

1981

SBW No. 0556
SCA No. 0086
SCA No. 00980
SCA No. 01164

**IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION**

BETWEEN:

HELEN BELL FEENER

Plaintiff

- and -

**HER MAJESTY THE QUEEN and THE MUNICIPALITY
OF THE DISTRICT OF LUNENBURG**

Defendants

HEARD: at Halifax, Nova Scotia, before the Honourable
Mr. Justice John M. Davison, in Chambers, on
April 5th, 1988

DECISION: April 19th, 1988

COUNSEL: Caster H. F. Williams, Esq., for the Plaintiff
G. F. Philip Romney, Esq., for the Defendants

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TRIAL DIVISION**

BETWEEN:

HELEN BELL FEENER

Plaintiff

- and -

**HER MAJESTY THE QUEEN and THE MUNICIPALITY
OF THE DISTRICT OF LUNENBURG**

Defendants

DAVISON, J.:

This is an application by the Municipality of the District of Lunenburg to strike out the Plaintiff's Notice of Trial dated the 26th day of January, 1988, or alternatively, to direct the Plaintiff to pay security for costs of the trial.

The Plaintiff is the wife of John Lloyd Feener. There has been a proliferation of litigation through the Nova Scotia Courts arising from a sale by the sheriff of Lunenburg County on November 16th, 1978, of lands formerly owned by John Lloyd Feener. The sale was pursuant to an Execution Order in favor of one D & E Industries Limited.

By an Originating Notice issued the 11th day of September, 1979, John Lloyd Feener commenced action against

the Municipality of Lunenburg (SBW 24687) alleging that the Municipality took part in a conspiracy to destroy the Plaintiff by illegally buying the Plaintiff's land. The Statement of Claim sets out other allegations but by Order of the late Judge Clements dated the 30th day of October, 1979, the Statement of Claim was struck as being false, scandalous, frivolous and vexatious and an abuse of process. Feener appealed this Order and the appeal was dismissed by Order dated the 21st day of January, 1980.

On the 21st of January, 1981, the Municipality commenced a proceeding against Feener and his wife, Helen Feener, requesting an Order putting the Municipality in possession of the property. An Order of Judge Clements granting this relief and ordering the Feeners to remove themselves from the property is dated the 2nd day of June, 1981.

The action of which this proceeding forms a part was commenced by Helen Feener on March 2nd, 1981, against Her Majesty the Queen and the Municipality of Lunenburg. The Plaintiff claimed that Her Majesty illegally entered her home and destroyed personal property and alleged that her dower interest could not have been disposed of at the time of the sheriff's sale. She sought "justice" and the sum of five million dollars damages. I was advised by counsel at the hearing and the record indicates that the Plaintiff retained the services

of a solicitor in Halifax, Gary Manthorne, and that in August of 1981, an amended Statement of Claim was filed on behalf of the Plaintiff which alleged that the Plaintiff had been deprived of the use and enjoyment of her land, that the Defendant had damaged items of property owned by the Plaintiff and that the Plaintiff was unjustly enriched. The Municipality applied before Judge Clements for an Order striking the Statement of Claim pursuant to Civil Procedure Rule 14.25. The learned judge dismissed this application by judgment dated September 10, 1981. Judge Clements referred to Civil Procedure Rule 14.25(2) and ignored the affidavit evidence filed on behalf of the application and found that upon reviewing the pleading alone there appeared to be a reasonable cause of action.

In January of 1983, John Feener, acting as counsel for his wife, gave notice of his intention to amend the Statement of Claim in the proceeding SBW 0556 apparently with a view to ascertaining the interest of the Plaintiff in the property having regard to the Matrimonial Property Act which had become law since the date of the sheriff's sale.

