**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Gillard v. Gillis*, 2018 NSSC 44

**Date:** 20180312
**Docket:** SYD No. 461783
**Registry:** Sydney

**Between:**

Stephen Gillard

Plaintiff

v.

Frank Gillis, Q.C.

Defendant

**Judge:** The Honourable Justice D. Timothy Gabriel

**Heard:** November 16, 2017, in Sydney, Nova Scotia

**Counsel:** Stephen Gillard – Self-Represented, Plaintiff
Guy LaFosse and Stephanie Myles, for the Defendant

**By the Court:**

## Introduction

[1] On November 16, 2017, I heard two applications brought by the Defendant with respect to this matter. The first involved an application to have some portions of the Plaintiff's affidavit, sworn October 17, 2017, struck. After hearing that application, I directed that certain paragraphs be struck, either in their entirety or partially.

[2] I will not reiterate the contents of the order taken out to implement that decision. The date of the order is November 22, 2017. It was granted pursuant to a notice of motion that was filed by the Defendant on November 9, 2017.

[3] The second motion with which the court dealt was that of the Defendant (Mr. Gillis) for summary judgment on evidence, pursuant to CPR 13.04. This notice of motion was filed on July 25, 2017. It is to this latter motion that the following reasons are directed.

[4] Mr. Gillard commenced action on March 24, 2017. His statement of claim reads as follows:

> GROUNDS FOR THE ORDER
>
> (1) On September 12, 1975, Nova Scotia Land Surveyor, J. Carl MacDonald, Registered his surveying work on our behalf for a piece of property I was about to purchase. That property now listed as 10 Coldwell Street, Glace Bay, N.S. P.I.D. #15394182.
>
> (2) On October 6, then solicitor Frank C. Edwards, registered our DEED for the property mentioned above, book 1038, page 250.
>
> (3) On December 21, 1977, then solicitor Charles J. Keliher, of the law form Crosby and Keliher, registered a mortgage on behalf of the Bank of Montreal in the name of my wife Marilyn, and myself, book 1135 page 850. Confirming the property mentioned above was of good and clear title.
>
> (4) On the 9th day of September, 2010, Solicitor Gillis sold a good portion of our land, with a QUIT DEED. A portion of our once $200,000.00 home sat on the property Mr. Gills sold to third party. The Grantor in this transition was DARR (Cape Breton) Ltd., a Federal Crown Corporation and the Grantees were John Simms, James MacLellan, and Doctor Gerald Turner.

(5) Solicitor Gillis acted as council for both the Grantor and the Grantees.

(6) I met with Solicitor Gills in May, 2010, gave him a verbal objection of title, and told him we had a warranty deed on our property, could prove occupancy going back 100 years, and we were not going to trade that in for a QUIT DEED.

(7) A written objection of title was registered with DARR (Cape Breton) Ltd. in July 2010.

(8) Solicitor Gillis ignored both objections, and proceeded with the sale and migration of said property.

(9) After our property was migrated, Solicitor Gillis served us with a Form 9, basically telling us we were trespassing on our own property.

(10) Solicitor Gillis's actions re our property would send our family on a legal nightmare that no family should have to endure. Solicitor Gillis knew something back in 2010, that we would discover over the course of the next seven years that we were in a battle that we had no chance of winning. Finding legal council [sic] to assist us in this matter, only made the situation a lot worse, and a great expense.

(11) We filed a claim with Lawyers Insurance and Solicitor Catherine Walker, Q.C. was commissioned to address our issues. Ms. Walker denied our claim. In September of 2013, we supplied Ms. Walker with our own title search documents. A railroad built back in 1860, when we were still a small colonially (sic) in the British Empire, over private property, our property, was not crown land, and is still not crown land today. Ms. Walker still denied our claim, but just to be nice tried to buy back our property from the new owners. Solicitor Gillis vetoed every attempt Ms. Walker made to solve our land issues, and has refused, to this day, to having our property returned to its rightful owners.

(12) Solicitor Gillis's actions back in 2010, not only sent us on a legal nightmare, that is still not over, but he stymied our plans to downsize and destroyed our family mentally, emotionally, physically and financially.

