

Date: 20130204
Docket: 12/34
Citation: *White v. Conception Bay South (Town)*, 2013 NLCA 10

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

BETWEEN:

MARY WHITE

APPLICANT

AND:

TOWN COUNCIL OF TOWN
OF CONCEPTION BAY SOUTH

RESPONDENT

Coram: Green C.J.N.L.

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

Application Heard: November 19, 2012
Judgment Rendered: February 4, 2013

Reasons for Judgment by Green C.J.N.L.

The Applicant appearing on her own behalf
Counsel for the Respondent: Blair Rogers

Green C.J.N.L.:

[1] Mary White applied, on May 24, 2012, for an extension of time to appeal a judgment of the Trial Division filed on December 10, 2010. Her application was dismissed by Harrington J.A. on June 18, 2012. See 2012 NLCA 36. She has now applied, pursuant to rule 57.31(4) of the *Rules of the Supreme Court, 1986* requesting leave of the Chief Justice to allow the application to be reheard by a panel of three judges.

[2] The original judgment which Ms. White sought to appeal was one in which she was successful in obtaining a declaration of the boundary between her land and a roadway in the Town of Conception Bay South. She was also awarded costs. See *White v. Conception Bay South (Town)*, 2010 NLTD(G) 193, 303 Nfld. & P.E.I.R. 94.

[3] In seeking extension of time for filing a notice of appeal, however, she asserted the trial judge was in error in applying certain limitation defences which had the effect of eliminating her claim for damages for trespass and for recovery of land she alleged was wrongfully encroached upon by the Town when widening the road adjacent to her property. She also sought to appeal on the basis that her solicitor, without her permission, requested the Court to issue a declaration of ownership in place of the claims for damages and return of the land, without informing her that success in obtaining a declaration would not provide her with an effective result with regard to enforcement of the declared boundary line. She also claimed bias on the part of the trial judge.

[4] The discretion which the Chief Justice may exercise under rule 57.31(4) to order a re-hearing by a panel of three judges with respect to a matter already decided by a single judge of the Court under s. 10 of the *Judicature Act*, RSNL 1990, c. J-4, must be exercised on the basis of proper principle. There must be “some good reason for requiring the parties to suffer the delay and expense that would be inevitably associated with re-arguing a matter that has already been decided” (*Stacey v. Stacey*, 2009 NLCA 50, 289 Nfld. & P.E.I.R. 180 at para. 21). There is a rebuttable presumption that the original decision was correct. The party seeking the rehearing has the burden of raising questions as to the original decision’s correctness or must point to some other good reason as justification for having the issue re-examined (*Earle v. Gulliver*, 2010 NLCA 56, 300 Nfld. & P.E.I.R. 267 at para. 8).

[5] The considerations that should go into determining whether a rehearing ought to be ordered include: (i) whether there can be said to be any “realistic basis” for saying that the original decision could contain legal error or involve discretion exercised on a wrong principle or otherwise improperly; and (ii) whether there is any “practical utility” in conducting another hearing, bearing in mind the interests of all parties to the litigation, the time and expense involved, and the degree to which the issues on the ultimate appeal may have become moot or overtaken by other events. See *Stacey* at para. 23.

[6] In denying the application for extension of time, Harrington J.A. concluded that: (i) Mrs. White had no *bona fide* intention to appeal within the applicable 30-day appeal period; (ii) she had no reasonable excuse for her failure to comply with the rule limiting the time for appeal; (iii) there was no potential merit to the appeal; and (iv) there were no special or exceptional circumstances, including prejudice, justifying an extension “nearly one and a half years” after the original trial decision.

[7] In undertaking this analysis, Harrington J.A. was addressing, as the appropriate considerations, the factors that had been identified by this Court in *Law Society (Newfoundland) v. Fahey*, 2000 NFCA 19 and numerous subsequent cases. There is no apparent error in his choice of applicable principles to be applied.

[8] Ms. White makes a number of other arguments, however, that she says should justify a rehearing. I will deal with each of these in turn.

