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NOVA SCOTIA COURT OF APPEAL

[Cite as: Williams v. Mulgrave (Town), 2000 NSCA 24]

Freeman, Bateman and Cromwell, JJ.A.

BETWEEN:

LILLIAN WILLIAMS Appellant - and - THE TOWN OF MULGRAVE and THE CANADIAN NATIONAL RAILWAY Respondents	)	Jamie MacGillivray for the appellant Robert G. Belliveau, Q.C. for the respondent CNR Harold A. MacIsaac for the respondent Town Appeal heard: November 25, 1999 Judgment delivered: February 3, 2000

THE COURT: Appeal allowed per reasons for judgment of Cromwell, J.A.; Freeman and Bateman, JJ.A. concurring.

CROMWELL J.A.:

I. Introduction:

[1] Since 1939, Mrs. Williams has owned a lot at Mulgrave. There, she and her husband built what she calls her “Shanty by the Sea”. On the south side of the property, there is an underground drain from the CNR right of way. There were problems with the drain from time to time and, on at least three occasions over the years, the CNR carried out repairs to it at Mrs. Williams’ request. When further problems arose in 1989, the CNR took the position that it had no legal responsibility for the drain.

[2] Lawyers became involved. Correspondence was exchanged. The CNR did some further work, but Mrs. Williams was not satisfied. In 1997, she sued the CNR and the Town of Mulgrave. (The Town had purchased the CNR right of way in 1996.) She claimed damages and an injunction alleging that the drain was negligently constructed, that water flowed onto her land from the drain creating a nuisance and that the presence of the drain on her land was a trespass. The CNR and the Town denied liability and further claimed that Mrs. Williams’ action should fail for two reasons. First, they said her action was time barred under the **Limitation of Actions Act**, R.S.N.S. 1989, c. 258, and second that her claim had been settled by mutual agreement.

[3] By consent, these two issues were determined before trial of the main action. MacLellan, J., the judge hearing the trial of these two issues, decided that the claims in Mrs. Williams’ action relating to her water drainage problem had been settled and could

not proceed. He held that the claim relating to the presence of the drain on her property had not been part of the settlement agreement. However, he also decided that while the action relating to the presence of the drain on her property was not covered by the settlement agreement, it was time barred. Mrs. Williams' action was, accordingly, dismissed with costs.

[4] Mrs. Williams appeals the judge's decision on both issues. The CNR and the Town, by Notice of Contention, say that the judge ought to have decided that the settlement agreement covered all claims, not just the drainage problem, and that even if the judge otherwise erred, he was right in the result because they had acquired an easement for the underground drain pipe.

II. Facts:

[5] The basic facts were not in dispute before the trial judge. Mrs. Williams and her husband acquired the Mulgrave property in 1939 and built a dwelling on it. After living on the property for some time, she became aware that there was a drain going through it which she thought originated on the adjoining CN right of way. Mrs. Williams claimed that, in the 1940s, the drain failed and water seeped out onto her lawn. She contacted CN who responded by sending out a crew to make repairs.

[6] There were further problems in the 1950's. Again Mrs. Williams contacted CN and again a crew was sent. A 42 inch concrete culvert was installed. CN also installed some drainage tile and erected cribwork to act as a retaining wall to stop the flow of

water onto her property. Mrs. Williams said that she thought CN must have some legal authority to have the drain crossing her property.

[7] In 1979, Mrs. Williams complained to CN about the condition of the cribwork which had been installed in the 1950's. CN effected repairs which included replacing the cribwork, installing a drain pipe leading to a catch basin which emptied into the 42 inch concrete pipe and facing the cribwork with painted plywood.

[8] In 1985, Mrs. Williams requested a copy of any agreement CN had which entitled it to run a drain through her property. In early 1986, CN responded that there was no such agreement. When further problems arose with the cribwork in 1989, Mrs. Williams retained counsel who wrote to CN on her behalf. CN responded that it had no legal responsibility, but would do some further work on condition that Mrs. Williams would not make further similar requests future.

[9] Correspondence between counsel and a meeting on site between CN officials and counsel on behalf of Mrs Williams followed. In a letter dated June 4, 1992, written after the site meeting, in-house counsel for CN summarized the situation as he understood it. He concluded that CN would undertake some further specified work "... on a without prejudice basis simply as a goodwill gesture, **provided Mrs. Williams will accept same as a solution to her present difficulties.**" (emphasis added). Counsel for Mrs. Williams responded that CN should proceed. Counsel for CN replied that the

work could proceed immediately " ... on the conditions set out in [his] letter of 4 June 1992, **namely that such work will be done on a "without prejudice" basis and must be accepted by Mrs. Williams as full and complete settlement of any claims she might have in reference to the drainage problems on her property.**" Once again, counsel for Mrs. Williams wrote advising that the work should proceed. The work was done in the fall of 1992.

