



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

Citation: *Franklin v. St. John's (City)* No. 3, 2018 NLCA 38

Date: June 26, 2018

Docket Number: 201101H0045

BETWEEN: JOHN FRANKLIN
APPELLANT

AND: CITY OF ST. JOHN'S
FIRST RESPONDENT

AND: SONCO GROUP INC.
SECOND RESPONDENT

AND: 55402 NEWFOUNDLAND
AND LABRADOR LIMITED
THIRD RESPONDENT

Coram: Green and Harrington, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 200601T3993
(2011 NLTD(G) 61)

Application Heard: June 20, 2018

Judgment Rendered: June 26, 2018

Reasons for Judgment by: Green and Harrington, JJ.A.

Counsel for the Appellant: Self Represented

Counsel for the First Respondent: Linda Bishop, Q.C.

Counsel for the Second Respondent: Gregory Moores and Amanda Whitehead

Counsel for the Third Respondent: Sarah Hogan

Green and Harrington JJ.A.:

[1] This is an application by John Franklin for “direction and clarification” of two orders made by this Court following an appeal in 2012 (*Franklin v. St. John’s (City)*, 2012 NLCA 48) and a reconsideration of that decision filed later that year (2012 NLCA 66).

[2] The Court always retains jurisdiction to clarify or give directions with respect to the scope or effect of its orders but it cannot reverse or vary them except in accordance with rule 59 of the *Court of Appeal Rules*, NLR 38/16 or the limited jurisdiction that flows from the inherent powers of the Court which have been preserved by section 7(2) and (3) of the *Court of Appeal Act*, SNL 2017, c. C-37.002.

[3] In the original decision, this Court varied a trial judgment dealing with claims concerning use of a right of way (a laneway) extending behind certain properties, including Mr. Franklin’s hotel property, on Water Street, St. John’s. It overturned certain declarations made by the trial judge because they extended beyond what was necessary to be decided to determine Mr. Franklin’s entitlement to an order in the nature of *mandamus* against the City. As well, the Court noted that all of the persons who potentially had a right to use the right of way were not made parties to the proceeding. In the result, the Court nevertheless concluded that the trial judge was correct in refusing the *mandamus* remedy. Mr. Franklin’s application for reconsideration of the decision was dismissed.

The Current Application

[4] The current application was motivated by Mr. Franklin’s concern over what he believes is a misinterpretation by the City and possibly others as to the legal effect of the original decision which, he says, has led the City to grant certain permissions to others with respect to the use of the right of way and to unduly restrict him with respect to his own use.

[5] When the application for direction and clarification came before the Court, Welsh J.A. determined that it was premature because the parties had never settled the formal orders reflecting the original and reconsideration decisions. She directed that the terms of the final orders be finalized before proceeding further.

[6] The parties could not agree on the terms of the orders. Accordingly, two members of the Panel who heard the original appeal and reconsideration (the third member, Wells, J.A. having since retired) settled the form of the orders pursuant to rule 57(5) and (6) of the *Court of Appeal Rules*. Mr. Franklin was given leave to proceed with his application if he felt he still needed clarification of the wording of the formal orders. He has now done so.

The Legal Effect of an Order

[7] The formal order of the Court, not the reasons for decision, is what gives legal effect to the rights of the parties discussed and dealt with in the judges' reasons. The reasons are, technically, only opinions of the particular author, as to what the result should be. Upon it appearing that at least a majority of the panel hearing the case are of one mind as to the result, that result then becomes embodied in the formal order of the Court, which forms the legally operative and enforceable juridical act emanating from the appeal. It is therefore to the terms of the formal order that one must first look to determine the rights of the litigants emanating from the appeal. The reasons, especially if by a concurrence they reflect majority thinking, remain relevant, of course, to explain the terms of the final order but they have no dispositive effect except insofar as it can be said that the order gives effect to the ultimate decision reached.