[5] In advance of the date upon which the Defendant's applications were scheduled to be heard (November 16, 2017), the Plaintiff filed his own motion (on November 6, 2017) seeking to have the court permit an amendment to his statement of claim. The amendments sought by Mr. Gillard are succinct and set forth as follows:

> THE APPLICANT (MR. GILLARD) REQUESTS AN ORDER AGAINST YOU
>
> $500,000 (FIVE HUNDRED THOUSAND DOLLARS) PLUS PAIN AND SUFFERING.

TO HAVE OUR HOME AND LAND RETURNED.

[6] For the purposes of this decision, I will assume that the statement of claim contains the amendment that the Plaintiff has requested. Given my determination with respect to the Defendant's motion for summary judgment, it will not be necessary that I make a separate determination with respect to that amendment.

## Background

[7] Prior to commencing legal action in the within matter, the Plaintiff had brought an action in 2014 against DARR (Cape Breton) Limited ("DARR"). This related to the September 9, 2010 land transaction identified in para. 4 of his statement of claim in the within matter.

[8] The 2014 action was dismissed by an order of Justice Jamie S. Campbell, which was granted on the date the matter had been set for trial (January 30, 2017). Mr. Gillard attended at that time and requested that his action against DARR be dismissed. Less than two months later, Mr. Gillard commenced the present action against Mr. Gillis, which is founded upon the same facts.

[9] In the present matter, Mr. Gillis has provided an affidavit, sworn July 25, 2017, in support of his application for summary judgment. The salient points of that affidavit are reproduced below:

> I, Frank Gillis, Q.C., of Glace Bay, Cape Breton Regional Municipality, Province of Nova Scotia, make oath and give evidence as follows:
>
> …
>
> 4. … I am a lawyer…
>
> 5. I am a practicing member of the Nova Scotia Barrister's Society and I was called to the Bar on December 10, 1976.
>
> 6. In 2010, I represented John Edwin Simms, James MacLellan and Dr. Gerard Turner, in a property transaction opposite DARR (Cape Breton) Limited ("DARR").
>
> 7. Mr. Simms initially retained me on March 1, 2010 to advise him with respect to a potential real property issue concerning whether he was encroaching on land owned by DARR on Coldwell Street, in Glace Bay, Cape Breton Regional Municipality, Province of Nova Scotia.
>
> 8. As a result of being retained by Mr. Simms, I obtained a survey plan from DARR that purported to show that Mr. Simms and three of his neighbours, including the Plaintiff, were encroaching on land on Coldwell Street in

Glace Bay, which either had been or was gong to be transferred to DARR from the Federal Crown.

9. I advised Mr. Simms that he may want to inform his neighbours of this potential encroachment and invite them to participate in the proposed transaction with DARR to resolve the issue.

10. On May 21, 2010, I met with my client, Mr. Simms, and his neighbours, James MacLellan, Dr. Gerard Turner and the Plaintiff, to review the survey plan and to discuss the encroachment issue.

11. My client, Mr. Simms, arranged for his neighbours, including the Plaintiff, to attend this meeting.

12. At that meeting, I informed Mr. Simms, Mr. MacLellan, Dr. Turner and the Plaintiff that, based on the survey plan, it appeared that their parcels of land were encroaching on a parcel owed by DARR.

13. Following the meeting of May 21, 2010, I sent a letter to Mr. Simms, Mr. MacLellan, Dr. Turner and the Plaintiff, summarizing our discussion, and a copy of this letter is attached hereto and marked as **Exhibit "A".**

14. I communicated with Joe Cashin, who represented the vendor, DARR, to negotiate an agreement of purchase and sale between DARR and my clients for the property on Coldwell Street, to eliminate the encroachment issue.

15. I did not act as solicitor for DARR in this transaction, not have I ever acted as solicitor for DARR in relation to any other matter.

16. The Plaintiff was ambivalent about whether he would participate in the transaction with DARR, and attached hereto and Marked as **Exhibit "B"** are copies of emails between me and Joe Cashin of DARR, explaining the delay caused by the Plaintiff's indecisiveness.

