

Date: 20120618

Docket: 12/34

Citation: *White v. Conception Bay South (Town Council of)*, 2012 NLCA 36

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

MARY WHITE

APPLICANT

AND:

TOWN COUNCIL OF THE TOWN
OF CONCEPTION BAY SOUTH

RESPONDENT

Coram: Harrington J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (General) 2005 01T 8609

Application Heard: June 5, 2012

Judgment Rendered: June 18, 2012

Reasons for Decision by Harrington J.A.

Applicant being self-represented.

Counsel for the Respondent: Blair J. Rogers

REASONS FOR DECISION

Harrington J.A.:

[1] The intended appellant, Mary White, applied pursuant to Rule 57.05 of the *Rules of the Supreme Court, 1986* for an order extending the time allowed for filing a notice of appeal of the decision of the trial judge. The application was based primarily on (i) an error by the trial judge in limiting the nature and extent of the inquiry of the boundary dispute which Ms. White and her late husband had with the intended respondent, the Town of Conception Bay South (the “Town”), and (ii) the alleged failure of the trial judge to deal with her claim for other remedies alongside the declaration of title she obtained respecting the boundary line asserted by her with respect to her property at Flats Road, Conception Bay South.

BACKGROUND

[2] Ms. White claimed that the Town had, over a period of many years, encroached upon her property by widening the adjacent public road causing the roadway boundary to curve towards and her boundary. She sought remedies for trespass including damages.

[3] The Town asserted a defence under the *Limitations Act*, SNL 1995, c. L-16.1, while maintaining a denial of any encroachment by the upgraded public road upon Ms. White’s roadside boundary.

[4] The uncontradicted evidence at trial established that Ms. White and her late husband first became aware of a possible encroachment upon their boundary in 1975 and later complained of a further encroachment on a second boundary in 1991. Nevertheless, a legal proceeding was not commenced against the Town until September, 2005.

[5] The trial judge found that the last activities of the Town allegedly affecting Ms. White’s property had occurred in the early 1990s and related to the installation of a trunk sewer line and paving of the road. The trial judge ruled that the applicable limitation period for the filing of the statement of claim had expired and that, for the most part, the proceeding was time barred. However, he held that the court had limited power under paragraph 8(1)(b) of the *Limitations Act* to make a declaration regarding the boundary line of Ms. White’s property in relation to the public road. He made a declaration of title favourable to Mr. White.

[6] From the decision of the trial judge filed December 10, 2010, Ms. White did not appeal in accordance with the Rules until May 12, 2012 when she filed an application for an extension of time to file a notice of appeal.

For the reasons which follow, the application for an extension of time is denied.

DECISION OF THE TRIAL JUDGE

[7] The learned trial judge in his reasons dealt with the history of the complaints of Ms. White and her late husband with regard to the actions of the Town over a period dating back to the mid-1970s. The principal argument made by Ms. White at trial was that the *Limitations Act* did not apply to bar an action for damages or recovery of land.

[8] However, the learned trial judge held that he was bound by the decision of the Supreme Court of Canada in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, where Major J wrote at para. 18:

It was conceded that a common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor ..., the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

[9] The trial judge found that, if the action involved damage to land, then a two-year limitation period applied. He further held that if the claim was for recovery of land, a ten-year limitation period applied. He held that the proceeding commenced in September 2005 was well beyond either of the applicable limitation periods.

[10] The trial judge found that Ms. White's only permissible claim was for a declaration of title with respect to her boundary lines since it was the claim which was not barred by the provisions of the *Limitations Act*. He noted in his reasons that during final argument Ms. White's counsel agreed that the Court's jurisdiction was limited by virtue of the *Limitations Act*. Her counsel abandoned all claims except for the claim for a declaration of title. The trial judge then proceeded to consider the conflicting survey evidence given by experts called for each party and made a declaration with regard to the boundary line of Ms. White's property adjacent to the road which was favourable to. However, he pointed out that this was not strictly a case of adverse possession by the Town since the Town had not asserted possessory rights against Ms. White.

[11] The trial judge awarded costs on a party-and-party basis in favour of Ms. White. Costs were taxed, and a written decision of the taxing master was filed on November 16, 2011. By this time, approximately 11 months had passed since the decision of the trial judge had been filed.

[12] Rule 57.03(1)(b) of the *Rules of the Supreme Court, 1986*, provides that a party wishing to appeal a decision of a trial judge is required to file a notice of appeal 30 days after the order is given. On May 24, 2012, Ms. White filed an application to extend the time for the filing of a notice of appeal pursuant rule 57.05. The filing date of the application was in excess of 500 days after the decision rendered by the trial judge.

