NOVA SCOTIA COURT OF APPEAL
Citation: *Purdy v. Bishop*, 2017 NSCA 84

Date: 20171128
Docket: CA 453201
Registry: Halifax

Between:

Bruce and Frances Purdy

Appellants

v.

Evelyn Bishop, Carole Black, Johanne Buchanan, Glenn Dodge, Richard Duchesne, Barbara Hines, Scott MacDonald, Careen McNeil, Ken Murray, Jennifer Quesnel, Lynn Ryan, Fernand Tardif

Respondents

Judges:	Beveridge, Farrar and Bryson, JJ.A.
Appeal Heard:	June 5, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson, J.A.; Beveridge and Farrar, JJ.A. concurring
Counsel:	Douglas Tupper, Q.C. and Melissa Pike (articled clerk) for the appellants Leo Ryan and Fernand Tardif, lay representatives for the respondents

Reasons for judgment:

Introduction

[1] Bruce and Frances Purdy appeal a decision of the Honourable Justice A. David MacAdam that the respondent cottage owners have a right-of-way over the Purdy property to the shore of the Northumberland Strait, (2015 NSSC 364).

[2] All the parties own cottage lots on what is known as the Amherst shore, adjacent to public highway 366. Originally part of a farm owned by Percy Brownell, the lots were deeded to cottage owners over many years. With the exception of the Carole Black lot, each cottage owner's deed also granted a right-of-way to the shore. (There appears to be a right-of-way to the shore in Ms. Black's chain of title.) But the cottage owners did not bring suit based on the rights-of-way granted to them in their deeds. Rather, they relied upon a reservation in the 1996 deed from Mr. Brownell to the Purdys. Alternatively, they claimed the right-of-way had been dedicated as a public road or they enjoyed that right by prescription or implied grant. The judge dismissed these alternative claims.

[3] The Purdys now appeal, arguing that the judge erred in three ways:

1. The right-of-way reservation in the Purdy deed granted nothing to the cottage owners.
2. He ignored the established interpretative rule that a reservation in a grant should be construed in favour of the person from whose title it detracts.
3. He incorrectly relied upon pre-contractual discussions between the Brownells and the Purdys to alter the plain meaning of the reservation in the Purdy deed.

The three grounds will be considered together when the reservation in the Purdy deed is addressed.

[4] During post-hearing argument before the judge, the cottage owners attempted to rely upon the grants in their own deeds to establish a right-of-way to the water across the Purdys' land. Counsel for the Purdys objected. The case had been put forward by the cottagers on the grounds previously described. The evidence had closed and the case had not been presented in light of this new legal argument. The Purdys had no opportunity to meet that case.

[5] For reasons that follow, the appeal must succeed and the judge's order granting the cottage owners a right-of-way based on the Purdy deed set aside. However, nothing in this decision should be construed as a comment on the rights-of-way the cottagers may have arising from their own deeds.

Background

[6] All parties own cottages on what was formerly land farmed by Percy Brownell and later his son, Neil and Neil's wife, Dora. Approximately sixty cottages are located on the former Brownell farmlands. Most are not adjacent to the water. The respondents own eight cottage lots between them.

[7] The Purdys bought property in 1996 abutting the Northumberland Strait. In 2008-09, they constructed a cottage on their property, adjacent to the water. The right-of-way claimed by the cottagers runs parallel to the Northumberland Strait, over the Purdys' property to a beach on the shore. The cottagers say this gives them access to the beach because the Purdy property slopes gradually to the shore, unlike many of the lots along the shoreline whose water access is impeded by a steep rocky cliff ten to fifteen feet high. The Brownells themselves traditionally travelled to the beach along what is known as a "tractor cut". The judge found that the cottagers also used this cut to go to the beach.

[8] When the Brownells sold to the Purdys in 1996, they provided for a right-of-way in the deed:

> SAVING AND EXCEPTING THEREFROM a right-of-way from the southern margin of the first mentioned right-of-way to the northern margin of lands of Lloyd Trerice. The said right-of-way being 16' wide running north and south roughly parallel to the shore of the Northumberland Strait as is presently being used by the cottage owners.

[9] The judge received evidence from the parties to provide context and give meaning to the intended right described by the language in the deed. This led him to make credibility findings owing to the differences between Mr. Brownell and the Purdys about what they discussed before the Purdys bought their lot. The judge also had to assess the credibility of a Purdy witness, Mr. Lennox, who was their neighbour and had settled a dispute with the Purdys regarding a mutual boundary and right-of-way.