On March 10th, 1983, Feener, representing his wife, and a solicitor for the Municipality appeared before Judge Clements. A transcript of what took place is attached to the Affidavit of Mr. Romney. Apparently, an application was made for security for costs, an application by the Plaintiff to

amend the Statement of Claim in accordance with the notice to which I have made reference and an application to strike the Statement of Claim as being frivolous and vexatious. This matter was apparently put over until May of 1983, but Mr. Romney, in his submissions to me, made reference to Judge Clements' comments on March 10th, 1983, and in particular the following:

Now you're getting into argument, this goes to this whole question of whether or not you are entitled to amend your Statement of Claim and whether or not it should be struck out as having been indicated on, or whether it should be struck out as being frivolous and vexatious. So that's the issue that's addressed to me in the notice given by Miss Scott and that's the issue too that will be dealt with by the Municipality.

Mr. Romney referred to that comment in an attempt to rebut the suggestion by Mr. Williams, on behalf of this Plaintiff, that the subsequent application to strike the Statement of Claim was an application on behalf of Her Majesty the Queen only.

In his decision, Judge Clements made reference to the multiplicity of actions before Mr. Justice Burchell and Mr. Justice Richard and finally the appeals to the Appeal Division. He concluded that the whole basis of all these actions dealt with the alleged illegality of the sheriff's sale. The learned judge concludes by saying:

And as I say, that really having been the whole basis of all these actions I have no choice but to decline to allow the amendment to be made and I am further going to grant the request of the Crown that the original action be struck out and disallowed. The Defendants in this case will have their costs to be taxed.

After rendering the decision, the transcript, which is exhibit "L" to Mr. Romney's Affidavit, set out further exchange between the court and Mr. Feener and it is clear to me as I read the comments of the late judge that he intended to strike all of the allegations in the Statement of Claim including those which were the subject of amendment by Mr. Manthorne. It was Judge Clements' position that any claims that were to be advanced by the wife should have been advanced with the earlier actions and he specifically made reference to the four or five actions already commenced on behalf of the Feener family. He stated that:

...it's against public policy for a lot of these matters to be litigated and re-litigated, an this is a prime example.

Following the hearing before Judge Clements, there is the Order granted on May 18th, 1983, which is the hub of the controversy with respect to the proceeding before me. Accordingly, I will set forth the complete text of the Order:

UPON IT APPEARING that the Plaintiff has made an Application to amend the Statement of Claim;

AND UPON IT APPEARING that the Defendant Her Majesty the Queen has made an Application to strike out the Plaintiff's Statement of Claim;

AND UPON THESE APPLICATIONS being heard before the Honourable Mr. Justice Lester L. Clements at the Court House in Lunenburg, on the 10th day of May, A.D., 1983;

AND UPON John Lloyd Feener having been heard on behalf of the Plaintiff;

AND UPON HEARING Gregory Evans on behalf of the Defendant, Her Majesty the Queen;

AND UPON HEARING G. F. Philip Romney, on behalf of the Defendant, the Municipality of the District of Lunenburg;

IT IS ORDERED that the Plaintiff's Application to amend the Statement of Claim be dismissed;

IT IS FURTHER ORDERED that the Plaintiff's Statement of Claim be struck pursuant to Civil Procedure Rule 14.25 and IT IS FURTHER ORDERED that both Defendants shall have their costs to be taxed against the Plaintiff.

The Plaintiff appealed this Order and by Notice of Appeal dated the 15th day of June, 1983, the following grounds are set forth:

- (1) That the Plaintiff had a right to Amend the Statement of Claim
- (2) That the Court file did not show an Application filed by Her Majesty the Queen, To strike out the Plaintiff's Statement of Claim, And that such an Application, Would not apply to the Defendant the Municipality for the District of Lunenburg.
- (3) That the Honourable Mr. Justice L. L. Clements, had allready dealt

with an Application filed by the Defendant the Municipality for the District of Lunenburg, dated September 1st, A.D. 1981, To strike out the Plaintiff's Statement of Claim, pursuant to Civil Procedure Rule 14.25, And in Mr. Justice L. L. Clements Decision dated September, 10th, A.D. 1981, Mr. Justice L. L. Clements dismissed the Application, And rewarded the Plaintiff Her Costs, Which shall be costs in the cause.