17. On or around June 15, 2010, I sent a letter to Mr. Simms, Mr. MacLellan, Dr. Turner and the Plaintiff, asking each of them to confirm their retainer before the transaction could proceed, and a copy of this letter is attached hereto and marked as **Exhibit "C".**

18. I received signed retainer letters from Mr. Simms, Mr. MacLellan and Dr. Turner, copies of which are attached hereto and marked as **Exhibit "D"**.

19. I did not receive a signed retainer letter from the Plaintiff.

20. The Plaintiff declined to participate in the transaction with DARR because he told me he believed he had good title to his land at 10 Coldwell Street, Glace Bay, and that he was not encroaching on DARR's land.

21. The Plaintiff did not retain me to act as his solicitor with respect to the transaction with DARR in 2010, or with respect to any other matter, at any time.

> 22. The Plaintiff has never sought legal advice from me.
>
> 23. On September 9, 2010, DARR executed a quit claim deed conveying any interest in PID number 15393622 to my clients, John Edwin Simms, James MacLellan Dr. Gerard Turner, and a copy of this quit claim deed is attached hereto and marked as **Exhibit "E"**.
>
> 24. I sent a copy of the Form 9 notice of parcel registration to the Plaintiff by registered mail on September 17, 2010, as required pursuant to the *Land Registration Act*, and copies of the Form 9, enclosures and registered mail receipt are attached hereto and marked as **Exhibit "F"**.
>
> …
>
> 26. I only acted as solicitor for the Plaintiff's three neighbours in acquiring the quit claim deed for them from DARR.
>
> 27. I was never a party to the September 9, 2010 transaction between DARR and my clients.
>
> 28. I do not own or have any interest or title to the property that was the subject of the quit claim deed, or any adjacent property.
>
> …
>
> 31. I am aware that the Plaintiff's action against DARR was dismissed, and a certified copy of the dismissal order is attached hereto and marked as **Exhibit "J"**.

[10] By way of evidence in the proceeding, both Mr. Gillard and Mr. Gillis were cross-examined with respect to the contents of their respective affidavits. I will return to some of the specifics of that evidence after a review of the law (generally), impacting upon the relief which the Defendant seeks.

## Issue

[11] The issue is whether I should grant the Defendant's/Applicant's motion for summary judgment pursuant to *Civil Procedure Rule 13.04*. In order to answer this question I must determine if there is:

i. A genuine issue of material fact for trial, whether on its own or mixed with a question of law? If no;

ii. Is there a question of law, either pure or mixed with a question of fact that requires determination? And, if yes;

iii. Does the challenged pleading have a real chance of success?

## Analysis

Law (in general)

[12] *Civil Procedure Rule 13.04*, as amended on February 26, 2016, states as follows:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[13] In *Shannex Inc. v. Dora Construction Limited*, 2016 NSCA 89, the Court of Appeal had opportunity to consider the (comparatively recently) reformulated *Civil Procedure Rule 13*. Justice Fichaud interpreted *Rule 13.04* in the following manner:

> 34 I interpret the amended *Rule 13.04* to pose five sequential questions:

> *** First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [*Rules 13.04(1), (2)* and *(4)*]**

If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under *Rules 13.08(1)(b)* and *6* as discussed below [paras. 37-42], or go to trial.

The analysis of this question follows *Burton's* first step.

A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [*Rules 13.04(4)* and *(5)*]

*Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended *Rule 13.04(6)(b)* allows the judge to balance these factors.

> *** Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: *Rules 13.04(1)* and *(2)*. This would be a nuisance claim with no genuine issue of any kind -- whether material fact, law, or mixed fact and law.

> *** Third Question: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: *Rule 13.04(3)*. Governing that discretion is the principle in Burton's second test: "Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes Burton's test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

…

[emphasis in original]

[14] Then, he continued at para. 36:

> 36 "Best foot forward": Under the amended Rule, as with the former *Rule*, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": *Rules 13.04(4)* and *(5)*; *Burton*, para. 87.

## Application

[15] Application of the framework adopted in *Shannex*, *supra*, yields the following:

i) Genuine issue of material fact for trial?