[10] At first, the Purdys maintained that they did not discuss the right-of-way with the Brownells before purchasing their property. Later, they said that they did

discuss it, but it meant that only Mr. Brownell could use the right-of-way. It is unnecessary to go into the evidence in detail, other than to remark that the judge clearly formed a very poor impression of the evidence of the Purdys and Mr. Lennox. He accepted Mr. Brownell's evidence. He found that the reservation of the right-of-way in the deed was "in favour of Mr. Brownell and the other cottagers":

> [44] . . . the Purdys were not *bona fide* purchasers without notice of the reservation of a right-of-way in favour of Mr. Brownell ***and the other cottagers***. Although Mr. Brownell appears to have believed that he reserved title to the tractor cut, I am satisfied that whatever his intention, he in fact reserved a right-of-way, not title to the tractor cut. Saving and excepting a right-of-way is not saving and excepting title.
>
> [Emphasis added]

The bold, italicized words are problematic. The judge recognized that Mr. Brownell's subjective intention could not transform the reservation in the deed from one legal right into an entirely different one. The right-of-way reserved was not a fee simple interest in title. But that logic also applies to whether the reservation of a right-of-way in favour of Mr. Brownell extended to the cottagers as well.

[11] It is important to emphasize here that the question is not whether the cottagers enjoy a right-of-way over the Purdys' property, but whether that right-of-way is granted by the words of reservation in the Purdy deed. As previously noted, we are confined to this very limited legal question because the cottagers did not advance their case based on the rights described in their deeds received from the Brownells, but rather on the Purdy deed.

[12] According to the judge's interpretation of the reservation in the Purdy deed, the cottagers had a right-of-way over the Purdy property to access the beach:

> [90] The applicants are entitled to use the tractor cut across the Purdys' land in order to access the roads running north on the hill side of the old Brownell farm to highway no. 366 and to access the beach to the extent that this access is on the Purdys' property. . . .

[13] Was the judge right in his interpretation of the reservation in the Purdy deed? Assuming he was entitled to consider the parties' evidence, did he make a palpable and overriding error in doing so?

Did the reservation of a right-of-way in the Purdy deed extend to the cottagers?

[14] The judge interpreted the "saving and excepting" clause in favour of the cottagers in this way:

> [88] I am satisfied that the court should consider the surrounding circumstances in order to determine the extent of the right-of-way. This is not a matter of ambiguity but simply of determining what the words meant on their face in the circumstances. Having regard to the circumstances, including the Purdys' knowledge that Mr. Brownell was reserving a right-of-way for all cottagers in their 1996 deed, I conclude that there is a right by the applicants [the cottagers] to a sixteen-foot access over the Purdy lands to the southern boundary of the Lennox lands . . .

[15] The law requires that a contract be "read . . . as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract", (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 47). Surrounding circumstances assist the Court in interpreting the language used by the parties, but does not displace it, (*Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, ¶ 57).

[16] The Court must interpret the intention of the parties objectively by the words they used in the deed, not by subjective wishes, motivations or recollections, (*Knock v. Fouillard*, 2007 NSCA 27, ¶ 27; *Stonehouse v. Bailey*, 2014 NSCA 50).

[17] The cases distinguish between an exception in a deed and a reservation. Typically, a reservation is a creation of a right in the conveyance which previously did not exist. An exception operates to take something out of what is being granted, which would otherwise pass to the grantee in the deed, (e.g. *Gibbs v. Grand Bend (Village)*(1995), 86 O.A.C. 321 (Ont. C.A.)).

[18] The reservation in the Purdy deed warrants repetition:

> SAVING AND EXCEPTING THEREFROM a right-of-way from the southern margin of the first mentioned right-of-way to the northern margin of lands of Lloyd Trerice. The said right-of-way being 16' wide running north and south roughly parallel to the shore of the Northumberland Strait as is presently being used by the cottage owners.

[19] The legal character of a "saving and excepting" clause such as this is a notional grant of a right-of-way from the grantee—in this case, the Purdys—to the grantor, Mr. Brownell. It is not a reservation of an existing right-of-way because Mr. Brownell did not need one; he owned the fee simple interest in the property under conveyance. He did not need a right-of-way to cross his own property, (Anger & Honsberger, *Law of Real Property*, 3rd ed (loose-leaf), ¶ 17.20.20(c) and MacIntosh, *Nova Scotia Real Property Manual*, Butterworths, ¶ 13.4D).

[20] The words "as is presently being used by the cottage owners" appear in the sentence describing the location of the right-of-way. It modifies the grant being reserved by fixing its location according to current use. It does not describe the right by which the cottage owners themselves exercise that use. Even if the language in the reservation could be considered ambiguous, neither the law nor the facts sustain the judge's conclusion that the reservation grants rights-of-way to the cottagers.