[8] One of the prime consequences of this principle is that only parties to the appeal can be beneficiaries of the rights determined by the appeal and contained in the resulting order. A second consequence is that even parties to the appeal can only benefit from the order to the extent that the rights in dispute are necessarily determined by the decision and embodied in the formal order. All other discussion in the reasons that is not necessary to reaching the ultimate decision, i.e. *obiter dicta*, is not dispositive of rights.

[9] In this case, the determination by the applications judge that the application for *mandamus* should be refused, as affirmed on appeal, is the operative decision. That is now reflected in the formal order which has been recently settled and filed. That order removed from the original order of the applications judge certain declarations he had made concerning the rights of other persons in the laneway and, instead, simply recorded that the application for *mandamus* had been dismissed.

[10] In reaching the decision that the applications judge was correct in dismissing the *mandamus* application, this Court concluded that the City was justified in seeking the consent of certain adjoining property owners before

agreeing to issue a permit to Mr. Franklin to construct a fence and stairs on property to the rear of his hotel, as they had a “sufficient interest” in the right of way on or near which, apparently, the fence and stairs were being constructed. In determining this, the Court was not settling the nature or extent of the legal rights of the other landowners. It was only indicating that they had some degree of sufficient interest that would justify their interests being considered by the City before acceding to Mr. Franklin’s request.

[11] Additionally, not all the adjoining property owners who had a potential interest in the right of way were parties to the litigation.

Mr. Franklin’s Concerns

[12] A considerable portion of Mr. Franklin’s submissions essentially amounted to a continuation of his arguments on the reconsideration hearing that the Court overlooked certain documentary evidence, misconstrued other evidence and wrongly applied certain legal doctrine, and that had it not done so the decision would have been different. These submissions are not open to Mr. Franklin at this stage. He has already had an opportunity to make these and other points on the reconsideration hearing. To the extent they were made, they were rejected. To the extent that they were not raised, the fact that he had an opportunity to raise them means that they cannot be raised again. If the Court made any errors, Mr. Franklin’s remedy is now limited to seek leave to appeal the decision to a higher court.

[13] I would add, as well, that Mr. Franklin also makes reference in his written submissions to statements made and actions taken by officials of the City of St. John’s subsequent to the Court’s decisions in interpreting and applying the decisions, which he says were incorrect, illegal, discriminatory and possibly “racist” (although he does not elaborate as to how they might be racist). He says that as a result of these actions, the City officials have “trampled” on his rights and perhaps the rights of others.

[14] The rectification of these alleged abuses cannot be dealt with on an application for clarification of the Court’s decisions, except by way of a declaratory explanation of what is the scope of the orders. To the extent that the City may have acted outside its legal authority, as defined by the Court’s orders or otherwise, or has otherwise acted illegally, Mr. Franklin retains whatever legal rights he has to access the trial court in an appropriate action seeking remedial redress for them.

[15] Mr. Franklin's other stated concerns are more germane to his request for clarification of the scope and effect of the decision. He says he is driven to seek clarification because of what he says is the inaccurate and overly-expansive interpretation placed by the City on the scope and effect of the decisions, which has affected the approach taken by the City to municipal regulation of the use and occupation of the right of way.

[16] He asks this Court for an injunction restraining the City from engaging in actions outside the boundaries of this Court's order, as he interprets it. While it is not possible on an application such as this to order the City to act in a different manner (assuming Mr. Franklin is correct in his contentions), a statement by the Court as to what is the scope and effect of the order may act as guidance for the parties as to the future application of the decision and could possibly serve as the foundation for other legal proceedings by Mr. Franklin to enforce what he perceives to be his continuing legal rights respecting the use of the right of way.

What this Court Decided

[17] To clarify the scope and effect of the Court's orders it is necessary to identify what it was that the Court actually decided. At its most basic, the affirmation by the Court of the applications judge's dismissal of Mr. Franklin's application for *mandamus* constituted a validation of the legality of the City's decision to seek consent from adjoining landowners who may have had rights in the laneway before granting Mr. Franklin a permit to do the work he proposed to do on the laneway.

