

Date: 20120924
Docket: 11/45
Citation: *Franklin v. St. John's (City)* No. 2, 2012 NLCA 66

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

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 C.J.N.L., Wells and Harrington JJ.A.
Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 2006 01T 3993

Application Heard: September 24, 2012
Judgment Rendered: September 24, 2012
Reasons for Oral Decision Rendered: October 12, 2012

Reasons for Judgment by the Court

Counsel for appellant: Bob Buckingham
Counsel for the first respondent: Linda Bishop
Counsel for the second respondent: Gerry Fleming
Counsel for the third respondent: Richard Rogers

REASONS FOR ORAL DECISION

By the Court:

[1] The appellant (“Franklin”) applies for reconsideration by the Court of its decision, 2012 NLCA 48, in this appeal. At the conclusion of Franklin’s submissions, the Court, without hearing from counsel for the other parties, dismissed his application. At the time, we indicated that reasons for the dismissal would be filed. What follows are those reasons.

[2] Franklin owns a small hotel on the south side of Water Street in the City of St. John’s that, together with one property to the west owned by the third respondent (“55402 NL Limited”) and two properties to the east, owned by persons not party to this action, backs onto a laneway running from Baird’s (sometimes Clift’s) Cove along the rear of the four properties. The second respondent (“Sonco”) owns a parking garage on the opposite (south) side of that laneway. Those three Water Street property owners and Sonco have claimed, and the first respondent (“the City”) has acknowledged, a right-of-way over the laneway. Franklin disputes those claims.

[3] The title of the three Water Street property owners devolved from 99 year leases executed in 1894 by the executors of the Estate of Thomas Clift, and assigned at various times between then and 1962 and 1965, the years particularly relevant to Franklin’s requested reconsideration. By a 1962 conveyance a company, Steers Limited, acquired the “fee simple interest” in a large parcel of property that included the three Water Street properties, a portion of the Sonco property and the land over which the laneway runs. That conveyance was specifically made subject to the three 99 year leases, one in respect of each of those three Water Street properties. By notice of expropriation in 1965, the City expropriated “all the right, title and interest” of Steers Limited and three other parties, unrelated to this matter, in the land over which the laneway runs.

[4] Subsequently, the City conveyed to Franklin the small portion, immediately adjacent to his hotel, of the land over which the laneway runs. That conveyance was specifically made subject to “any existing rights including rights-of-way ... held by any of the owners of properties in the immediate area of the laneway, of which the subject land forms a part...”.

[5] When the City refused a building permit to construct certain facilities on the portion of the laneway land conveyed by it to Franklin, unless the consent of the adjoining property owners was first obtained, Franklin sought *mandamus* from the Trial Division to compel the City to withdraw its requirement for consent of the adjoining property owners. The applications judge concluded that, at the time of expropriation, the three Water Street property owners had a right-of-way interest over the laneway that was not extinguished by the notice of expropriation. He also decided that those property owners would have acquired an easement by prescription as a result of their usage, with the City's acquiescence not their permission, of the laneway during the 40 years following 1965. The applications judge refused *mandamus* and Franklin appealed.

[6] In its decision, dismissing the appeal, this Court noted problems with the proceedings below. Because of the inadequacy of the pleadings, the lack of adequate documentary evidence and the fact that certain persons or entities appearing to have an interest were not before the Court as parties, all explained in the reasons, this Court concluded that it should "confine its decision [on the appeal] 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 the proceedings".

[7] On the appeal, this Court concluded that the predecessor in title of 55402 NL Limited, and perhaps the predecessors in title of the two Water Street properties to the east of Franklin's hotel, had a sufficient property interest in the laneway to justify the City requiring their consent prior to consideration of Franklin's application for the building permit. Accordingly, we affirmed the Trial Division decision to refuse the requested *mandamus*.

[8] On this application for reconsideration, Franklin contends that there is "a simple, obvious flaw in the previous decision" in that, while this Court "acknowledged the City of St. John's expropriated all right, title and interest of ... Steers Limited ... in and to the land described in the schedule attached to the expropriation notice", it overlooked the fact that by the 1962 conveyance Steers Limited "acquired all property of the Clift Wood estate which included the now Sonco Garage, 187-189 Water Street (now the Cellar Restaurant building), 196 Water Street (now Byron's Clothing store) and 197-199 Water Street (now 55402 Inc.)". This oversight, Franklin contends, resulted in the Court drawing the erroneous conclusion that "there

were somehow other parties with interest in the laneway” at the time of expropriation by the City of the property interests of Steers Limited.

[9] Franklin’s submission cannot be accepted because it is not correct. When the relevant provisions of the document by which Steers Limited acquired its title in 1962 are properly construed, it is obvious that the document is not a conveyance of the fee simple “absolute in possession” of the lands, including the land over which the laneway runs, but of the “fee simple interest” subject to the 99 year lease of each of those three Water Street properties. At that time, each of the leases had at least 28 years remaining in the term. The 1962 conveyance also named the party in whom or in which each leasehold title was vested at the time. Notwithstanding the absence of the actual leases and assignments, which were not before the Court, the then current assignees of those leases must, in light of the evidence that was before the Court, particularly the 1962 conveyance and the abstracts of title, be held to have been entitled to exclusive possession of the three properties conveyed to them by assignment of the leases. By virtue of section 3 of the *Conveyancing Act*, RSNL 1990, c. 34, they must also be held to have been entitled to the benefit of any right-of-way appertaining to or reputed to appertain to their respective leasehold properties. It might be helpful to also note, in passing, that in October, 1988 Hiscock, the predecessor in title of 55402 NL Limited, acquired from Steers Limited the freehold reversionary interest in his leasehold property and, as a result of the merger of the leasehold and freehold estates in the one holder, became the fee simple owner absolute in possession of the property, together with all rights appertaining or reputed to appertain, whether acquired by prescription or otherwise, to the land that was a dominant tenement in respect of that subservient tenement, the land over which the Laneway runs.

[10] Thus, contrary to the assertion of Franklin, that the Court’s conclusion that “there were somehow other parties with an interest in the laneway ... was an error”, there was at least one party, and perhaps more, other than Steers Limited having a property interest in the laneway at the time of expropriation of the property interest of Steers Limited. Because those parties were not named in the notice of expropriation, their interests were not affected by it.

[11] No simple, obvious flaw in the previous decision having been shown, it is not necessary for the Court to consider whether the nature of the alleged error was such that the Court would have had jurisdiction to rehear the matter and to make the correction sought by Franklin. Accordingly,

Franklin's application for reconsideration of the appeal decision is dismissed on the basis that no slip or oversight has been established.

[12] With respect to costs of this application, counsel for Franklin acknowledged the normal practice that an order for costs will usually favour the successful party. Counsel for the City took the position that it took at the hearing of the appeal, that the City, in such circumstances, neither seeks nor expects to pay costs. Counsel for Sonco seeks costs. Counsel for 55402 NL Limited did not seek costs and expressed the view that in circumstances where it is important to all parties to have judicial determination of an issue it is not appropriate to order costs solely on the basis of success. In all of the circumstances, and bearing in mind that in its decision on the appeal this Court did not conclude that Sonco had established such a right as would justify the City requiring its consent, the Court is of the opinion that it ought, as it did at the hearing of the appeal, to order that each party would bear its own costs. It is so ordered.

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

C. K. Wells J.A.

M. F. Harrington J.A.