was questioned extensively about her opinion that Mr. Boudreau's abstract showed marketable title for Mr. Ross to the Point. She maintained her conclusion that it did but acknowledged that others might have a different opinion.

Issues to be Decided

[28] This litigation is about the migration of property owned by Manfred Ross under the *Land Registration Act*. Mr. Ross is not a party and I am advised by counsel that he no longer owns the migrated lands. The expert report of Catherine Walker, QC, suggests the property was owned by Vladi Private Islands (Canada) Limited and M. & M. Developments Limited as of October 2015. I do not know who the current owners are. As I explained to counsel at various points during the trial I am not prepared to grant an order which might adversely impact the owner of the Ross property since they were not involved in this proceeding.

[29] It is clear that at some point the issue of ownership of the Point will have to be resolved whether by further litigation or agreement. Both Mr. Chapman and Mr. Boudreau testified that it was their intent to preserve the ownership claims of Ross and Krebser by use of the textual qualification.

[30] In the pre-trial brief filed on behalf of Mr. Krebser, Mr. Robichaud indicated his client was seeking damages as well as the following relief:

> My client also seeks a declaration from this Honourable Court directing that the Ross property description be amended to coincide with the amended Hunt survey and deeds.

[31] At the beginning of the trial I raised this with Mr. Robichaud and indicated that I would not grant such an order since it was not within the scope of the relief sought in the statement of claim and neither the Registrar General nor the owner of the Ross property were parties.

[32] At the beginning of closing submissions I again expressed my concern to counsel about the scope of any decision I might give in light of the absence of the owner of the Ross property as a party. Mr. Kingston, on behalf of the defendant, said that the issue I needed to decide was the reasonableness of Mr. Boudreau's conduct in carrying out the migration. He said I might need to refer to some of the title documents but not come to any definitive conclusion on ownership.

[33] Mr. Robichaud agreed I should decide whether Mr. Boudreau was negligent. He said this would include assessing the reasonableness of his Opinion of Title and deciding whether Mr. Ross had marketable title to the Point.

[34] Mr. Robichaud said that even if I found Mr. Ross had marketable title I would still need to decide whether use of the description based upon the Hunt survey was appropriate. Mr. Robichaud argued that Mr. Ross did not have superior title to the Point and so the request to remove Mr. Krebser's PID from the provincial mapping system was not justified.

[35] Mr. Robichaud also argued his client had "perfect title" to the Point in 2005 and he would have been entitled to migrate it under the *Land Registration Act* without any qualification. He says the actions of Mr. Boudreau have now made that impossible because of the use of the 1981 Hunt description and the textual qualification and Mr. Krebser has suffered ongoing damages in his attempts to rectify the problem.

[36] At the end of the trial I reserved my decision. By letter dated November 29, 2016, I requested further submissions from counsel on the following questions:

1. Can I decide the issue of Mr. Boudreau's negligence without commenting on whether Mr. Ross had marketable title to the land described in the Krebser Deed? Please explain.
2. Can or should I express an opinion on whether Mr. Ross had marketable title to the lands described in the Krebser Deed without Mr. Ross or his successors in title being parties? Explain.
3. If I should not comment on the quality of the Ross title without he or his successors being parties, what should happen in this proceeding in relation to the trial which was completed in October?

[37] Mr. Robichaud, on behalf of the plaintiff, said the issue of Mr. Boudreau's negligence could not be resolved without the court coming to a conclusion on whether Mr. Ross had marketable or any title to the Point. He recognized that such a conclusion should not be binding on non-parties and in particular Mr. Ross and his successors in title and suggested that the court's determination should be expressly without prejudice to those parties. His submissions imply that the issue of Ross's title would be decided afresh in subsequent litigation without regard to the findings in this case.

[38] As an alternative Mr. Robichaud repeated a position he had advanced in his closing submissions that the court should permit Mr. Krebser to join Mr. Ross and his successors in title in this proceeding. On this point his supplementary submissions say the following:

> In all the circumstances I would invite the Court to consider allowing the Plaintiff to add Ross and his successors in title to the proceedings for the sole purpose of proceeding under Section 35 of the *Land Registration Act* in regards to the parcel registers. The Defendant, Real Boudreau, would likely not have to participate, or participate on an extremely limited basis, in those proceedings. That would allow the Plaintiff to seek rectification of the parcel description related to the Ross lands and allow for a full disposition of the matter.
>
> As I indicated in my closing arguments damages are not complete at this time. As a result of the alleged negligence of the Defendant my client is left with the real possibility that he will have to proceed under Section 35 of the *Land Registration Act* in any event. The question for this Honourable Court to determine is whether it should, in order to provide equity to all parties, allow the Plaintiff an opportunity to proceed under one forum in pursuing relief. Efficiencies in time and expense could be achieved in so proceeding.
>
> As regards the evidence and trial which was completed in October a decision could be deferred on the question of negligence until such time as the parties have canvassed an application under Section 35 of the *Land Registration Act* at which time damages can be assessed. In the alternative that Your Lordship does not wish to proceed in this manner I would invite a finding on negligence and delay a finding on damages until such time as the section 35 LRA application can be completed.

[39] Mr. Kingston argues that the allegations of negligence against Mr. Boudreau can be decided without determining whether Mr. Ross had marketable title. He says the question is whether Mr. Boudreau's actions were those of a reasonably competent lawyer, not whether he was correct in certifying that Mr. Ross had marketable title. He argued that the court should review the title information but only for the limited purpose of determining whether it reasonably supported Mr. Boudreau's exercise of professional judgment.

