



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

Citation: *Janes v. Embree (Town)*, 2022 NLCA 36

Date: June 9, 2022

Docket Number: 201901H0004

BETWEEN:

NELSON JANES
and LORI ANN JANES

FIRST and SECOND
APPELLANTS

AND:

THE TOWN COUNCIL OF EMBREE

FIRST RESPONDENT

AND:

DON BENNETT

SECOND RESPONDENT

AND:

HAROLD NIPPARD

THIRD RESPONDENT

AND:

DENNIS FUDGE CONTRACTING
LIMITED

FOURTH RESPONDENT

AND:

ROBERT FUDGE

FIFTH RESPONDENT

Coram: Welsh, Hoegg and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
St. John's 201501G3741
(2018 NLSC 127)

Appeal Heard: March 9 and 10, 2022

Judgment Rendered: June 9, 2022

Reasons for Judgment by: Welsh J.A.

Concurred in by: Hoegg and O'Brien JJ.A.

Counsel for the Appellants: Jean V. Dawe Q.C.

Counsel for the First, Second and Third Respondents: Erin Best
and Giles Ayers

Counsel for the Fourth and Fifth Respondents: No appearance

Authorities Cited:

CASES CITED: *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42.

STATUTES CONSIDERED: *Municipalities Act, 1999*, SNL 1999, c. M-24, sections 178, 404, 408; *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8, section 42.

REGULATIONS CONSIDERED: *Development Regulations*, NLR 3/01, section 5.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, rules 17A.01(1) and 17A.03(2)(b).

TEXTS CONSIDERED: R. Sullivan, *Sullivan on the Construction of Statutes*, fifth edition, (Markham, ON: LexisNexis Canada Inc., 2008).

Welsh J.A.:

[1] The Embree town council had received complaints about the state of the property on which Mr. Janes had built two buildings and stored various items.

At issue in this appeal is the authority of the council to make an order requiring Mr. Janes to remove or repair the buildings and to remove waste material and equipment from the property. In addition, the scope of authority to determine issues stated for purposes of a summary trial is addressed.

BACKGROUND

[2] The interest of Lori Ann Janes, who is named as a party and is Mr. Janes' daughter, is limited to personal property that she had stored in one of the buildings. Accordingly, for purposes of this appeal, references are to Mr. Janes who is deemed to be the owner of the leased property.

[3] Mr. Janes constructed a wharf on 1.8 hectares of land leased to him by the Crown. On it he built one two-storey building and a smaller wooden structure. The trial judge accepted that, over time, the property was used for "the storage of his boat, tractor trailer, forklift, trailers and cube van, in addition to various pieces of machinery" (decision of the trial judge, 2018 NLSC 127, at paragraph 4). The trial judge also accepted that:

[5] Since the [property] is on the Main Road through Embree and is waterfront property, the condition of the buildings and the [property] itself became the subject of complaints to the Town.

[6] In March and May of 2010 and also in June of 2011, the Town of Embree corresponded with Mr. Janes asking that he remove debris from and repair structures on the [property] which he admittedly occupied.

[4] Approximately a year before the town council issued an order regarding the property, at the Town's request, Service NL conducted an environmental inspection, and on August 8, 2012, reported to the Town that there were no environmental issues engaging the concern of the Department.

[5] In 2013, on the advice of legal counsel, the Town issued an order relying on section 404 of the *Municipalities Act, 1999*, SNL 1999, c. M-24. Written notice of the order, dated April 10, 2013, which was served on Mr. Janes, states, in relevant parts:

Whereas [the Property] ... is currently in a dilapidated state and as a result poses a safety risk to the public.

Whereas pursuant to s. 404 of the *Municipalities Act* ... the Town Council of the Town of Embree has the authority in the public interest to make certain orders with respect to the maintenance of the Property.

Take Notice that Nelson Janes, being the owner of the Property is hereby ordered to undertake the following remedial work to the Property:

1. To remove from the Property all of the debris situate on the Property and without limiting the generality of the foregoing, the removal of car wrecks, a tractor truck, scrap metal, a forklift, and a cabin cruiser type boat and trailer.
2. To remove or to repair to a suitable standard all buildings situate on the Property.

(Emphasis added.)

[6] The notice specified that the work was “to be completed within 30 days of service of this order”, and advised that, if the order was not complied with, the Town reserved the right to have the work done, with any costs to be recovered against Mr. Janes as a civil debt owed to the council. There was no mention of Mr. Janes’ right to appeal the order.

[7] On July 19, 2013, the contractor began demolition of the smaller building and destruction and removal of the chattels, other material and equipment. When this occurred, counsel for Mr. Janes delivered correspondence to the Town, by hand, advising, among other things, that:

The Town of Embree has failed to comply with the statutory provisions governing it and as such is acting in an unlawful manner, giving rise to a claim for damages by our clients of several hundred thousand dollars.