[16] The "facts" as applicable to the Plaintiff's claim all flow from the circumstances surrounding the granting of the September 9, 2010, deed referenced above ("the deed"). Assuming, for the purposes of this application, that the amendment requested by the Plaintiff has been granted, he has coupled his action against Mr. Gillis with a plea for recovery of title to the land which was affected by this deed.

[17] It is clear that the Plaintiff brought an earlier action in 2014 against DARR, the grantor of the deed for recovery of the rights to the land that he alleged were affected by the transaction. The statement of claim in that earlier action stated that the Plaintiff's sought the following relief:

> To have my home and land returned, plus costs, plus damages, etc., etc. In the amount of $500,000.00 (five hundred thousand dollars). DARR (Cape Breton) Limited Sold my property in September 2010 to third parties over my acknowledged objections.
>
> NOTICE OF ACTION Amended to include Lawyer's Insurance Association of Nova Scotia as a defendant.

[18] As has been noted, this 2014 action was dismissed by an order granted on January 30, 2017 (issued February 24, 2017).

[19] In the current proceeding, it is clear that the Defendant Gillis was a solicitor involved in the transaction which was consummated on September 9, 2010. He was

not a party to the transaction and at no time owned the lands encompassed in the above referenced deed. He would have no consequent ability to return them even if ordered to do so by the Court.

[20] On the basis of the evidence as presented, it appears to be common ground that Mr. Gillis was able to put together and broker a resolution between DARR and virtually all of Mr. Gillard's affected neighbours. This settlement appears to have resolved the alleged boundary overlap or encroachment issues between the parties, and culminated in the execution of a Quit Claim deed by DARR with respect to the affected lands. This was a resolution in which Mr. Gillard was invited to participate as well. However, he declined to do so. At no time, therefore, did a solicitor/client relationship develop between the Plaintiff and the Defendant. Moreover, the Quit Claim Deed, of course, could only purport to confer upon the Grantees whatever interest DARR actually owned in the subject lands at the time. If DARR actually owned no part of the lands encompassed therein (or, at least, no part of the lands to which Mr. Gillard maintains that he has clear title) then the Deed itself would be a nullity insofar as he is concerned.

[21] I agree with the submissions of counsel for the Defendant Gillis that it is very difficult to identify a basis for the claim asserted against him on the pleadings, even as amended. A generous interpretation of the statement of claim would base Mr. Gillard's action against the Defendant on the grounds of professional negligence. The factual "underpinning" upon which Mr. Gillard would have to rely in support such a claim, however, is uncontroverted.

[22] I conclude, therefore, that there are no genuine issues of material fact to be determined and answer the first "Shannex" question with "no".

ii. Issue of law, either pure or mixed with question of fact that requires determination?

[23] The second question arises as to whether there an issue of law. As noted above, the issue is whether on the facts of this case – as I said in a generous interpretation of the statement of claim – there arose a duty of care owed by the Defendant Gillis to the Plaintiff Gillard, if so, whether that standard was breached by the Defendant, and finally, whether there are damages to Mr. Gillis as a result of the breach. So the answer to the second question is "yes".

iii. Does Mr. Gillard's pleading have a real chance of success?

[24] In *Shannex, supra*, Justice Fichaud stated at para. 51:

> …*Burton* followed a long line of authority, in the Supreme Court of Canada and in this Court, that established the test as whether the challenged claim or defence has a "real chance of success"…
>
> [Emphasis added]

[25] As I have indicated, the only discernable basis for the existence of any possible claim by the Plaintiff against the Defendant would be on the basis of negligence. Those aspects of the facts which could conceivably give rise to an action for professional negligence will now be considered.

[26] I will begin by observing that even if a claim in professional negligence against the Defendant could found the basis of a claim for compensation under the *Land Registration Act* (s. 85 of that *Act)*, that legislation goes on to say:

> 85(4) Notwithstanding the *Limitations of Actions Act*, a person loses the right to compensation if, within six years after the person learns that a loss may have been sustained, or within such additional time as the Registrar General may agree, that person does not either enter into an agreement with the Registrar General providing for compensation or commence an action for compensation.

