SUPREME COURT OF NOVA SCOTIA
Citation: *Innes v. Childs*, 2019 NSSC 150

Date: 20190508
Docket: BW No. 464961
Registry: Bridgewater

Between:

Jack Innes, Q.C.

Applicant

v.

Solomon Childs, Kathleen Barkhouse, Trudy Ernest, April Rafuse and Registrar General of the Land Registry

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By correspondence
Last correspondence received:	April 24, 2019
Counsel:	Augustus M. Richardson, Q.C., for the Applicant, Jack Innes, Q.C. Allen Fownes, for the Respondents, Solomon Childs and Kathleen Barkhouse Duane Eddy, for the Respondent, the Registrar General Brent H. Silver, for the Respondents Trudy Ernst and April Rafuse (not participating)

By the Court:

Background

[1] My decision in this matter was reported in *Innes v. Childs*, 2019 NSSC 73. The sole issue requiring determination was the cross application by Mr. Childs and Ms. Barkhouse for compensation under the *Land Registration Act* as a result of an error made by lawyer Jack Innes when he migrated a property which Mr. Childs and Ms. Barkhouse ("the Respondents") subsequently purchased at a foreclosure sale.

[2] I concluded that what was in effect the Respondents' cross application should be dismissed on the basis that they were unable to demonstrate that they were entitled to any compensation under the *LRA*. In the course of my reasons for that conclusion, I stated, among other things:

> 59. ... I am hard-pressed to characterize the claims of [the Respondents] in these proceedings as anything other than opportunistic…
>
> …
>
> 64. As I have explained, the Respondents (Mr. Childs – over 40 years and Ms. Barkhouse over 30 years) have lived adjacent to the Childs/Barkhouse property for a long time. They knew that the *de facto* property line of 27 Martin's Point Road was the fence... They knew the real boundary of the property they were getting when they … purchased it from SMC. It was only after they received the actual deed, saw the erroneous description, and got out their measuring tape, that they began to hope for more.
>
> …
>
> 70. In summary, then, the Respondents have suffered no loss because neither they nor their predecessors in title ever owned more land than what the present (and pre-existing) fenced boundary provides. The error in the land migration carried out by Mr. Innes did not affect the rights of the Respondents Childs/Barkhouse to any of the land to which they were entitled (to the west or left of the fence) which had been acquired by prescriptive right by their predecessors in title over the years, nor did it affect the remainder of the overlap area which remained on the east or right (the Ernst/Rafuse) side of the fence.

> 71. Most importantly, by virtue of the Consent Order, the records of the Registrar now reflect all of the land that the Respondents could have ever expected to obtain based upon what they knew, or ought to have known (all along), of the real boundary between the two properties.

[3] At the conclusion of my decision, I requested submissions from the parties on the issue of costs, if they were unable to agree, within 20 days thereof. I received the submissions of both Mr. Innes and the Registrar General of the Land Registry ("the Registrar") within the time stipulated. I was provided with those of the Respondents on April 24, 2019.

[4] The Applicant and Registrar were completely successful in defending against the Respondents' cross application. The application itself, originally brought by Mr. Innes, was settled beforehand. The Applicants are presumptively entitled to their costs pursuant to *Civil Procedure Rule* 77.03.

[5] Presumptions may be rebutted. However in this case, and notwithstanding the fact that what occurred originally flowed from an error on the part of the Applicant Innes, I am of the view that both successful parties should receive their costs in this matter. I will explain.

The nature of Mr. Innes' error

[6] This Applicant clearly did err when he migrated the title to the property in question. However, as I indicated in the decision:

> 67. As a consequence, the Applicant's migration of the property with the erroneous legal description could not and did not, in law, affect pre-existent prescriptive rights which arose, I have found, as a result of the placement of the current fence dividing these properties (and its predecessor) since at least 1965. When one adds to this the facts that the foreclosure notices circulated in advance of the sale contained the proper legal description, the Respondents possessed over 30 and 40 years (respectively) of familiarity with the Childs/Barkhouse and Ernst/Rafuse properties, they knew that the fence had always been treated as the boundary between them, and they did not find out that the description in the Sheriff's deed contained more land than that until after they had purchased it, then what they are presently possessed of today is exactly what they expected to get when they purchased 27 Martin's Point Road from SMC in 2007, post foreclosure.
>
> 68. The migration did <u>not</u> affect the pre-existing *de facto* "fence-bound" lot acquired by Childs/Barkhouse, nor that owned (at the time) by Herman Rafuse (Ernst/Rafuse predecessor) in 2007. Moreover, the consent order in February 2018,

> obtained through the intercession of the Applicant and Ms. Walker (LIANS), and to which all parties consented, fixed the boundary between the two properties exactly where I have found that it should be, and has been at least since 1965.
>
> …
>
> 77. As has been explained (and quite apart from all else), the legal description received by the Respondents, whether with or without the "saving and excepting" clause, would have been divergent from the actual *de facto* boundary on the ground in any event. The placement of the fence, which had been recognized by the owners of civic numbers 27 and 33 since at least 1965 as the true boundary, conformed with neither scenario. Compensation is accordingly being sought on the basis of a boundary discrepancy between the legal description in the deed and the actual location of the proper boundary. The combination of sections 21(1), 85 and 86(1) indicate that no compensation is available to the Respondents under the *LRA* as a result. They have not established that they have suffered a loss which is compensable under the legislation.