We require that all demolition activities cease immediately until this dispute can be resolved without further destruction of property and increase in your liability for same.

[8] The governing provisions referenced in the above correspondence and confirmed in additional correspondence on July 22nd specify that a notice under section 404 of the *Municipalities Act* “shall” include information regarding the right to appeal the order to the regional appeal board.

[9] On August 8, 2013, the Town wrote to Mr. Janes regarding the April 10, 2013 notice:

We are advising you that you have the right to appeal this decision and that your appeal must be filed within 14 days of the service or posting of this order
... .

The fourteen-day appeal period for the April 10th order clearly had expired, and the Town had already entered onto the property, bulldozed the smaller building

and destroyed or hauled away material, chattels and equipment located on the property.

[10] On August 14, 2013, the Town served a second notice on Mr. Janes, again under section 404 of the *Municipalities Act*. That notice did include information regarding Mr. Janes' right to appeal to the Board. On August 28, 2013, Mr. Janes appealed the August 14th order to the Board. By decision dated September 30, 2014, the Board confirmed the Town's right to make the August 2013 order. Mr. Janes did not seek judicial review of the Board's decision.

[11] Mr. Janes sought damages for trespass as claimed in a statement of claim he issued on July 17, 2015. The Town applied to have the matter determined by summary trial. The judge stated the relevant question to be: *Was the April 10, 2013 Notice validly given pursuant to section 404 of the Municipalities Act, 1999?* The judge answered that question in the negative and concluded that the Town's action was not authorized under section 404. However, in dismissing Mr. Janes' claim in trespass, the judge determined that the Town's action was authorized under section 178 of the *Act*:

[98] ... I confirm that the Town is entitled to recover from Mr. Janes the costs it incurred for the removal of waste material (but not demolition and removal of the smaller building) because these actions were taken and costs incurred, lawfully under section 178 of the *Municipalities Act*.

ISSUES

[12] At issue in this appeal is whether the trial judge erred: (1) in concluding that actions taken by the Town pursuant to section 404 of the *Municipalities Act* were invalid due to non-compliance with the legislative scheme; and (2) in deciding the matter on an issue not identified for purposes of the summary trial, that is, section 178 of the *Municipalities Act*.

ANALYSIS

Legislative Provisions

[13] Section 404 of the *Municipalities Act* authorizes a municipal council to make an order requiring an owner or occupier of property to remove materials from the property. The section provides, in relevant parts:

(1) A council may make an order ...

...

(1) that the owner or occupier of real property remove from that property, solid waste, noxious substances and substances or things which may be a hazard to public health and safety or which adversely affects surrounding properties.

(2) A person ordered to carry out an action ... under subsection (1) shall be served with that order and shall comply with that order at that person's own expense.

...

(5) Where a person to whom an order is directed does not comply with the order or a part of an order made under subsection (1), the council may take the action that it considers necessary to carry out the terms of the order and any costs, expenses or charges incurred by the council in carrying out the terms of the order are recoverable from the person against whom the order was made as a debt owed to the council.

(6) A council may delegate to an official or employee of the council the power to issue orders under this section.

[14] Section 408 of the *Municipalities Act* provides for an appeal of an order made under section 404:

(1) A person aggrieved by an order made under subsection 404(1) may, within 14 days of the service or posting of the order, appeal to the appropriate regional appeal board established under the *Urban and Rural Planning Act, 2000* and the board may make an order with respect to the matter that appears just.

(2) Where an appeal has been started under subsection (1), the council shall not begin to carry out an order made under section 404 until the appeal has been heard or otherwise disposed of.

...

(4) Notwithstanding subsection (2), where a building poses an immediate threat to public health and safety, a council may take the action it considers necessary to eliminate that threat

(Emphasis added.)

In this case, there was no indication that subsection (4) would apply.

[15] Section 42(1) of the *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8, addresses the right to appeal an order to the regional appeal board established under the *Act*:

A person ... aggrieved of a decision that, under the regulations, may be appealed, may appeal that decision to the appropriate board where the decision is with respect to

...

- (d) a decision permitted under this or another Act to be appealed to the board.

[16] Where a council makes an order, notice regarding the right to an appeal must be given to the owner or occupier of the property. Section 5 of the *Development Regulations*, NLR 3/01, under the *Urban and Rural Planning Act*, provides:

Where an authority makes a decision that may be appealed under section 42 of the Act, that authority shall, in writing, at the time of making that decision, notify the person to whom the decision applies of the

- (a) persons (sic) right to appeal the decision to the board;
- (b) time by which an appeal is to be made;
- ...
- (d) manner of making an appeal and the address for the filing of the appeal.

(Emphasis added.)

