SUPREME COURT OF NOVA SCOTIA
Citation: Bailey v. Stonehouse, 2012 NSSC 448

Date: 20121224
Docket: Tru. No. 348608
Registry: Truro

Between:

Julie Angela Bailey

Applicant

William Daniel Murphy Stonehouse and Marie Danella MacQuarrie

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	March, 21, 2012 in Halifax, Nova Scotia
Final Written Submissions:	July 23, 2012
Counsel:	Robert Pineo, for the Applicant Stacey England, for the Respondent

By the Court:

I. Overview

1. This application concerns a dispute between two neighbours, Julie Bailey and William Stonehouse, as to which of them holds title to a road (the "Sutherland Road") that divides their properties (the "Bailey Property" and the "Stonehouse Property", respectively). At the heart of this matter is the interpretation of ("Packard Deed") a 1927 Deed by which Elizabeth Packard conveyed the present-day Bailey Property to her nephew, Daniel Baillie (no relation to the Applicant). Her earlier application for a mandatory injunction was denied.

2. In particular, this application turns on whether a phrase in the Packard Deed, "excepting thereout the right of way or road extending from the lands of said Donald Sutherland to the Public highway aforesaid", was merely intended to record a previously established right of way in favour of the Sutherland Property, or whether it was intended to exempt the fee simple interest in the Sutherland Road from the grant to Daniel Baillie.

3. Julie Bailey, the applicant, argues in favour of the former interpretation. In her application, she seeks a declaration that Ms. McQuarrie had no property interests in the right-of-way on or before February 9, 2011, a declaration that the

quit claim deed purporting to convey that right-of-way to Mr. Stonehouse is invalid, an injunction requiring Mr. Stonehouse to file a copy of this order with the land registry within 30 days, a declaration that Mr. Bailey is the sole owner in fee simple of the right-of-way, punitive damages; and costs on a solicitor-client basis. However, in both the written submissions and argument, Ms. Bailey only sought a declaration that Mr. Bailey does not have any documentary interest in Sutherland Road. Consequently, my decision deals solely with the question of Mr. Stonehouse's documentary interest in the Sutherland Road.

4. William Stonehouse, the Respondent, holds with the latter interpretation, and, having sought out one of Ms. Packard's descendants, the Respondent Marie Danella MacQuarrie (who takes no position on the issues), he obtained her purported interest in the property by Quit Claim Deed. The Applicant asks me to set aside this Deed as invalid and seeks further a declaration that Mr. Stonehouse has no fee simple interest in the Sutherland Road.

5. For the reasons that follow, I hold in favour of the Applicant. I find that although on its face the 1927 Packard Deed supports Mr. Stonehouse's interpretation, the extrinsic evidence reveals a latent ambiguity as to the meaning of the pertinent clause and that further the extrinsic evidence weighs heavily in

favour of the interpretation suggested by Ms. Bailey that Ms. Packard included the fee simple interest in the Sutherland Road in her conveyance of the Bailey Property to Mr. Baillie. Since Ms. Packard did not retain the fee simple interest in the Road, it follows that the Respondent Ms. MacQuarrie acquired no interest in it and the purported interest acquired by Mr. Stonehouse by Quit Claim is ineffective against Ms. Bailey.

6. I grant Ms. Bailey's application for a declaration that Ms. McQuarrie had no property interest in the right-of-way on a before February 9, 2011 and a declaration that of the quitclaim deed purporting to convey that right-of-way to Mr. Stonehouse is invalid. I am not prepared to grant her request for trespass damages or that Mr. Stonehouse be directed to return to the disputed property to its state prior to the construction of the driveway in November, 2011 within 30 days of the order being granted. And given that there was no argument on the question of ownership of the Sutherland Road in fee simple, I also decline to order this. As to the request for an injunction, Ms. Bailey will be entitled to file this decision and any Order for Judgement with the appropriate authorities.

Facts

A. The dispute between the parties

7. Ms. Bailey and Mr. Stonehouse both own real property in Earltown, Colchester County, Nova Scotia. The Bailey Property comprises approximately thirteen acres, and spans eastward from the public highway to a property owned by Layton Lynch, which was owned by Donald Sutherland at the time of the Packard Deed (the "Lynch Property"). The Stonehouse Property begins at the public highway and runs southeast along the Sutherland Road for approximately 119 feet, at which point it is bordered by the Bailey Property. The Sutherland Road divides the Bailey and Stonehouse Properties for this short distance, but also continues through the Bailey Property to the Lynch Property.

8. Mr. Stonehouse acquired the Stonehouse Property (as well as other properties in the area) by Warranty Deed in 1990 from Alan and Kathryn Lockerby, executors of the estate of Elizabeth MacKay. Ms. Bailey acquired the Bailey Property by Warranty Deed in 2002 from her uncle, John MacNutt (McNutt). The history of the Bailey Property is set out in further detail below.

9. In his affidavit evidence, Mr. Stonehouse claims that he personally used the Sutherland Road to access the Stonehouse Property from 1990 until early 2009, and that he also used the Road beginning in 1985 to access an adjoining property. He states that his use of the Sutherland Road was unchallenged by Elizabeth MacKay, the previous owner of the Bailey Property.

10. The affidavit of John MacNutt, supports Mr. Stonehouse's claim that he had been using the Sutherland Road for some time prior to 2009. He recalls that the Sutherland Road was maintained by his father and George Lynch, but that Douglas MacKay (former owner of the Stonehouse Property) used the Sutherland Road to access his land. He also notes that following Mr. Stonehouse's purchase of the property, Mr. Stonehouse used the Sutherland Road to transport hay to his property, and that he installed several culverts in the ditch between the Sutherland Road and his property.

