Date: 19971216 Docket: C.A. 140741

NOVA SCOTIA COURT OF APPEAL
Cite as: Fickes v. Lamey, 1997 NSCA 192
Clarke, C.J.N.S.; Hart and Flinn, JJ.A.

BETWEEN:

JACKSON W. FICKES G.F. Philip Romney Appellant	)	for the Appellant
- and -	)	
	)	Colin D. Bryson for the Respondent
SAMUEL R. LAMEY, ALAN G. FERRIER and ALLEN C. FOWNES Respondents	)	Appeal Heard: December 5, 1997
	)	Judgment Delivered: December 16, 1997

THE COURT: Appeal allowed per reasons for judgment of Flinn, J.A.; Clarke, C.J.N.S. and Hart, J.A. concurring.

FLINN, J.A.:

In a proceeding, prior to this proceeding, the appellant was sued by his neighbours for trespass. The neighbours claimed that the appellant had interfered with their property rights in the construction of a helicopter landing area on their property. The appellant's defence was, essentially, that he had a right-of-way over the property. In a written decision, following trial, Justice Carver found for the neighbours, and awarded damages, including punitive damages, and an injunction against the appellant.

In the present proceeding, the appellant sued his lawyers, the respondents. With respect to the respondent Lamey, the appellant claims that Mr. Lamey gave him wrong advice concerning a right-of-way, which had been granted to the appellant as an appurtenance to his land, and which was the subject of the prior proceeding. The appellant claims that he relied on Mr. Lamey's advice to his detriment.

Mr. Lamey's counsel made application, before Justice Hall of the Supreme Court of Nova Scotia for an order to strike out those

portions of the appellant's statement of claim relating to his claim against Mr. Lamey for damages resulting from advice allegedly given by Mr. Lamey to the appellant concerning the appellant's right-of-way, prior to the entry of the appellant on to his neighbour's lands.

The basis of the application was the principle of *res judicata*. The submissions of counsel for Mr. Lamey, on this appeal, are the same as the submissions he made before the Chambers judge. Mr. Lamey's counsel submitted that it was fundamental to the appellant's claim against Mr. Lamey that the appellant relied upon Mr. Lamey's advice. Without reliance, there is no claim in law. He submitted that this issue, of reliance, had already been decided, against the appellant, by Justice Carver in the prior proceedings instituted by the appellant's neighbours.

Mr. Lamey's counsel referred to the following paragraph from the appellant's statement of claim in this proceeding:

> In early September of 1995, it was agreed that the defendant Lamey would be called as a witness at the trial and the defendants Ferrier and Fownes were retained to represent the plaintiff for the balance of the proceeding. The purpose of calling the defendant Lamey as a witness was to

> provide evidence that the plaintiff had acted in good faith and on the advice given to him by the defendant Lamey. (emphasis added)

He then referred to the following passage from Justice Carver's decision in the prior proceeding (in this quotation the reference to the plaintiff is to the appellant's neighbours. The reference to the defendant is to the appellant):

> In this case the plaintiffs claim exemplary damages because this is not the first time the defendant had crossed over upon the plaintiffs' lands and converted their land to his own use. Through a prior settlement in 1991 he paid dearly for his entry upon their land. Before he moved, in this case, he should have known to proceed with extreme caution. He may argue he was taking this land as a right-of-way but I find to the contrary. If he was serious about this being a right-of-way he would have joined it going some place. I do not accept his argument about the right-of-way. I find he used it as a guise and did what he pleased with the plaintiff's land, particularly cutting of trees, levelling a knoll and the placement of the electricity cable where he did.

From Justice Carver's words counsel concluded that it had been clearly decided, in the prior proceeding, that the appellant had not relied on the legal advice given to him by Mr. Lamey with respect to the right-of-way in question.

The Chambers judge agreed. He ordered that the appellant's claim against Mr. Lamey, for allegedly providing negligent advice to the appellant, concerning the appellant's right-of-way rights, prior to the appellant's trespass onto the lands of his neighbours, be struck.

The appellant appeals, claiming that the Chambers judge erred in his interpretation of the decision of Justice Carver. He submits that the issue, as to whether the appellant relied on the advice of his lawyer, was not decided, nor even addressed, by Justice Carver.

In **Angle v. M.N.R.**, [1975] 2 S.C.R. 248, Dickson, J. (as he then was) said the following concerning issue estoppel, at p. 254-255:

> Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935, defined the requirements of issue estoppel as:
>
> > . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies .....

> Is the question to be decided in these proceedings, namely the indebtedness of Mrs. Angle to Transworld Explorations Limited, the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of De Grey C.J. in the *Duchess of Kingston's case* (1776), 20 St. Tr. 355, 538n, quoted by Lord Selborne L.J. in *R. v .Hutchings* (1881), 6 Q.B.D. 300, at p. 304, and by Lord Radcliffe in *Society of Medical Officers of Health v. Hope*, [1960] A.C. 551. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: *per* Lord Shaw in *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155. The authors of Spencer Bower and Turner, *Doctrine of Res Judicata*, 2nd ed. Pp. 181, 182, quoted by Megarry J. in *Spens v. I.R.C.*, at p. 301, set forth in these words the nature of the enquiry which must be made:
>
> > ... whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do.

I agree with the submissions of the appellant's counsel that the Chambers judge misinterpreted the decision of Justice Carver in the prior proceeding. The issue of reliance was not decided by Justice Carver in the prior proceeding, so as to foreclose the appellant from raising it in this proceeding. I have come to that conclusion for three reasons:

(1) In his decision in the prior proceeding, after reviewing the factual background, Justice Carver set out the

issues before him as follows:

> The issues are
>
> (1) Whether the defendant had a right to a right-of-way in the position where he proposed it and as laid out by Mr. Berringer.
>
> (2) If not, whether Mr. Fickes had permission from the plaintiffs to cut the trees, level the area and bury the pole line.
>
> (3) If not, did Mr. Fickes' entry upon the land constitute trespass?
>
> (4) If there is no right-of-way laid out on the ground from the private road to Lots 2 and 3, who shall determine that and when?
>
> (5) If there was trespass, what are the damages if any?
>
> (a) special;
> (b) general;
> (c) exemplary or punitive.
>
> (6) Whether injunctive relief should be ordered.

Justice Carver does not mention legal advice, or the reliance, (or otherwise) on that legal advice, as an issue which was before him.

(2) The findings by Justice Carver, as to the manner in which the appellant dealt with his neighbours, so as to give rise to an assessment of punitive damages, is not a finding that the appellant placed no reliance on the advice which his lawyer gave to him.

(3) It was not necessary for Justice Carver to make a finding - that the appellant placed no reliance on his lawyer's advice - for him to conclude that the appellant was liable to his neighbours for punitive damages. In other words, to paraphrase the words quoted by Dickson, J. in **Angle**, a finding (that the appellant placed no reliance on his lawyer's advice) was not "so fundamental" to Justice Carver's decision (awarding punitive damages against the appellant) that the decision cannot stand without such a finding.

I would allow this appeal, and I would set aside the decision and Order of the Chambers judge. Further, I would order the

respondent Lamey to pay to the appellant his costs, both here and in the Court below, which I would fix at $1,500.00 plus disbursements.

Flinn J.A.

Concurred in:

Clarke, C.J.N.S.

Hart, J.A.

C.A. No. 140741

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JACKSON W. FICKES

Appellant

- and -

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Respondents

REASONS FOR JUDGMENT BY:

FLINN, J.A.