[21] The reservation in this case was contained in a deed from the Brownells to the Purdys. The reservation is an exception from that deed. It will be interpreted against Mr. Brownell because it detracts from ownership of the lot being conveyed. The law presumes detractions minimally impair the interest being conveyed, (MacIntosh, ¶ 5.8D, *Boudreau v. Boudreau* (2000), 184 N.S.R. (2d) 172 ¶ 32, aff'd 190 N.S.R. (2d) 300 (C.A.)).

[22] The evidence accords with application of the foregoing principles. The judge relied upon Mr. Brownell's evidence to find that the Purdys had knowledge of the cottagers' use of the right-of-way. Mr. Brownell testified that:

> [42] . . . When I was negotiating with the Purdys regarding the purchase of this lot, I made it absolutely clear to them that their lot would not include Brownell Lane (which I retained) and ***that all cottagers would continue to have the right*** to use Brownell Lane. I believe that my deed to the Purdys clearly delineates this arrangement.
>
> [Emphasis added]

[23] In fact, the judge found that Mr. Brownell did not retain title to Brownell Lane, but reserved a right-of-way over it. But he went further and found that the saving and excepting clause *created* a right-of-way in favour of the cottagers:

> [43] . . . I am satisfied that Mr. Brownell made it clear to them what the saving and excepting clause in their deed referred to. By accepting the deed and completing the purchase, the Purdys also accepted the burden placed on their

> property. Mr. Brownell thereby reserved a right-of-way over the Purdys' property.
>
> [44] The applicants have noted a number of inconsistencies and contradictions in the evidence of Mr. and Mrs. Purdy. I agree with many of these. ***However, it is their denial of Mr. Brownell's evidence that he made it clear to the Purdys that he was reserving a right-of-way for use by all the cottage owners that I find most incredible.*** I accept Mr. Brownell's evidence that he informed the Purdys of this. As stated by the applicants, the Purdys were not *bona fide* purchasers without notice of the reservation of a right-of-way in favour of Mr. Brownell and the other cottagers. Although Mr. Brownell appears to have believed that he reserved title to the tractor cut, I am satisfied that whatever his intention, he in fact reserved a right-of-way, not title to the tractor cut. Saving and excepting a right-of-way is not saving and excepting title.
>
> [Emphasis added]

[24] This was not Mr. Brownell's evidence. He did not say that the reservation in the deed gave any rights to the cottagers. He thought they already had such rights. They were not new. The judge concluded:

> [88] I am satisfied that the court should consider the surrounding circumstances in order to determine the extent of the right-of-way. This is not a matter of ambiguity but simply of determining what the words meant on their face in the circumstances. Having regard to the circumstances, including the Purdys' knowledge that Mr. Brownell was reserving a right-of-way for all cottagers in their 1996 deed, I conclude that there is a right by the applicants to a sixteen-foot access over the Purdy lands to the southern boundary of the Lennox lands, and to the extent access to the beach by the slipway is over the Purdys' lands, access to the beach by this route.

[25] Respectfully, this conclusion is unsupported by legal principle or evidentiary foundation. If the cottagers enjoy any rights-of-way, they do not arise from the Purdy deed.

[26] The reservation clause in the Purdy deed may describe a right that is already enjoyed by the cottage owners – but it does not create that right. The cottagers' deeds may do so. Unfortunately, as the judge observed, the cottage owners did not place that issue before him until it was too late:

> [34] . . . (I note that during submissions counsel for the respondents submitted that the applicants' argument that their individual deeds provided a right-of-way was only raised after the evidence, and was raised too late in the application to be considered. I am not satisfied that the deeds provide such rights, so to some

> extent, it is unnecessary to deal with this objection. However, in the alternative, I would have acceded to counsel's request had it been necessary.)

[27] Typical is a deed to the respondent, Barbara Hines, which says:

> Together with a right-of-way to and from the main road and to and from the beach over the right-of-ways [sic] mentioned herein.

[28] The generic character of this right-of-way does not render it legally ineffective. But there was no evidence about the nature and extent of these rights-of-way, and, in particular, where they were located.

[29] The judge correctly noted that the cottagers had not relied upon their own deeds to establish their claims until the evidence had concluded. The Purdys had been prejudiced because they had not responded to the case on the basis of rights-of-way in the cottagers' deeds. No evidence had been led regarding the cryptic language in those rights-of-way. Respectfully, the judge was wrong to have commented on those rights, except to decline to consider them.

[30] The Court cannot order an outcome based on claims not pleaded, evidence not led and rights not argued until too late. The appeal is allowed, and the judge's order granting the respondents a right-of-way is set aside.

[31] Hearing costs before the judge of $15,000 shall be repaid to the Purdys. The Purdys shall have their costs of the appeal in the amount of $2,500.

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.