[27] If I were to consider this provision to be applicable in this case, I would then consider para. 45 of the Plaintiff's affidavit which details his attempts to make such a claim, and exhibit 32 thereto (p. 640), which is the Registrar's reply:

> 14 March, 2017
>
> Mr. Stephen Gillard
> 10 Colwell Street
> Glace Bay, NS
> B1A 5H6
>
> Dear Mr. Gillard:
>
> **RE: Land Registration PID 15393622**
>
> Thank your [sic] for sending me the binder of documents pertaining to PIDs 15393622 [the Simms PID] & your PID [15394182]. I have also reviewed the information and documents that have been registered or recorded at the Land Registration Office.

I will attempt to summarize your issues in a straightforward manner. I note that in 2012, you received a letter from my predecessor Norman Hill, which gave you the same advice about your issue.

Briefly put, a 2011 plan [98121727] includes a note stating that the Simms PID is "occupied by Civic #10". There is also a plan attached to your 1975 deed that shows a portion of the Simms PID is included in your land, PID 15394182.

What we have, therefore, are two competing surveyors' opinions. Only a Court can sort out the boundaries of the two parcels. I do not have the authority to adjudicate a boundary or title dispute.

The *Land Registration Act* [LRA] does **not** guarantee the location, boundaries or extent of a parcel. Moreover, the LRA states that provincial property mapping is not conclusive of a parcel's location, boundaries or extent. The mapping is a drawing only, not a survey.

The LRA give you **10 years from September 8, 2010** to record either:

a) A Certificate of *Lis Pendens* showing that you have started a law suit to confirm your interests in the Simms PID;

b) A Court Order confirming your interest in the Simms PID; or

c) Simm's agreement confirming your interest in their PID.

**If you fail to record one of these items by September 8, 2020, your claim against the Simms expires.**

Given the above, I have no choice by to deny your claim for compensation.

Yours very truly,

C.A. Mark Coffin, JD
Director of Property Registration
Registrar General, Land Titles

[Emphasis in original]

[28] The present action commenced by the Plaintiff cannot accomplish any of those objectives. Mr. Gillard has taken no action against Simms, the surveyors involved, or any other of his neighbours who supposedly benefited from the conveyance of September 9, 2010. He has consented to a dismissal of an earlier action against DARR, the entity which had conveyed what he alleges to have constituted (at least) a portion of lands that he owns, to some of his neigbours by Quit Claim Deed.

[29] Moreover, insofar as the claim can be said to be grounded upon an allegation of professional negligence against the Defendant, the action was commenced outside of the limitation period. I refer to the terms of the present *Limitation of Actions Act* 2014, c.35 (LAA) which provides *inter alia:*

> 8 (1) Unless otherwise provided in this *Act*, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.
>
> (3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is
>
> (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
>
> (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs. 2014, c. 35, s. 8.

[30] The current iteration of the *LAA* was proclaimed on August 4, 2015, and has been in force since September 1, 2015. It clearly was not in force on September 9, 2010, when the deed was executed. However, s. 23 of the LAA stipulates:

> 23 (1) In this Section,
>
> (a) "effective date" means the day on which this *Act* comes into force;
>
> (b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.
>
> (2) Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in Section 11, and in respect of which no proceeding has been commenced before the effective date.

> (3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of
>
> (a) two years from the effective date; and
>
> (b) the day on which the former limitation period expired or would have expired.
>
> (4) A claimant may bring a claim referred to in Section 11 at any time, regardless of whether the former limitation period expired before the effective date. 2014, c. 35, s. 23; 2015, c. 22, s. 4.