[10] In November 1993, counsel for Mrs. Williams wrote counsel for CN complaining about flooding on her property. CN's counsel responded on November 15, 1993 that CN was not prepared to do further work because the work in September of 1992 had been done " ... on a without prejudice basis and **on condition that it be accepted by Mrs. Williams as a full and complete settlement of any claims she might have in reference to drainage on her property.**"

[11] Mrs. Williams started this action in August of 1997.

III. The Trial Judge's Decision:

[12] MacLellan, J. decided that the agreement reached in 1992 finally settled Mrs. Williams' complaints with respect to her water drainage problems (by which I think he meant her claims in negligence and nuisance), but not her claim with respect to the presence of the drain on her land (by which I think he meant her claim in trespass). This finding followed his review of the correspondence and consideration of the

testimony of the two solicitors and Mrs. Williams. The judge rejected Mrs. Williams' evidence that she did not agree to the arrangement and accepted her then solicitor's evidence that the issue of the presence of the drain pipe (as opposed to drainage problems) was still a live issue after the 1992 agreement.

[13] On the limitation of actions point, the judge held that the applicable 6 year period is set out in s. 2(1)(e) of the **Limitation of Actions Act** which refers to " ... all actions for direct injuries to real or personal property ...". He found that the limitation period " ..... in regard to an action requesting the removal of the drain pipe..." began to run in February of 1986 when CN wrote to Mrs. Williams advising that it had no agreement respecting a storm sewer crossing her property. The judge was of the view that the Court could extend the limitation period under the **Act** for a maximum period of four years and that, even if he did so, the limitation period would have expired in February of 1996, about 18 months before the action was commenced in August of 1997. He concluded:

> I therefore accept the position of the defendants that this action is prohibited by the limitation period insofar as it deals with the installation of the drain pipe across her property.
>
> This being the only issue not dealt with by the argument of accord and satisfaction, I would allow the defendants' application to dismiss the plaintiff's claim against both of them.

IV. Analysis:

1. Settlement Agreement:

[14] Mrs. Williams submits on appeal that the judge erred in finding there was a valid settlement. She says the agreement was uncertain, that her then solicitor had no

authority to enter into it and that it is so unfair that it should not be enforced.

[15] I do not accept these submissions. The fact that there is a dispute about the terms of a contract does not mean that the contract fails for uncertainty. Here, the trial judge reviewed the correspondence and the testimony and made a finding that there was an agreement with certain terms. His findings are reasonable and supported by the evidence; I see no basis upon which we should disturb his conclusion. The agreement was entered into by counsel on behalf of Mrs. Williams who had apparent authority to do so; the judge rejected Mrs. Williams' evidence that she did not agree to the arrangement, finding that " [o]bviously, she was aware of the conditions upon which CN would do this final work on her property." As for the submission that the agreement is so unfair that it should not be enforced, there is nothing in the circumstances disclosed in the evidence to support this argument.

[16] CN and the Town submit that the judge did not err in finding there was a valid settlement agreement, but that he erred in failing to find that it dealt with all of Mrs. Williams' claims. I do not accept this argument. The scope of the settlement agreement is central to the judge's finding with respect to the certainty issue. In other words, the question of whether the terms of the agreement were certain is closely related to the question of what the terms were. As pointed out by CN in its factum, the finding of the judge that the terms of the agreement were certain is well supported by the evidence. I see no basis for appellate intervention in relation to his finding of what the terms were.

2. Limitation of Actions:

[17] Mrs. Williams alleges two errors in the trial judge's conclusions on the limitation point. First, she argues in essence that her claim in trespass relating to the presence of the drain on her property is a continuing cause of action. It follows from this that, for limitation purposes, time begins to run each day so that the limitation period for the claim has not expired. Second, it is submitted that the judge chose the wrong date of discovery of the cause of action by Mrs. Williams; instead of receipt of the letter from CN in February 1986, the proper date of discoverability should have been at the time of recurrence of problems with the drain in 1989. (Having upheld the judge's decision that the nuisance and negligence claims were settled, I do not need to address the limitations aspect of those claims.)

[18] CN and the Town submit that 1986 is the very latest date the limitation period could start to run, assuming without conceding that the discoverability rule, properly applied, would bring it to that date. Both submit that Mrs. Williams, with reasonable diligence, should have been aware of the cause of action in the 1950's when CN installed the 42 inch concrete culvert. It is also submitted that whatever the correct view is concerning the limitation of actions, it is clear on the record that CN acquired an easement for the drain so that its presence is lawful and does not constitute trespass.

a. Is the trespass alleged here a continuing cause of action?