[13] Ms. White's application set forth the following grounds:

- (i) the trial decision was received by her fifteen months after the trial on December 11, 2011, and she claims to have been in ill health since that time;
- (ii) it was the opinion of all of the (unidentified) lawyers and a former judge that she spoke with that the limitations statute did not apply as the encroachment is continuing and that the trial judge erred in applying the statute to her case;
- (iii) her solicitor, without her permission, requested that the matter of the declaration of ownership be dealt with by the trial judge without properly informing her that her success on obtaining a declaration would not provide her with any effective result with regard to the enforcement of her boundary line; and
- (iv) that the trial judge showed bias during the trial in allowing counsel for the Town to engage in "delaying tactics".

ANALYSIS

[14] Rule 57.05 gives discretion to this Court to extend the time for filing a notice of appeal under rule 57.03 "either before or after the expiration of the time limitation where, in the opinion of the Court, refusal to do so would create an injustice". The factors to be considered on such an application were discussed by Cameron J.A. in *Law Society (Newfoundland) v. Fahey*, 2000 NFCA 19, 95 A.C.W.S. (3d) 1011 were listed at para. 3 as follows:

1. whether the appellant had a bona fide intention to appeal within the appeal period;
2. whether there is a reasonable excuse for the failure to comply with the rule;

3. the potential merits of the appeal; and
4. the presence of any exceptional or special circumstances justifying or working against the fairness of an extension.

(a) *Bona fide* intention to appeal

[15] The decision of the trial judge was rendered on December 10, 2010. Two counsel appeared at trial on behalf of Ms. White, and party-and-party costs were awarded to her by the trial judge. Costs of \$22,117.59 were taxed and allowed on November 15, 2011, with trial counsel representing Ms. White at the taxation. No notice of appeal was filed in that period, nor was there any medical evidence tendered by Ms. White to establish that she was in any way incapacitated or unable to instruct counsel with regard to filing an appeal after the trial decision and the taxation of the bill of costs.

[16] Significantly, the trial judge noted in his reasons that during argument Ms. White's counsel confirmed that his client was abandoning her claim for a remedy other than a declaration of title expressly permitted under paragraph 8(1)(b) of the *Limitations Act*. This is clear evidence of a conscious concession by Ms. White and her counsel during the trial as to the limited scope of the judge's mandate (see paragraph 33 of the reasons of the trial judge).

[17] All of the foregoing circumstances militate against Ms. White's submission that she had a *bona fide* intention to appeal the decision of the trial judge. For these reasons, I find that this ground is without merit.

(b) Whether a reasonable excuse for the failure to comply with the rule exists.

[18] I am satisfied that there is no reasonable excuse for the failure to comply with the rule regarding an extension of time for filing a notice of appeal. Ms. White had experienced legal counsel at trial and at the taxation of the bill of costs. Notwithstanding her advancing age, Ms. White presents herself as an intelligent and articulate person. Having obtained a favourable result within the narrow confines of the proceeding permitted by the *Limitations Act*, it appears that Ms. White was hoping that the Town would take some positive steps arising from the declaration granted by the trial judge which would not put an end to the encroachments which she considered to remain unsolved. This strategy, which may have caused a delay in filing a notice of appeal, does not provide her with a reasonable excuse for failure to comply with the time limit for the filing a notice of appeal.

(c) Potential merits of the appeal

[19] The main obstacle for Ms. White here is the fact that she was a successful claimant with respect to the only remedy which her counsel on her behalf, acknowledged to be available at trial. Given that the original proceeding brought by Ms. White before the trial judge was for the most part substantially out of time thus limiting her claim to a declaration of title, it is impossible to see how any appeal at this stage could have any merit.

[20] Ms. White's report that the problem with the boundary encroachment is still ongoing does not constitute a meritorious ground of appeal of the original decision. The allegations that the trial judge demonstrated bias or that he erred with regard to the narrowing of the claim during argument belies the fact that the abandonment of most of her claims occurred as a result of actions of Ms. White's trial counsel upon her instructions. I find that an appeal of the trial judgment has no potential merit.

(d) Exceptional or special circumstances

[21] Given that the claim brought by Ms. White in the first instance was significantly out of time, and that Ms. White is now seeking to appeal a successful though limited result from the trial judge, there are no exceptional or special circumstances justifying an extension of time for the filing of a notice of appeal nearly one-and-a-half years after the original trial decision was rendered.

[22] It would pervert the course of justice to allow a litigant to be permitted to appeal in circumstances where the core complaint about the decision-making by the trial judge arises from an informed decision of the intended appellant, in consultation with her counsel, to abandon at trial key aspects of her original claim that she now seeks to reinstate. The trial judge made a declaration of ownership in favour of Ms. White being the only remedy available to her resulting from the long delay in bringing legal action against the Town. She cannot now seek to re-open the claim for the purpose of seeking remedies that were otherwise barred by the operation of the *Limitations Act*.

SUMMARY AND DISPOSITION

[23] For the foregoing reasons, I find no valid grounds for granting an extension of time for the filing of a notice of appeal in this case. The application is dismissed. Costs are awarded to the Town on a party-and-

party basis to be taxed based on Column 3 of the Scale of Costs, Appendix to Rule 55 of the Rules.

M. F. Harrington J.A.