[7] Moreover, Mr. Innes' efforts, together with those of LIANS, significantly attenuated the impact of his oversight upon all of the Respondents. But for the intransigence of the Respondents, Childs and Barkhouse, all issues with the two neighbouring properties affected by Mr. Innes' oversight would have been resolved without any of the parties being required to litigate. This includes the latent discrepancy between the dimensions of the two properties "on the ground" and the "correct" legal description of the migrated property which all prior indicia of title indicate that Mr. Innes should have used. This discrepancy was only uncovered during the course of the significant attempts by both himself and LIANS to correct the migration error.

[8] The aftermath of Mr. Innes' efforts to remedy matters was described in the decision thus:

> 71. Most importantly, by virtue of the Consent Order [agreed to by all parties in February, 2018], the records of the Registrar now reflect all of the land that the Respondents could have ever expected to obtain based upon what they knew, or ought to have known (all along), of the real boundary between the two properties.

What is the proper award of costs in these circumstances?

[9] Since this was an application in court, Tariff A presumptively applies (*CPR* 77.06 (2)) ,"... unless the judge who hears the application orders otherwise". In this case I am prepared to "order otherwise". This is because I am in agreement with counsel for Mr. Innes that:

> "... the amounts actually claimed by the Respondents were so small and so vague that it would be more appropriate to assess the claim for costs as if it was a complicated application heard in chambers under Tariff C."

[10] The reasonableness of this concession is heightened by the fact that there were some agreements between all parties which shortened the length of the court time required to just over one-half day. Moreover, if I were to employ Tariff A, it would in almost all circumstances result in an award that is higher than that which is being actually proposed by Mr. Innes and the Registrar.

[11] Tariff C, which is found at the end of *CPR* 77, reads as follows:

TARIFF C

Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia

For applications heard in Chambers the following guidelines shall apply:

(1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

(a) the complexity of the matter,

(b) the importance of the matter to the parties,

(c) the amount of effort involved in preparing for and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	**Range of Costs**
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1000 - $2000
1 day or more	$2000 per full day

[12] In an ordinary situation, using Tariff C, this proceeding would attract an award of costs of between $1,000.00 and $2,000.00. Since my decision was determinative of the entire remaining matter at issue in the proceeding, I have discretion under subsection 4 of that Tariff to multiply the maximum amounts in the "1/2 – 1 day range" by a factor of two, three or four times. I must consider the complexity, the importance, and the amount of effort involved in preparing for and conducting the application.

[13] As I noted in the decision, the facts which form the background to this application bore a superficial complexity. This was exacerbated somewhat by the vagueness of the Respondents ' articulated claims referenced above.

[14] The importance of the matter to the parties was obviously significant. It concerned two neighbouring and abutting properties and their dimensions. For a time, the Respondents (unfounded) claims interfered with efforts by their neighbours (the non-participating Respondents Ernst and Rafuse) to sell their property, and caused at least two potential sales to fall through.

[15] On the other hand, and as I earlier pointed out, the Respondents did make some concessions which shortened the actual court time which was needed to hear the application. They dispensed with cross-examination of all of the deponents who supplied affidavits in this proceeding, as referenced in the decision. Moreover, and in addition, they agreed that the two surveyors and Catherine Walker, all of whom supplied opinion evidence in affidavit form, were qualified to do so, and that the

only issue with respect to that affidavit evidence was the weight which the court was to assign to it.

[16] All things considered, I am prepared to multiply the maximum figure in the applicable range of costs under Tariff C ($1,000.00) by a factor of two, which yields a costs award of $2,000.00. To that, I add the disbursements to which the Applicant Innes attests, $140.00 (1/2 of $279.18, rounded) for photocopying and printing, $95.87 for discovery cost and $671.25 for transcript, as well as court filing fees and the like. I conclude that the disbursements of the Registrar would have been essentially the same. Therefore, the amount of $3,000.00, inclusive of disbursements, sought by Mr. Innes and the Registrar, is both reasonable and appropriate.

Conclusion

[17] Jack Innes and the Registrar shall each have their costs against the Respondents Childs and Barkhouse, in the amount of $3,000.00, inclusive of disbursements, on a joint and several basis.

Gabriel, J.