(4) That Civil Procedure Rule 14.25, was not in argument before Justice L. L. Clements, in Chambers on May 10th, A.D. 1983, And that the Court didnot hear Gregory Evens on behalf of the Defendant Her Majesty The Queen, as the Order states.

(5) That the Order of the Honourable Mr. Justice L. L. Clements, dated May 18th, A.D. 1983, is in Error, And a miscarriage of Justice.

AND TAKE NOTICE, that the Appellant requests that the Order Appealed from be (Rescinded) as follows, That the Appellant be allowed to Amend the Statement Of Claim, And that the Matter be set down for Trial.

It is to be noted that grounds 2 and 3 are included in the submissions made by Mr. Williams to me on behalf of the Plaintiff.

The judgment of the Appeal Court is dated December 8th, 1983. Chief Justice MacKeigan began his judgment as follows:

This is, I hope, the last of a long series of hopeless and inevitably unsuccessful legal proceedings launched by John L. Feener and/or by his wife, Helen, in the County Court, the Supreme

Court and the Federal Court of Canada against the Crown, the Attorney General of Nova Scotia, the municipality of the District of Lunenburg and other defendants, including the sheriff of Lunenburg County.

His Lordship referred to other actions including the decision of Mr. Justice Burchell dated April 22nd, 1980, holding that there was no impropriety or illegality with respect to the sale and the decision of Mr. Justice Richard which dismissed an action by Mr. and Mrs. Feener alleging conspiracy to defraud by the sheriff and others. The judgment of Mr. Justice Richard was appealed and the Appeal Division confirmed Richard, J.'s decision that the action was clearly frivolous or vexatious and an abuse of the process of the Court. Chief Justice MacKeigan, as he then was, had the following to say with respect to the application to strike the Statement of Claim.

He granted the Crown's motion to strike out the statement of claim. He correctly considered that this was just another attempt to question the legality of the sheriff's sale and was thus vexatious, frivolous and an abuse of process.

From the date of that decision, nothing transpired until Mr. Williams, on behalf of the Plaintiff, filed Notice of Trial in January of 1988. This prompted the application before me.

It is the position of the Plaintiff, as I understand

it, that because Judge Clements, in his decision of September 10th, 1981, had denied the application by the Municipality to strike the Statement of Claim on the grounds it was false and frivolous, that the only matters before the learned judge in May of 1983 was the application by the Defendants for security for costs and the application by the Crown to strike out the Statement of Claim as it relates to the Crown only.

If one gives a literal interpretation to the Order of May 18th, 1983, the reference to the "Plaintiff's Statement of Claim" in the last paragraph must refer to the claims advanced against both Defendants. If it was only intended to strike the Statement of Claim as it related to Her Majesty, one would expect that this could have been specified in the Order.

The Order provided that both Defendants would recover costs. The solicitor for the Applicant says that this was because the Plaintiff failed in her application to amend her Statement of Claim. On the other hand, is it not significant that the provision with respect to costs was contained in the same sentence that dealt with the striking of the Statement of Claim?

The Order should have provided for a dismissal of the action against both Defendants. If there is any doubt about the meaning of the Order, the ambiguity should be resolved

in favor of the Plaintiff because the consequence to the Plaintiff is more serious than it is to the Municipality. Her action would be effectively concluded.

Attached to Mr. Romney's Affidavit as exhibit "L" is a transcript of the hearing before Judge Clements on May 10th, 1983, from which insight can be obtained as to the reason for the Order of May 18th, 1983. The learned judge was of the opinion that the action by Mrs. Feener had as a base the wrongful behaviour of Sheriff Surette in the conduct of the sale and that matter had been settled by the decision of Mr. Justice Burchell or the decision of Mr. Justice Richard and finally the decision of the Appeal Division (which came down after the judge's decision on the first motion to strike).