[31] It would appear that the limitation period specified above is applicable, which would prescribe a limitation period of six years after "a claim was discovered". This refers to what was originally known, at common law, as the "rule of discoverability". In the modern context, that rule has been expressed in *HRM v. WHW Architects et al*, 2014 NSCA 75 as follows:

> The discoverability principle does not apply where the limitation period bears no relation to the cause of action or the knowledge of the plaintiff. For example, in *Fehr v. Jacob*, [1993] M.J. No. 135 (Man. C.A.), Justice Twaddle put it this way:
>
> > In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. <u>When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies</u>. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.
>
> The foregoing was approved by the Supreme Court of Canada in *Ryan v. Moore*, 2005 SCC 38 at para. 23. In Nova Scotia, reference can be made to *Sawh v. Petrie*, [1986] N.S.J. No. 415 (S.C.A.D.); leave to appeal denied: [1987] S.C.C.A. No. 94.
>
> [Emphasis added]

[32] Section 23 of the LAA is premised upon "discovery". It is clear that the Plaintiff had actual knowledge of whatever facts he currently alleges give rise to his claim against Mr. Gillis as far back as September of 2010, if not before. He had attended previous meetings with lawyer Gills, in concert with his neighbours, and was also privy to correspondence which Mr. Gillis had provided to himself and his neighbours in relation to the plan to execute the deed. He was invited to participate in the settlement which culminated in the execution of the deed, an option in respect

of which virtually all of his neighbours elected to participate. Mr. Gillard, alone, declined. It is clear from the pleadings and the evidence given on cross-examination of the parties that Mr. Gillis provided him with a copy of the deed, as well as notice of the registration, via registered mail on September 17, 2010. It is also clear that the Plaintiff filed complaints against Mr. Gillis with the Barrister's Society on September 27, 2010, November 11, 2011, and February 11, 2013 (Gillard affidavit, paras. 16, 20 and 33) (which complaints were dismissed) on the basis of what he has cited as the facts in his current action.

[33] In the face of this knowledge, the Plaintiff took no action against the defendant and when he did elect to commence legal action (in 2014) it was against DARR, a cause of action which was dismissed in 2017 with his consent, as earlier noted. It was only upon the dismissal of his action against DARR that the Plaintiff commenced the current action against the defendant Gillis.

[34] This is a motion for summary dismissal of the Plaintiff's action, in which one of the reasons cited by the Defendant/Applicant is the fact that the action is barred by the *LAA*. The Plaintiff has had notice of this motion since July 25, 2017. I have received nothing from the Plaintiff explaining why it took him so long to commence his action again the Defendant.

[35] Section 9 of the *LAA* states:

> (1) A claimant has the burden of proving that a claim was brought within the limitation period established by clause 8(1)(a).
>
> (2) A defendant has the burden of proving that a claim was not brought within the limitation period established by clause 8(1)(b). 2014, c. 35, s. 9.

[36] I have sufficient to discharge the Defendant's burden of proof under 9(2), but have been provided with nothing from the Plaintiff pursuant to s. 9(1).

[37] Even if had concluded that the *LAA* did not bar Mr. Gillard's action, I would have concluded that he has no real chance of success against Mr. Gillis in any event. I say this, first, because it is abundantly clear that no solicitor/client relationship existed between the parties. This is a fact that is not in dispute. It is also clear that the Plaintiff did not seek legal advice from Mr. Gillis. In fact, whatever advice Mr. Gillis offered to the collectivity composed of Mr. Gillard and his neighbours, the Plaintiff chose to disregard it and expressly declined to participate in the transaction under discussion, which led to the preparation of the deed. Mr. Gillis, in fact, sent

him a retainer letter but Mr. Gillard refused to sign it (affidavit, Gillis, paras. 17 – 19).

[38] During cross-examination, Mr. Gillard testified that instead of putting any faith in what Mr. Gillis had told him, he chose to consult with the surveyor with whom he had been involved when he originally purchased his home. This surveyor told Mr. Gillard that he stood by his work, and that there was no encroachment. Mr. Gillard's evidence was that he accepted and relied upon this reassurance, and as a consequence rejected the course of action recommended by Mr. Gillis.

[39] I remind myself of what Justice Saunders said in *Burton Canada Company v. Coady*, 2013 NSCA 95 (earlier referred to as "Burton's case"):

> 44 The phrase "real chance" should be given its ordinary meaning -- that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
>
> > Is there a reasonable prospect for success on the undisputed facts?
>
> the answer would be yes.