[9] First, she submits that Harrington J.A. should have recused himself from hearing her application for extension of time because he had sat as a judge in the Trial Division on a previous application related to this matter which involved an application by previous counsel of Ms. White’s to withdraw from the case. She says that in the course of that hearing, Harrington J.A. had commented on the merits of her case by indicating that he was surprised that the case had not been “thrown out years ago.” Counsel for the Town could not confirm whether or not such a statement had been made. Accordingly, I listened to the recording of the hearing in the Trial Division, which took place on February 24 and 27, 2009, to determine exactly what was said. The only statement which could be said to approach the notion of comment on the merits was the following inquiry made by the judge towards the end of the hearing:

I was a bit curious as to why a summary trial application or summary judgment application wasn’t brought earlier with regard to the limitations issue. Any reason for that?

[10] Counsel responded by saying that the limitations issue had in fact been discussed in a previous settlement conference. The judge then did not pursue the matter further.

[11] I cannot see how this comment, directed to procedural and timing aspects of the case, could realistically be said to amount to expressing an

opinion on the merits of the matter. Furthermore, a recusal motion must generally be made before or during the hearing in respect of which the judge is being asked to recuse himself or herself. In this case, Ms. White did not raise the matter in front of Harrington J.A.

[12] Secondly, Ms. White submits that Harrington J.A. made an error in his appreciation of the facts upon which her application was based, when he wrote that Ms. White had made a ‘conscious concession’ and an ‘informed decision’ in consultation with her counsel to abandon her claim for damages for trespass and limit the claim to a declaration of title. Ms. White insists that she made it clear to Harrington J.A. that the decision to abandon the other claims was made by her counsel without input from her. Indeed, Harrington J.A., in his reasons, acknowledges this (See paragraph 13(iii)). As well, in other parts of his reasons he refers to the concessions respecting remedy “which counsel on her behalf, acknowledged...” (paragraph 19; underlining added), thereby seeming to recognize that Ms. White did not herself make the concession. It is far from clear, therefore, that Harrington J.A. misapprehended the facts, as Ms. White alleges.

[13] Even if Ms. White is correct in her assertion, however, the problem with her position is that whether or not the abandonment of the claim by her counsel was made with Ms. White’s knowledge, this was a tactical decision which counsel would have likely been entitled to make on Ms. White’s behalf without getting specific instructions from her. In *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, Major J. indicated that courts rarely go behind counsel’s positions taken in court to ask whether he or she has authority to make the decision; instead that is an issue for the appropriate professional regulator if it is subsequently alleged that counsel acted against or without the client’s instructions:

[33] The appellant submitted that even if counsel’s decision was sound, he was obligated to inform the appellant of this decision and to accord him the opportunity to participate in it. In my opinion, it is for the Law Society ... to consider whether defence counsel’s conduct in the circumstances complied with the standards of the profession in the province...

[34] Where, in the course of the trial, counsel makes a decision in good faith and in the best interests of his client, a court should not look behind it save only to prevent a miscarriage of justice...

[35] On the facts of this case, I conclude that counsel had carriage of the defence and the implied authority to make tactical decisions, as the ones made here, in the best interests of his client....

[14] Inquiry into authority of counsel will generally only be relevant when dealing with an allegation of ineffectiveness of counsel as a ground of appeal, which in itself involves first establishing a miscarriage of justice (*G.D.B.*, paras. 5, 28-29 and 35). Ineffectiveness of counsel as a ground of appeal, based on counsel's acting without express instructions, will only be available in "the rarest of cases" in civil cases such as cases involving some overriding public interest or the interests of vulnerable persons or cases where one party to the litigation is complicit in the failure of counsel to act according to a proper standard (*D.W. v. White* (2004), 189 O.A.C. 256 (C.A.) at para. 55) or perhaps in immigration matters and mental health detention cases where liberty of the subject may be at risk (*Gligorevic v. McMaster*, 2012 ONCA 115).

[15] Here, there is nothing to suggest that the normal rule that the court will not look behind the decisions taken by counsel would not have applied. Accordingly, even if Ms. White did not participate in the decision to limit the claim to a declaration of title, that fact would not undermine the conclusion reached by Harrington J.A. that the proposed appeal on this ground had no potential merit because of the concession made by counsel.

[16] A third submission made by Ms. White was that Harrington J.A. wrongly insinuated that she had "feigned illness" and had an ulterior motive as an explanation for why she had not filed an appeal on a timely basis. In fact, what Harrington J.A. said in his reasons was the following:

[15] ... 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.