[17] In contrast to section 404, which authorizes a council to order the owner or occupier of property to remove material, section 178 of the *Municipalities Act* provides authority for a council, on its own motion, to remove material from property:

A council may remove from real property solid waste, noxious substances and anything that poses a hazard to public health and safety or adversely effects (sic) the amenities of the surrounding property, and charge the owner or occupier of the real property for the costs of its collection and disposal.

(Emphasis added.)

Clarity in an Order

[18] Before proceeding with a consideration of the legislative provisions for purposes of this case, a comment on the scope of authority granted to a council is necessary. Care must be taken to avoid imprecise language when a council takes action under section 404. In this case, the Town and the trial judge

referred to “debris”, which is not language found in the legislation and is not an appropriate descriptor.

[19] Under section 404, a council has authority only to make an order for the removal of items that fall within those specified in the legislation. Accordingly, the order must clearly identify with specific language any items that are properly characterized as “solid waste, noxious substances and substances or things which may be a hazard to public health and safety or which adversely affects surrounding properties”. This is necessary because a lack of precision may lead to confusion and misunderstanding and the consequent destruction or removal of items for which authority is not granted by the legislation.

[20] As applied to this case, the order set out in paragraph 5, above, is not sufficiently specific. “Debris” does not identify the particular items that fall within the language of section 404. Further, the trial judge erred by failing to turn her attention to the language of the legislation to ensure that the items referenced generally as “debris” were properly characterized as falling within the scope of items over which the council had authority. This error has no effect on the resolution of this appeal given, as discussed below, that the order was invalidly issued.

Scope of the Issues on a Summary Trial

[21] The matter proceeded by way of a summary trial. Use of that procedure was not challenged on appeal. However, Mr. Janes submits that the trial judge erred by straying outside the boundaries of the questions that were set to be determined. The basis for this submission is that a summary trial is circumscribed by the issues identified as appropriate for decision.

[22] Rule 17A.01(1) of the *Rules of the Supreme Court, 1986*, provides for a party to “apply to the Court with supporting affidavit material or other evidence for summary trial seeking judgment on or dismissal of all or part of the claim”. Pursuant to rule 17A.03(2)(b), the court has authority to “grant judgment in favour of any party, either upon an issue or generally, unless ... it would be unjust to decide the issues on the application.” In *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42, Green J.A., for the majority, cautioned:

[33] ... the issues that may be dealt with on a summary trial under rule 17A must, of course, fall within the pleadings. This necessarily follows from the fact that the pleadings define the issues that are in dispute. It is those issues which must be scrutinized to determine whether there is a “genuine issue” for trial

...

[115] ... All litigation must be conducted within the scope of the pleadings as originally drafted or as properly amended. ...

[23] This principle is reiterated several times in the decision (see, for example, paragraphs 113 to 122, 131 and 144). Setting the parameters of the issues to be determined by reference to the pleadings is a matter of procedural fairness to ensure that a party will not be taken by surprise or prejudiced.

[24] In this case, the relevant issue stated by the judge is:

Was the April 10, 2013 Notice validly given pursuant to section 404 of the Municipalities Act, 1999?

[25] As discussed below, the judge answered that question in the negative. But rather than limiting her answer to that question, the trial judge proceeded to determine whether the Town had authority to act pursuant to section 178 of the *Municipalities Act*. The difficulty with taking that step is that the interpretation of section 178 was not one of the stated questions to be determined at the summary trial.

[26] Further, the possible application of section 178 is not pleaded by the Town in response to Mr. Janes' statement of claim. No foundation was laid for the consideration of section 178 as an alternative to section 404 of the *Municipalities Act*. Indeed, only section 404 is referenced in the orders issued by the Town, in the Town's pleadings in defence, and in the questions stated by the judge to be addressed in a summary trial.

[27] Applying the law stated in *Brook Construction*, I am satisfied that the judge erred by incorporating section 178 into the analysis. It was an error to step outside the parameters of the issues that were defined by the pleadings and set to be determined by means of the summary trial. It follows that the application of section 178 of the *Act* was not properly before the Court. In the circumstances, the appropriate course is to decline to address the interpretation of section 178 for purposes of the appeal. This is not to be taken as endorsing the trial judge's interpretation of section 178. That is an issue to be left for another day when the question is properly before the court.

[28] In the result, the question to be considered by this Court on appeal is the operation of section 404 of the *Municipalities Act*.

Section 404 of the *Municipalities Act*

[29] For the following reasons, I am satisfied that the trial judge did not err in concluding “that non-compliance with section 5 of the *Development Regulations* renders the actions taken pursuant to section 404(5) of the *Act* invalid” (decision of the trial judge, at paragraph 80).