[18] In reaching the conclusion that the *mandamus* should be denied, however, it was necessary to determine whether at least one of the adjoining landowners had a sufficient interest in the laneway to justify the City seeking consent before granting the permit to Mr. Franklin. It was not necessary, however, to define with precision the nature of the interests held by the adjoining landowners, only that there was some sort of interest that was sufficient for the City to recognize before acting. Only two of the adjoining landowners – 55402 Newfoundland and Labrador Limited (55402NL) and Sonco Group Inc. (Sonco) – were parties to the proceeding.

[19] The applications judge, it will be recalled, attempted to restructure the *mandamus* proceeding into a matter that would involve a determination of the private property rights of the affected landowners and in fact concluded that 55402NL and Sonco had prescriptive easements entitling them to use the whole

of the laneway (2011 NLTD(G) 61, para 85). This Court, however, rejected the applications judge's approach and treated the matter solely as an application for *mandamus*. In its original decision, it stated:

[22] The procedural or legal consequence of the amendments ordered by the applications judge was not placed in issue, or even raised, in this Court by any of the parties. That does not however make it appropriate for this Court to determine the issues not joined in pleadings below, or expressed in the formal order, particularly where the materials before the Court disclose the existence of persons not party to the proceedings but potentially having an interest in determination of the validity of certain assertions in the originating application as amended. Essentially, on the pleadings as amended, the proceeding before the applications judge, whether viewed as an application or an action, remained a proceeding seeking an order of *mandamus*.

[20] The consequence of this approach was to narrow the determinations that were necessary to dispose of the appeal and, by extension, of the core matter at issue, that is, whether a *mandamus* should have been issued. This Court made this clear when it stated:

[26] ... [T]his Court should, in the foregoing circumstances, confine its decision as to property ownership, and entitlement under agreements, to such determinations as are strictly necessary to deal with the issue of whether or not Franklin is entitled to his requested *mandamus*, and then only to the extent that such determination can be made without bearing on the rights of any person or entity not before the Court as a party to these proceedings. ...

(Emphasis added.)

[21] Thus, while the Court had to determine whether the applications judge was correct in deciding that at least one of the adjoining landowners had a sufficient interest in the laneway to justify the City in seeking consent of that owner, the extent and nature of that interest, and by whom it was held, were not necessary to be defined or determined. This approach was even more necessary with respect to the rights of non-party adjoining landowners. The Court made this clear as follows:

[47] Apart from Franklin, only two of the owners of the properties abutting the Laneway are before the Court in this proceeding so it is inappropriate to make any determination as to the extent of the interests of the others in the Laneway. ...

[22] The Court proceeded to analyze the record with respect only to the interests of 55402NL and Sonco.

[23] With respect to 55402NL, the Court concluded, on the basis of the documented interests of the predecessors in title of 55402NL and the operation of section 3 of the *Conveyancing Act*, RSNL 1990, c. C-34, that “55402 NL Limited has the right-of-way interest in the laneway that it asserts” (paragraph 48). The Court did not, however, consider it necessary to determine whether 55402NL may also have acquired easement rights by prescription on the basis of use of the laneway. The Court also did not comment on – nor did it need, for the purposes of the appeal, to comment on – the exact nature and scope of 55402NL’s rights. Aside from confirming that 55402NL did have a legally-recognizable interest in the nature of a right-of-way in the laneway, the nature and extent of those rights concerning how they could be exercised and against whom, are to be derived, not from the Court’s judgment, but from the applicable legal instruments involving the abutting landowners governing their proprietary interests or from rights acquired by prescription.

[24] With respect to Sonco, the Court declined to make any definitive ruling as to whether Sonco could be said to have had an interest in the laneway. For the purposes of the appeal, it did not have to do so. Its analysis is summed up in the following passages:

[51] ... It is sufficient, for disposition of the appeal, that 55402 NL Limited unquestionably has a right-of-way interest over the whole of the Laneway and refused consent for the permits requested by Franklin.

[52] ... The evidence establishes, and the law affirms, that the right-of-way interest in the Laneway of the predecessors of at least one of the adjoining property owners, 55402 NL Limited, survived the 1965 expropriation. Those rights continued to be exercised and tolerated by the City subsequent to the 1965 expropriation. Without deciding whether they do or do not, because they are not before the Court, it must be recognized that other owners of adjoining properties may also enjoy such rights.