[17] This statement is merely a recitation of fact, not an insinuation that Harrington J.A. thought Ms. White had feigned illness. The obligation on an applicant for extension of time to appeal is to put forward sufficient evidence and argument to satisfy the test for granting an extension. Harrington J.A. was not satisfied that there was any evidence to support Ms. White's assertion that she had been ill, to such a degree that she would have been incapacitated from filing an appeal for the whole of the one and a half years that had elapsed since the trial judgment. I see nothing in what

Harrington J.A. wrote in this regard that could suggest that he misapplied the applicable principles.

[18] Fourthly, Ms. White argued that Harrington J.A. erred in concluding that the proposed appeal had no merit because he was incorrect when he decided the *Limitations Act*, SNL 1995, c. L-16.1 barred all of her claims except the claim for a declaration of title. She submits that her claims were not barred on the basis of limitation because the encroachments of the Town were “ongoing” and therefore constituted a continuing trespass for which an action would still lie. The problem with this submission, as a ground of appeal, is that, as noted by Harrington J.A., counsel had confirmed, on her behalf, that she was abandoning her claim for a remedy other than a declaration of title and therefore conceded that the *Act* did apply. In limiting Ms. White to her remedy of declaration of title, the trial judge relied not only on counsel’s concessions but also made findings on the evidence that led to the conclusion that the *Act* barred the other claims. Harrington J.A. considered these matters in the context of the applicable jurisprudence, including the decision of the Supreme Court of Canada in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 and concluded that there was no potential merit in the appeal on this point. I am unable to discern any realistic basis for concluding that there was possible legal error in this regard.

[19] A fifth point made by Ms. White is that “if the trial judge’s ruling is allowed to stand, then all the new owners of properties on the riverside of Flats Road will have to endure the same type of harassment, or worse...” The incidental impact of the trial judgment on others who are not parties to the litigation cannot form the basis of a claim to a rehearing of the ruling affecting Ms. White.

[20] I have concluded, therefore, that there is no realistic basis for saying that Harrington J.A.’s decision could contain legal error or involve the exercise of discretion based on a wrong principle or otherwise improperly. There is no basis in the circumstances for requiring the parties to suffer the delay and expense that would be associated with rearguing this application before a panel of three judges.

[21] Before concluding, however, there is another observation which should be made about Ms. White’s application. In her application she makes a number of statements which demonstrate she may be misapprehending the effect of the trial judgment. As noted, the trial court did make a declaration in her favour as to the proper location of her property boundary. This was

based on a 2005 survey known as the “Renouf Survey.” Ms. White agrees that the Renouf Survey is “basically correct”. She does not seek to appeal the determination of the judge as to the location of her boundary. She appears to believe, however, that because the court did not make findings in respect of her trespass and dispossession claims, she has effectively lost her property. In her application to me she stated it this way:

The trial judge’s ruling which states, in effect, that the Council can keep the land they took, without paying for it, is unjust and unsatisfactory...

The trial judge’s decision, in essence, “that the land belonged to us but the Council can have it because they claim they did not know they took it” is grossly unfair and sickening...

(Underlining added.)

[22] While it is true that the absence of any remedy other than a declaration of her boundary does not entitle Ms. White to damages for past trespasses nor to an order ejecting the Town from the property to the extent it is still occupying it, the declaration establishing her boundary does have legal force. It eliminates any dispute in the future if the Town were to encroach again beyond the established boundary and would entitle her to sue for damages for any new trespasses, to recover possession of the property in respect of any such new encroachments and to resist any attempts by the Town to enter on the property beyond the boundary line. She would also be entitled to mark the boundary, by fencing or otherwise. The Town must respect the court’s declaration in this regard.

[23] It must be remembered that the Town did not seek, and did not receive, by way of counterclaim, a declaration that by virtue of the *Limitations Act* it had effectively dispossessed Ms. White from her property, nor did the trial judge so find. His finding was limited to a determination that Ms. White could not pursue her claim based on the previous encroachments which had not continued within the applicable limitation periods prior to commencement of the action (Trial judgment, paras. 28 and 30).

[24] Ms. White may have won more than she thinks she has.

Disposition

[25] There is no basis for the exercise of my discretion to order a rehearing before a panel of three judges. The application is dismissed.

[26] In the circumstances, each party shall bear her or its own costs.

J. D. Green C.J.N.L.