[30] It is clearly stated in the two notices sent by the Town to Mr. Janes that the Town was relying on section 404 of the *Municipalities Act* as authority for requiring Mr. Janes to remove equipment, chattels and material from the property and remove or repair the buildings (for convenience, referred to collectively as “materials”).

[31] When proceeding under section 404, notice of the order must be given to the owner or occupier of the property and must include specified information regarding the right to appeal the order to the regional appeal board. This conclusion follows from a reading of sections 404 and 408 of the *Municipalities Act* together with section 42 of the *Urban and Rural Planning Act* and section 5 of the *Development Regulations*, which states that the information regarding the right to appeal “shall” be included in the notice.

[32] It was not argued on appeal that “shall” was not intended to be mandatory in this context. Being mandatory, the effect of non-compliance is to render the order a nullity or invalid. See: R. Sullivan, *Sullivan on the Construction of Statutes*, fifth edition, (Markham, ON: LexisNexis Canada Inc., 2008), at pages 69 and 74 to 79. In the result, where information regarding the right to appeal the order to the Board is not included in the notice, the order is invalid and may not be relied upon by the town council.

[33] In this case, the April 10, 2013 notice to Mr. Janes was non-compliant with the applicable legislative provisions because it did not include the information regarding the right to appeal. In the result, that order could not be relied upon by the Town as authority to require Mr. Janes to remove materials from the property. Nor could it authorize the Town’s entry onto the property or the destruction or removal of the materials by the contractor.

[34] Further, the subsequent provision of the relevant appeal information in the August 2013 correspondence to Mr. Janes is of no assistance to the Town since that occurred after the Town’s entry onto the property. Further, while the August 14, 2013 order complied with the legislatively prescribed notice

provisions, it did not retroactively authorize the Town to enter onto the property. In addition, Mr. Janes' appeal to the Board had the effect of precluding the Town from taking any further steps until the appeal had been disposed of, that is, September 30, 2014.

[35] The conclusion follows that the Town could not rely on the orders made pursuant to section 404 of the *Municipalities Act* for authority either to require Mr. Janes to remove materials from the property or to carry out the terms of the order on its own motion until after September 30, 2014.

[36] In the result, the Town entered onto Mr. Janes' property without authority. Unauthorized entry onto private property where authorization is legislatively required amounts to a trespass for which the owner or occupier of the property has a claim in damages. In the result, the Town is liable for the damage caused by the Town's unauthorized actions in demolishing and removing the materials, including the building and the equipment that was delivered to the scrapyard.

Costs

[37] The trial judge gave leave for the parties to make an application regarding costs. Mr. Janes requests costs in both Courts on a solicitor-client basis, or under column 5 of the scale of costs.

[38] In support of his position, Mr. Janes' submits that the Town acted in a high-handed manner and caused the litigation by the failure to comply with the legislative requirements that underpin the authority to issue an order to enter onto private property, demolish a building and remove equipment and materials. He correctly submits that, before taking steps to have a contractor enter onto the property, the Town had the responsibility of ensuring that their notice was compliant with the legislative requirements. That said, faced with the April 10, 2013 order, and knowing what the Town was requesting of him, Mr. Janes took only minimal steps to remedy the situation before the contractor entered onto the property some three months later. However, the manner in which the Town proceeded resulted both in Mr. Janes having to obtain legal advice with undue haste, and in damage to his property that was sustained while that advice was obtained.

[39] As the successful party, Mr. Janes is entitled to his costs in this Court and in the court appealed from. I am satisfied that the circumstances are such as to warrant costs at an elevated level, and would, therefore, order costs on column 4 of the scale of costs.

SUMMARY AND DISPOSITION

[40] In summary, the trial judge erred by deciding the matter on an issue not identified for purposes of the summary trial, that is, section 178 of the *Municipalities Act*. The interpretation of section 178 is left for another day when the question is properly before the court.

[41] However, the judge did not err in concluding that actions taken by the Town on Mr. Janes' property pursuant to section 404 of the *Municipalities Act* were unauthorized because they were taken in reliance on an invalid order. In the result, the Town's unauthorized entry onto Mr. Janes' property constituted a trespass for which the Town is liable in damages.

[42] Accordingly, I would allow the appeal and remit the matter to the Supreme Court, General Division for the assessment of damages, with costs as set out in paragraph 39, above.

[43] Finally, I note that Denis Fudge Contracting Limited and Robert Fudge did not participate in the appeal. They rely on paragraph 4 of the order, which will continue in effect:

4. The Fourth and Fifth Defendants are entitled to full indemnification from the First Defendant for actions of the Fourth and Fifth Defendants (acting as agents (*sic*) of the First Defendant) for which liability is determined.

B.G. Welsh J.A.

I concur: _____
L.R. Hoegg J.A.

I concur: _____
F.P. O'Brien J.A.