(Emphasis added.)

[25] Considered from the perspective of what was necessary to be decided for the Court to make the disposition it did (affirming the denial of the *mandamus* remedy), and taking into account the absence of certain adjoining landowners as parties in the litigation, it can be said that the legal effect of the Court’s orders is as follows:

1. The City’s refusal of the permits requested by Mr. Franklin was justifiable because at least one adjoining landowner (55402NL) had an interest in the nature of a right-of-way in the disputed laneway;

2. Because the nature and extent of 55402NL's interest in the laneway, against whom it could be exercised and in what circumstances (e.g. what degree of accommodation must be given to others having a similar right) were not determined, 55402NL cannot derive any rights concerning such matters from the Court's decision but must have resort to, and seek to enforce by separate action if necessary, the instruments affecting title as the source and definition of those rights or enforce any prescriptive rights it may have acquired;

3. Because Sonco's interest in the laneway was not determined, it cannot derive any rights in respect of its interest in the laneway from the Court's decision but must have resort to, and seek to enforce by separate action if necessary, the instruments affecting its title as the source of its legal rights or enforce any prescriptive rights it may have acquired;

4. Other landowners abutting the laneway who were not parties to the litigation cannot be the beneficiaries of any determinations made by the Court nor can they be affected by the Court's rulings;

5. Mr. Franklin retains such legal rights as he may have with respect to the use and occupation of the laneway as he may derive from the instruments affecting his title or from any prescriptive rights he may have acquired, subject only to the rights he may enjoy in common with others that may be derived from those same and related instruments and which thereby may have to be accommodated because of the nature of joint entitlement. The Court's decision does not take away any legal proprietary rights that Mr. Franklin may otherwise have acquired through the instruments affecting his title or by prescription and he still may seek to legally enforce them.

[26] Mr. Franklin takes particular exception to a letter dated November 23, 2017 addressed to him from the City in response to certain complaints he had made regarding the parking of vehicles in the laneway which he said interfered with his use of the right of way. In it the municipal prosecutor in the Legal Department of the City stated:

As per the 2012 decision of the Newfoundland and Labrador Court of Appeal in *Franklin v St. John's (City)*, the Water St. property owners to the West and East that back onto the private laneway have an easement over the laneway.

[27] Mr. Franklin asserts – and we agree – that this statement is indicative of confusion and misapprehension of the legal effect of the Court's decision. It is simply not correct to state that “as per” (meaning in this context “by means of” or “according to”) the Court's decision, the landowners abutting the laneway have an easement over it. For the reasons already given, with the exception of 55402NL, none of the abutting landowners derive any easement rights over the laneway *from the Court's decision* and even in respect of 55402NL only the

existence of a right but not its scope (including any limitations resulting from any obligation to accommodate use by other possible joint easement owners, including Mr. Franklin) was recognized. What rights the other landowners have can only be derived from other legal sources, if any, such as the legal instruments affecting their respective title or from prescription, and only after they seek to enforce them and receive a declaration or order from a court defining their nature and extent and enforcing them.

[28] I would also add, however, that in its letter, the City's municipal prosecutor goes on and asserts that the City is under no obligation to enforce Mr. Franklin's rights relating to the laneway and that it was a civil matter that must be resolved between him and the other property owners. In that, the City is correct. Mr. Franklin may seek legal redress against the other owners in respect of any of his retained easement rights that he believes have been improperly infringed. This Court's decision has not taken those rights away. To repeat, all it did was to determine that Mr. Franklin was not entitled to a mandatory order *against the City* that a permit be issued to him to use part of the laneway in a certain way.

[29] It is to be hoped that this analysis may clear up some of the confusion that appears to have existed concerning the scope and effect of this Court's orders. Parties and others having notice of this clarification decision should act accordingly. We would make no order as to costs.

J.D. Green J.A.

M.F. Harrington J.A.