[40] With respect to this proposition, the defendant/applicant argues in his brief (p. 15):

> In the present case, Mr. Gillis offered unsolicited information to the plaintiff, which the plaintiff expressly declined to entertain. Mr. Gillis's correspondence to the Grantees and the Plaintiff following the May 21, 2010 meeting is clear that the Plaintiff did not agree to proceed with the property transaction. [*Affidavit of Frank Gillis, Exhibit* "C"]. The Plaintiff makes no allegations of reliance on any information or advice given by Mr. Gillis. The Plaintiff cannot now realistically argue that Mr. Gillis owed him a duty of care, and therefore on this question of law, the Plaintiff has no real chance of success.

[41] With respect, I agree.

[42] Moreover, with respect to damages, it appears that the Defendant cannot establish that he has sustained any. The "deed" was a Quit Claim deed, as I noted earlier. This presents of two possible scenarios. First, if it can be shown that DARR had a legal interest in the lands in that deed, and it sold that interest to some of Mr. Gillard's neighbours in a transaction in which he refused to participate, then the Plaintiff has suffered no injury – DARR merely sold its interest in the lands as it was

entitled to do. On the other hand, if DARR can be shown to have had no interest in the land set out in the deed, then it cannot sell what it does not own. In such a scenario, the Plaintiff's own title to any of the lands included in the deed (if any) is unaffected, and he has sustained no damage. Under either scenario, the Defendant merely acted for the grantees.

[43] If his argument were to be that he has been damaged by the conduct of Mr. Gillis in placing the deed on record at the Registry of Land Titles in the face of the Plaintiff's asserted interest in the land, again, Mr. Gillis merely acted for clients who were willing to pay for a Quit Claim Deed from DARR, which clients had full knowledge of Mr. Gillard's position. The Plaintiff has the benefit of the Registrar of Land Titles' views as to what would be required to correct the problem (if there is one). To date he has taken no steps which could implement any of the directions which the Registrar gave. Certainly this action against Mr. Gillis cannot do so.

[44] Nor has he commenced legal action against any of his neighbours, his former surveyor, or his former lawyer (at the time his current home and lands were purchased) to resolve the ownership issue which he alleges exists. As to DARR (the party who actually sold what he claims to have been some of his land) he consented to a dismissal of his action against them.

[45] This current action against Frank Gillis has no realistic prospect of success.

**Conclusion**

[46] It is uncontested that various people (including some lawyers) have attempted to assist the Plaintiff over the years. He has been dismissive of, hostile to, and often contemptuous of the advice and assistance with which they have attempted to provide him. Any attempts to resolve his difficulties which would have required him to do or pay anything were referred to as "ransom demands" in his affidavit, as that affidavit was constituted prior to the Defendant's motion to strike portions of it (paras. 18, 39 and 40, for example). Many of the efforts of these people to assist him have been rewarded (in the case of lawyers) by complaint(s) to the Barristers' Society.

[47] By way of further example (and it is merely one) he made some insulting references in his original affidavit at para. 38 (which references I have struck) to LIANS and their lawyer, ("covering up a crime", "accessory to land fraud") who at one time tried to assist Mr. Gillard by investigating and offering suggestions as to

how he might resolve his concerns informally, despite the fact that LIANS had no legal obligation to do so. He has also sought to have criminal charges laid against "corrupt officers of the Court, a corrupt Nova Scotian land surveyor", and others who he claimed were "running a land scam" (Gillard affidavit, para. 25). He has put both DARR and now the current Defendant, Mr. Gillis, to a not insignificant amount of legal expense as a result of this action and its predecessor. Among other things, he seems either unable to understand, or unwilling to accept, the role that his intransigence has played in creating and prolonging this ordeal.

[48] Summary judgment shall issue to dismiss Mr. Gillard's claims against Frank Gillis, Q.C. The Applicant/Defendant, Frank G. Gillis, shall have his costs, inclusive of disbursements, in the amount of $3,000.00. In fixing this amount, I have had regard to the expense in this application, the application to strike, and also the completely unfounded and scandalous references made by the Plaintiff to some lawyers (including the Defendant) and others within the context of his original affidavit of October 17, 2017.

Gabriel, J.