[19] The only limitation period relied upon by CN and the Town is found in s. 2(1)(e) of the **Limitation of Actions Act**, R.S.N.S. 1989 c. 258 as amended, 1993, c.

27; 1995-96, c. 13. That section provides:

> 2 (1) The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:
>
> (e) ... all actions for direct injuries to real or personal property, ... within six years after the cause of any such action arose; (emphasis added)

[20] The assumption of counsel is that actions in trespass to land fall within the words "... direct injuries to real or personal property ....." and they are supported in this by J.S. Williams, *Limitation of Actions in Canada* (2nd, 1980) and Lewis Klar, et al, *Remedies in Tort*, looseleaf, vol. 3 at p. 23-48.3. As the point was not argued before us, I proceed on the same assumption.

[21] The trial judge did not address the issue of whether the alleged trespass was a continuing cause of action for limitation purposes. The claim in trespass is asserted as follows in Mrs. Williams' Statement of Claim:

> 16. Mrs. Williams claims against the CNR and the Town for trespass in that the Town and the CNR intentionally interfered with the land owned by Mrs. Williams, and, after the initial interference, in allowing the trespass to continue contrary to the wishes of Mrs. Williams, and the trespass includes, but is not limited to the construction of the underground drain, the construction of the retaining walls, and the repairs and changes made over the years to the underground drain and retaining walls. (emphasis added)

[22] Both the installation of the drain and allowing it to continue on her property are complained of in the Statement of Claim.

[23] The way in which the pleading is drafted reflects the long established rule that where a structure is wrongly placed on another person's land, both the placing of the structure and the failure to remove it are actionable wrongs. The trespass is said to

continue until the structure is removed. The result is that, for limitation purposes, the continuing trespass of failing to remove the structure gives rise to a new cause of action each day it is not removed.

[24] For example, R.W.M. Dias et al, *Clerk and Lindsell on Torts* (16th ed, 1989) at 1305 states:

> Every continuance of a trespass is a fresh trespass, in respect of which a new cause of action arises from day to day so long as the trespass continues. (emphasis added)

[25] John B. Fleming in his *Law of Torts* (8th, 1992) put it this way at p. 42-3:

> If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitute an actionable wrong. There is a "continuing trespass" as long as the object remains; and on account of it both a subsequent transferee of the land may sue and a purchaser of the offending chattel or structure be liable, because the wrong gives rise to actions de die in diem until the condition is abated. ..... In all these cases, the plaintiff may maintain successive actions, but, in each, damages are assessed only as accrued up to the date of the action .... (emphasis added)

[26] Lewis Klar, et al state the rule similarly in their *Remedies in Tort*, looseleaf, (1987), Volume 3 at p. 23-18.1 and 23-49:

> Trespass by way of personal entry is a continuing injury, lasting as long as the personal presence of the wrongdoer. The same rule applies where a structure or object is placed on another's land. In such cases, not only the initial intrusion, but also the failure to remove it constitutes an actionable wrong, and there is a continuing trespass until the object is removed or the condition abated, thereby giving successive owners the right to sue. .....
>
> A continuing trespass gives rise to a new cause of action each day. The limitation period in such a case does not run from the initial trespass but starts afresh with each successive cause of action. (emphasis added)

[27] To the same effect is this passage from G.H.L. Fridman, *The Law of Torts in*

Canada (1989), volume 1 at p. 13:

> One single act suffices for liability in trespass. Each time the defendant commits the act which constitutes the unlawful entry on or interference with the land of the plaintiff he is guilty of the tort. However, the common law has long known the concept of continuous trespass. This occurs when there is a repetition of acts or omissions of the same kind as that for which the original action was or could have been brought. (emphasis added)

[28] Finally, I refer to J.S. Williams, supra, at 62:

> The act of intentionally or negligently entering or remaining on, or directly causing physical matter to come into contact with land in the possession of another is a trespass *quare clausum fregit* and is, in most Canadian jurisdictions, subject to a limitation period of six years. In such actions the accrual of the cause of action occurs when the act of trespass is committed. Each distinct act of trespass is viewed as giving rise to a fresh cause of action. Practically each day marks the accrual of a fresh cause of action. A succession of such acts may amount to what is called a "continuing trespass". Each act gives a separate cause of action and has its own limitation period. Thus an action may be maintained after a delay so that part of the continuing trespass is statute-barred and the rest of it is still actionable. Thus an action for damages may be maintained with respect to every trespassory act occurring within the space of the limitation period.