The learned judge rejected the submissions of the Plaintiff to the effect that Mrs. Feener's action was not based on the invalidity of the sale. The learned judge goes on to say that the Plaintiff, Helen Feener, should have raised the matter of the dower interest at the time of the initial action on the ground that the litigant must bring forward his entire action at the same time. It should be noted that the judge made reference to the fact that the Municipality of Lunenburg, together with the Crown and Helen Feener, "were privy to this whole thing throughout". He goes on to state:

The plea of res judicata applied except
in special cases not only to points

upon which the courts was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. This doctrine is founded upon public policy as being in the interests of the public there be an end to litigation and to prevent the hardship of the individual twice being vexed for the same cause. ... Whether the Plaintiffs frame their action under the heading of conspiracy, negligence, loss of dower, unjust enrichment or whatever, the simple fact remains that the Plaintiff claims in all these actions, and all other actions commenced by one or the other or both the Plaintiffs, is founded on the alleged illegal act of wrongful deprivation of their property at Whynott Settlement, underlying both actions undoubtedly is the judicial sale ...

Judge Clements concludes his remarks with these comments:

... I am further going to grant the request of the Crown that the original action be struck out and disallowed. The Defendants in this case will have their costs to be taxed. (emphasis added)

It should be noted that the judge didn't make reference to the "Statement of Claim" being struck but that the "action" be struck. There is only one action which is against two defendants and as I read the remarks of the learned judge, it is clear to me that he intended the Statement of Claim to be struck against both defendants. Whether he was influenced by the intervening decision of the Appeal Division or whether

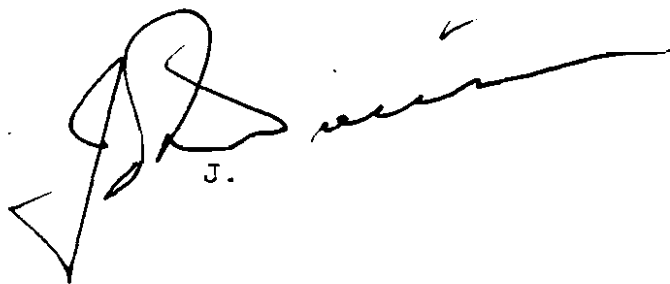
I agree with the reasons advanced by the trial judge for striking the action is immaterial. This is not an appeal from the trial judge's decision. That appeal was heard by the Appeal Division and was the subject of the decision dated December 8th, 1983. The sole purpose of referring to the learned judge's reasons is an attempt to resolve any ambiguity which may exist as a result of the wording of the Order of May 18th, 1983.

In any event, even if I had any lingering doubt about the meaning of the Order or the effect of the Order having regard to the previous decision of September, 1981, the issue before me has been decided by the decision of the Appeal Division dated December 8th, 1983.

The Notice of Appeal from the Order of May 18th, 1983, set out the grounds for appeal which are quoted earlier in this judgment. Included in the grounds are the very issues raised before me, i.e. that this application to strike was filed by Her Majesty and would not apply to the Municipality and that Judge Clements had already dealt with the application by the Municipality in September, 1981. The Appeal Division dismissed the appeal and in doing so agreed with Judge Clements that the action was another attempt to question the legality of the sheriff's sale and was vexatious and an abuse of process.

The issues before me were settled by the Appeal Division in December, 1983. The application is dismissed. As the proceeding stands with the Statement of Claim struck, the Order should provide that the action do stand dismissed out of this Honourable Court.

The Defendant Municipality shall recover its costs of this application for the Plaintiff.

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a long, sweeping horizontal line. The letter 'J.' is printed in small black font directly beneath the initial 'J'.

Halifax, Nova Scotia
April 19, 1988