1998 **S.H. No. 146826**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

J. LUKE CLEARY

Plaintiff

- and -

MINISTER OF JUSTICE FOR THE PROVINCE OF NOVA SCOTIA AND BASIL R. HANRAHAN AND BETTY L. HANRAHAN

Respondents

DECISION

BEFORE: The Honourable Justice David W. Gruchy, in Chambers, at Halifax, Nova Scotia

DATE HEARD: June 17, 1999

DECISION DATE: June 17, 1999

WRITTEN RELEASE OF DECISION: July 2, 1999

COUNSEL: Sheree L. Conlon, for the Plaintiff
William Jordan, Q.C., for the Respondents

GRUCHY, J.(ORALLY):

This is an application for an injunction concerning a matter which has arisen as a result of a property dispute between two neighbours. The plaintiffs have actually commenced an action for the Quieting of Titles bringing clearly into question the ownership of a certain small strip of land between the two neighbours. The property is actually located at Eastern Passage and the law suit concerning the quieting of that title is ongoing.

Amongst other things applied for today, is an interim injunction to enjoin the respondents from using the claimed land until such time as these issues are determined at trial. These issues essentially being the ownership of the property. The application concerned other matters, but because of the length of time envisaged in this application, it was not possible to proceed with the matter in regular chambers, but rather to put the matter for determination in special times chambers. Indeed as it is, it is clear that that decision is correct; this matter will take time.

The issue which I must address is whether, in the circumstances as outlined to me, would it be equitable to grant an interlocutory injunction to prevent the respondents from intruding on the land in question. The authority that I have arises from the **Judicature Act**, s.43.9 and I need not repeat the provisions for the purposes of this oral decision. I also have authority to act pursuant to **Civil Procedure Rule** 43.01(4) which gives me the right to grant an interlocutory injunction on such terms as I deem to be just.

It is undoubtedly a discretionary remedy and one which must be exercised with considerable care, or it is not only discretionary, it is in fact an extraordinarily remedy because a sanction may be applied without the benefit of a full trial.

In a situation such as this, however, it is sometimes necessary to attempt to maintain a status quo which is fair to both sides, and I refer to the case of **Feigelman et al. v. Aetna Financial Services Ltd.** (1985), 26 N.S.R. (2d) 241.

The law is clear that on an application for an interim injunction there are three tests which I must apply. First, is whether the applicant has shown on the merits of the case a strong *prima facie* case or at least a serious question to be tried. Secondly, that the applicant will suffer irreparable harm if the injunction is not granted, and thirdly that the balance of convenience lies in the favour of granting the injunction.

I need not quote for the purposes of this decision the opinion of Matthews, J.A. in **Gateway Realty Ltd. v. Arton Holdings Ltd.**; it is an oft quoted portion of the law in Nova Scotia and virtually every application for interim injunction must refer to that decision.

Similarly, the decision of Davison J. in **J.W. Bird and Co. Ltd. v. Leveque et al.** shows clearly the type of consideration which I must give.

Amongst other things I must consider whether there is a serious question to be tried,

and I must also be relatively certain that the claims by the plaintiff are not frivolous or vexatious.

I have reviewed the material on file herein with respect to the claim itself, and indeed it is clear, in my view, that there is a serious question to be addressed in the matter and which ordinarily ought to be addressed by means of a trial. It will be necessary, in my view, for a trial judge to make findings of fact and findings of credibility and hence a trial is essential. But in the meantime it is clear from a reading of the documents on file that there are serious issues between the parties which must be addressed. That, therefore, is my finding with respect to the first criterion to be addressed in the granting of an interim injunction.

The second question, that is whether the applicant will suffer irreparable harm if the injunction is not granted, may be of difficulty because on the face of it all that is at issue is the ownership of a small piece of land and ordinarily the matter could very well wait until the trial as long as the parties themselves seek to maintain some sort of a status quo, because by maintaining the status quo in this matter no irreparable harm will be incurred.

In this case, however, the respondents in recent days have entered upon the land in question and have taken upon themselves to construct a small shed. Even that would not be of particular note, except for the location. The location of this particular shed is virtually in front of the windows of the plaintiff's home, and in my view, if the plaintiffs are

correct in their claim, this shed would constitute an ongoing nuisance. It is irreparable in the sense that as long as that shed is there, and assuming the plaintiff had the right of ownership, then time lost in the enjoyment of their property is time which can never be retrieved.

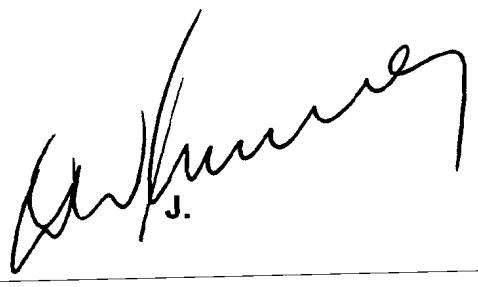
I am satisfied that this claim is not frivolous or vexatious and I am satisfied that in fact the defendants have taken what amounts to nothing more than a provocative action, going onto the property when they knew perfectly well that the ownership of the property was in question and which was before the court. They have constructed a barn, in effect saying that they have no regard for what the court may or may not find; they are simply going to exercise their ownership.

Accordingly, I find that the second criterion, that is the irreparable harm to the applicant, has been established to my satisfaction.

Finally, the matter of balance of convenience. In my view, the balance of convenience clearly is in the favour of the applicant and ought to have been considered all along by the parties. The balance of convenience ought to have been that both parties would stop provocative actions, whether by the posting of signs or whether by the construction of buildings or whether by the pulling out of shrubbery. Those are all provocative actions that ought to have been avoided.

Clearly the balance of convenience in this case was to have left the property alone, or as much as possible, until the court has an opportunity to adjudicate matters appropriately.

I am satisfied that an interim injunction ought to be issued and I am prepared to order that the shed be moved from the property off the disputed area, and that neither party, neither the plaintiff nor the defendant, shall have access to it except that the plaintiff shall have access only in exercising access to their own home and the plaintiff shall also have access for the purpose of mowing the lawn. No other access to the property will be permitted to either party.



J.