[29] The assertions of the text writers are borne out by the cases. In **Truro v. Archibald** (1901), 31 S.C.R. 380, aff'g, [1900] N.S.R. 401 (N.S.S.C.), the plaintiff's action was for trespass by the Town constructing and maintaining a drain through his land. The drain had been constructed in 1886 but no complaint was made until 1896. It was held that the action was not time barred by the twelve month limitation period under the **Towns' Incorporation Act** of 1895 because the trespass was a continuing one.

[30] **Truro v. Archibald**, while nearly 100 years old, is referred to without criticism in G.H.L. Fridman, *The Law of Torts in Canada* (1989), volume 1 at 14, by Klar et al in *Remedies in Tort (supra)* at 23-18.1 and has been followed much more recently in this province: see **Lockwood v. Brentwood Park Investments** (1967), 64 D.L.R. (2d) 212

(N.S.S.C.) at 215; aff'd on this point (1970), 1 N.S.R. (2d) 669 (N.S.S.C.A.D.) at 678.

[31] The rule of continuing trespass has been relied on in several modern cases in other provinces. Without being exhaustive, I would refer to **Maeckelbury v. Radium Waterworks District** (1983), 53 B.C.L.R. 90 (C.A.) per Lambert, J.A. at para. 18; **Johnson v. British Columbia Hydro** (1981), 27 B.C.L.R. 50 (S.C.) per Murray, J. at pp. 57-58; and **Earle v. Martin** (1998), 172 Nfld. & P.E.I.R. 105 (Nfld. S.C.) per Easton, J. at paras. 14-16.

[32] The respondents rely on the 1902 decision of the Supreme Court of Canada in **Chaudière Machine and Foundry Company v. Canada Atlantic Railway Company** (1902), 33 S.C.R. 11 for the proposition that the trespass here was complete and actionable by 1939 (subject to discoverability) and that new actions do not arise daily thereafter. I do not agree that **Chaudière** supports that proposition. **Chaudière** did not involve trespass by failure to remove objects wrongly left on the plaintiff's lands, but with construction of an embarkment near, and raising the level of the street in front of, the plaintiff's property. The case was, therefore, not one of continuing trespass. Moreover, the Supreme Court of Canada distinguished **Chaudière** in **Roberts v. City of Portage LaPrairie,** [1971] S.C.R. 481 and specifically adopted the following statement from *Salmond on Torts*, (15th ed., 1969) at p. 791:

> ..... An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains

> present upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action. (emphasis added)

[33] I conclude, therefore, that I am bound to apply the long standing rule that an action in trespass relating to the presence of structures unlawfully on Mrs. Williams' land is not barred by s. 2(1)(e) of the **Limitation of Actions Act**. The cause of action arises each day the objects are not removed; the effect of the limitation period is to limit damages to six years preceding the commencement of the action.

[34] I conclude, therefore, that the learned trial judge erred in law when he held that the trespass claims relating to the presence of objects unlawfully on Mrs. Williams' property was barred by s. 2(1)(e) of the **Limitation of Actions Act**.

[35] I have assumed, as have counsel, that the applicable limitation period is six years under s. 2(1)(e) of the **Limitation of Actions Act**. I would note, however, that where, as here, a trespass consists of a permanent installation on another's land and the plaintiff is the owner, there is perhaps something to be said for the view that section 10 of the Statute, relating to actions to recover possession of land governs the case. I think it is clear, in any event, that the twenty year period set out in s. 10 is an absolute cut off for an action in continuing trespass where the trespasser's acts are such that they would constitute adverse possession. As Hallett, J.A. noted in **MacDonell v. M & M Developments**, (1998) 165 N.S.R. (2d) 115 at p. 123:

> The law is abundantly clear that if MacDonell's predecessors in title were the true owners of the lands in dispute, there was no obligation on them to assert a claim

> until someone adverse to them went into possession. It is only then that the clock starts to run pursuant to the provisions of the **Limitation of Actions Act** so as to bar an action for trespass unless the action is started within the time limits prescribed by s. 10 and 20 of the **Limitation of Actions Act**. There is no requirement on a true owner to assert a claim to lands from which he has not been dispossessed; at law he can leave the land vacant without being considered to be out of possession (see **Wood v. LeBlanc**, [1904] 34 S.C.R. 627).

[36] Of course, not all acts of trespass constitute acts of adverse possession and I reach no conclusion on this point in this case, the matter having been neither raised nor argued.