[40] Mr. Kingston says the court should not express an opinion as to whether Mr. Ross had marketable title to the Point because of the absence of Mr. Ross and his successors in title as parties to this litigation. He notes that those parties might choose to present different evidence and submissions than those advanced by Mr. Boudreau in defence of the claim against him.

Analysis and Disposition

[41] The statement of claim alleges that Mr. Krebser owns the Point and that Mr. Boudreau's migration of the Ross lands to include the Point has made his property unmarketable. Mr. Krebser maintained that position at trial and argued that the title searches and plans showed he had "indefeasible title" to the Point. That was also the

opinion of Mr. MacLean, and this conclusion formed the foundation for his expert report. In the face of this it is hard to conclude that title to the Point is not an issue to be decided in this litigation.

[42] In the expert report filed on behalf of Mr. Boudreau, Ms. Walker reviews the title information and concludes that Messrs. Ross and Krebser have competing claims to the Point. She disagrees with Mr. MacLean's interpretation of the title searches. She concludes that Mr. Ross had marketable title to the Point at the time of the migration.

[43] Marketable title is different than actual title. It is defined in Section 4 of the *Marketable Titles Act* which reads:

> **Marketable title**
>
> **4 (1)** A person has a marketable title at common law or equity or otherwise to an interest in land if that person has a good and sufficient chain of title during a period greater than forty years immediately preceding the date the marketability is to be determined.
>
> **(2)** A chain of title commences with the registered instrument, other than a will, that conveys or purports to convey that interest in the land and is dated most recently before the forty years immediately preceding the date the marketability is to be determined.
>
> **(3)** A chain of title may commence before or after the coming into force of this Act.
>
> **(4)** Nothing in this Section extinguishes any interest in land.

[44] Mr. Boudreau's decision to certify that Mr. Ross had marketable title to the Point involved his interpretation of various registered instruments including deeds and plans. In order for the court to assess the reasonableness of that decision it is necessary to look at those same documents and reach a conclusion with respect to their proper interpretation and application. The resolution of the dispute between Mr. Krebser and the Ross title holders will require interpretation of those documents. I acknowledge this may involve additional evidence concerning the use and occupation of the land, however the starting point will be the registered instruments.

[45] It should be noted that Mr. Boudreau went beyond a mere assessment of Mr. Ross's marketable title. He extended the search back to the township grant and compared the Krebser and Ross back titles. He formed the opinion that Mr. Ross had "superior" title to Krebser over the Point and on that basis felt he could migrate it for Mr. Ross. A resolution of the issues in this case will require an assessment of the

reasonableness of Mr. Boudreau's conclusion that there were competing chains of title but that Mr. Ross had a superior claim.

[46] Based upon this analysis it is clear to me that a decision concerning Mr. Boudreau's alleged negligence will require the court to assess the nature and extent of Mr. Ross's title to the Point. In the circumstances of this case the suggestion that the reasonableness standard requires a less rigorous interpretative exercise than resolving the claims between owners is a distinction without a difference. In either case the court will have to come to a conclusion with respect to the proper interpretation of the deeds and plans. In fact, that is what each of the experts has done in formulating their opinions.

[47] Both counsel take the position that the decision in this case would not be binding on Mr. Ross and his successors in title. Even if that is so, the court should avoid circumstances where there is a risk that different judges will give inconsistent decisions on the same evidence. Such an occurrence could undermine public confidence in the court. A brief example will illustrate the problem. Assume that I find Mr. Boudreau negligent because his opinion that Mr. Ross had marketable title to the Point was unreasonable. Also assume that the court in the subsequent litigation between Mr. Krebser and Mr. Ross's successors decides that Mr. Ross actually owns the Point. If there is no additional evidence in the second action how can these two decisions be reconciled? The result would be that Mr. Boudreau is liable for an unreasonable but correct opinion on title.

[48] All of these circumstances lead me to conclude that the issues in this litigation overlap with the underlying title claims to the extent that they should not be decided without the participation of Mr. Ross and his successors in title. These parties clearly have an interest in the issues which have been raised in this litigation. The philosophy of having all issues decided in a single proceeding is found in *Civil Procedure Rule 35.08(2)* which states:

> **35.08(2)** It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.

[49] Having decided that the Ross title holders are necessary parties I believe the appropriate outcome is to issue an order staying this proceeding until they are joined. This is a discretionary power, reflected in *Civil Procedure Rule 35.11(5)*, which reads:

> **35.11(5)** A judge may order a stay of any other proceeding in which a party is mistakenly joined, a necessary party is mistakenly not joined, or a party is misnamed.

[50] The appropriateness of using a stay in these circumstances was acknowledged by the Nova Scotia Supreme Court, Appeal Division, in **Allen v. P.A. Wournell Contracting Ltd.**, 1980 CanLII 2720 (NSCA), where the court said:

> [9] The practice appears to be that where it is impossible to say that the Court could effectively and completely adjudicate upon the issues in the action unless a certain person was added as a party an order will be granted staying the action until the proposed party is added: see *Attorney-General for England & Royal Bank*, [1948] O.W.N. 782; *Re Starr and Township of Puslinch et al.* (1976), 12 O.R. (2d) 40.

[51] It is unfortunate this issue did not crystalize until after the trial had concluded. Although the plaintiff is primarily responsible for defining litigation by determining who to sue it is open to any party, including the court, to raise the question of joinder of parties at any time. To some extent everyone shares responsibility for the failure to identify and deal with the issue prior to trial.

[52] If either party wishes to make written submissions with respect to costs they may do so within one month of the date of this decision.

Wood, J.