[37] It is significant, I think, that for the purposes of s. 10 of the **Limitation of Actions Act** (action to recover possession), the period runs from when the right to bring action "... first accrued ...", suggesting that if the same act constitutes an ongoing trespass, time for the purposes of s. 10 runs from the time the initial act was committed. This view is reinforced by s. 11(a) which states that the action for possession is deemed to have "first accrued" when the plaintiff was dispossessed. I also think the same principle applies to the time periods set out in s. 32 relating to easements. In other words, when the acts relied upon to establish the easement would in, its absence, be trespass, they are not actionable once the easement comes into existence.

3. Easement:

[38] CN and the Town ask us to find that an easement has been acquired for the drain over Mrs. Williams' land. This issue was addressed in the briefs filed with the trial judge, but it is not mentioned in his reasons. As a result, the relevant findings of fact were not made.

[39] The nub of this submission is that CN's use of the drain was open, obvious and notorious. As counsel for CN put it in his factum:

> ..... it is uncontested that CNR placed the concrete side drain on the Appellant's property in 1957. It is also uncontested that she was aware of this at the time and that she neither objected nor apparently gave express permission. CNR did not use any kind of force to put the culvert in place. The culvert has remained in place up to the present. As such, more than twenty years of continuous use, *nec vi, nec clam and nec precario* is proven by the evidence. The key ingredient of acquiescence on the part of the servient landowner, the Appellant, is unquestionably present.

[40] In my opinion, there is an unsurmountable difficulty with this argument. Neither the findings of fact at trial, nor the evidence before the trial judge sustain a finding of an easement in favour of CN.

[41] For an easement by prescription to be found, it must be shown that the owner of the dominant tenement has actually used the claimed easement so as to "... carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognized and if resistance to it is intended." : Spencer G. Maurice, *Gale on Easements* (14th, 1972). CN must establish that it has made use of the easement without force, secrecy or evasion, to use the traditional language, and that such use was not dependant on the consent of Mrs. Williams, the owner of the servient tenement: see A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (2d, 1985) at 943.

[42] As counsel for CN points out in his factum, it has never been established that

CN was responsible for the initial installation or for the up-keep of the drain. In short, CN's position throughout has been that the drain is not theirs and that any work done on it was done as a neighbourly gesture with not only Mrs. Williams' consent but at her urging. It follows, in my opinion, that CN established neither actual use of the drain nor that any use it may have made of the drain was other than with Mrs. Williams' express agreement.

[43] On the record before us, and absent the necessary findings by the trial judge, I cannot conclude the claim for an easement has been established.

4. Requested Adjournment:

[44] At the hearing of the appeal on November 25, 1999, counsel for CN, supported by counsel for the Town, asked that the appeal be adjourned and heard before a different panel of the Court because a few pages of inadmissible evidence had wrongly been included in the Appeal Book. The Appeal Book had been filed on July 22, 1999. This inadmissible evidence consists of seven pages of transcript addressing without prejudice communications and includes reference to an offer by CN of what could be described as a "nuisance value" settlement. Counsel for CN stated in his letter to the Court written on November 25th:

> ..... I have discussed this with senior counsel for CN. It is CN's view that justice cannot be done nor can it seen to be done in the circumstances. ... (emphasis added)

[45] The adjournment was denied. While it was both wrong and unfortunate that

this material was included in the record, there is no reasonable basis for concern that the Court's impartiality was thereby compromised. Trial judges, as finders of fact, must frequently hear evidence ultimately ruled to be inadmissible or which is admissible only for a limited purpose. This, generally, does not affect the judge's impartiality. This Court on appeal is not a trier of fact and there is, therefore, it seems to me, less reason for concern about any inability to resolve the legal issues uninfluenced by inadmissible evidence.

[46] As Cory, J. said on behalf of the majority of the Supreme Court of Canada in **R. v. S.(R.D.)**, [1997] 3 S.C.R. 484 at 531, an apprehension of bias must be reasonable in the circumstances of the case and be assessed from the point of view of an informed person, with knowledge of all the relevant circumstances including that impartiality is one of the duties that judges swear to uphold. He continued:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark, supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly. (emphasis added)

[47] In my opinion, a reasonable and informed person with knowledge of the relevant circumstances would have no basis for concern that the material wrongly included in the record could adversely affect the Court's impartiality.

V. Disposition:

[48] I would allow the appeal, set aside the order of MacLellan, J. and in its place make an order striking out the plaintiff's action in negligence and nuisance because they are barred by the settlement agreement but providing that the action founded on continuing trespass is not barred by s. 2(1)(e) of the **Limitation of Actions Act**. As success is divided, I would reduce the award of costs awarded against the appellant by MacLellan, J. at trial by one-half and award the appellant her costs of this appeal in the reduced amount of $500.00 plus disbursements.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.