11. Sharon Bailey is Ms. Bailey's mother. Sharon Bailey's affidavit evidence is to the effect that she recalls Douglas MacKay using the Sutherland Road to access his property, and that he did so with her parents' permission. Of course, this evidence is hearsay and in any event has no bearing on the interpretation of the relevant deeds.

12. Mr. Stonehouse claims in his affidavit that the Sutherland Road has been used by the residents of Earltown for over a century, a claim which Ms. Bailey challenges. Mr. Stonehouse adduced no evidence, beyond his assertion, to establish such a claim, but in any event this is irrelevant to determining who has fee simple title to the Sutherland Road as the issue of limitations is not before me.

13. It appears that the difficulties between the parties began in early 2009, when a disagreement arose concerning Mr. Stonehouse's use of the Sutherland Road. The particular details of their dispute are immaterial to the issues before me on this application. In brief, Ms. Bailey alleges that Mr. Stonehouse's use of the road has resulted in some damage to her property, and that since the property is, to her knowledge and belief, her own, she is within her rights to exclude him from its use. This dispute has generated some litigation, including this application.

14. On June 4, 2010, Mr. Stonehouse made an application for an easement over a portion of the Sutherland Road and for an injunction preventing Ms. Bailey from interfering with his use of it. Ms. Bailey made an application on June 25, 2010 for an injunction preventing Mr. Stonehouse from entering onto the disputed property. She also sought damages for nuisance and trespass.

15. After conducting a title search on the Bailey property in January 2011, Mr. Stonehouse concluded that Ms. Bailey was not the owner in fee simple of the Sutherland Road, because the 1927 Warranty Deed from Elizabeth Packard to Daniel Baillie did not include the fee simple interest in the Sutherland Road, but rather retained the fee simple in the grantor. Mr. Stonehouse sought out one of Elizabeth Packard's descendants, the Respondent Ms. MacQuarrie, and by Quit Claim Deed acquired her 1/16th interest in the Road. Although Ms. MacQuarrie appeared before me at the hearing and offered testimony on cross-examination, she did not otherwise participate in this proceeding and took no position as to the issues between Ms. Bailey and Mr. Stonehouse.

B. History of the Bailey Property

16. The parties helpfully provided me with the Deeds and title abstracts for the multiple properties involved in this matter. At the center of the dispute, of course, is the history of the Bailey Property, but other relevant parcels include the Stonehouse, Lynch, and Hall properties. All of the properties were once part of a large parcel of land acquired by John Graham et al by Crown Grant on July 25, 1828.

17. After a number of conveyances and subdivisions, the Bailey Property was conveyed by Charles Graham and his wife Christy Graham to Charles Marsh by Warranty Deed on August 21, 1877. By that time, Charles Graham no longer held title to any of the adjacent land, and the parcel conveyed to Charles Marsh comprised the Bailey Property and what is today the Hall Property. The 1877 Deed includes the clause "[r]eserving the right of way from Said Donald Sutherland's land to the main post road." This is the first deed to reference the Sutherland Road.

18. The parcel was then sold to Alexander Baillie on August 1, 1885. With almost identical language to the 1877 Deed, the conveyance to Alexander Baillie includes the clause "reserving the right of way from said Donald Sutherland's land to the Main Post Road."

19. On December 24, 1897, Alexander Baillie conveyed the Hall Property to the Community of Earltown.

20. The Bailey Property next passed to Elizabeth Packard by virtue of Alexander Baillie's Last Will and Testament on January 28, 1925.

21. On July 19, 1927, Elizabeth Packard conveyed her interest in the Bailey Property to Daniel Baillie in consideration for a bond of maintenance. The

description of the property is similar to the previous deeds, but the clause referencing the Sutherland Road reads as follows:

> …containing thirteen acres, more or less, excepting thereout the right of way or road extending from the lands of said Donald Sutherland to the Public Highway aforesaid, and also the land on which the "HALL" is situated. [emphasis added by me]

22. Daniel Baillie conveyed the Bailey Property to Peter McNutt in 1940. The Warranty Deed repeats the language of the Packard Deed. Peter McNutt then conveyed the property to John and Jennie McNutt in 1987. That Deed contains similar language to the previous two, but the words "or road" are omitted:

> …Containing 13 acres more or less excepting a right of way from lands of Donald Sutherland to the public highway and land on which the hall is situate.

23. Finally, the property was conveyed to the Applicant in 2002. The property was migrated and registered under the Land Registration Act, 2001, c. 6, on January 8, 2004.

24. As noted above, on February 9, 2011, Mr. Stonehouse obtained a Quit Claim Deed for Ms. MacQuarrie's purported 1/16th interest in the Sutherland Road.

Issues

25. The sole issue argued before me on this application is whether the 1927 Deed from Elizabeth Packard to Daniel Baillie included the Sutherland Road in the

conveyance, or whether the Road was retained by the grantor. A preliminary issue to address is whether s. 11(1) of the Conveyancing Act, R.S., c. 97, is applicable to the interpretation of the Packard Deed.

Arguments of the Parties

26. Both Ms. Bailey and Mr. Stonehouse argue that the Packard Deed is unambiguous on its face, and that the intention of the parties can be determined within the "four corners of the deed". Each argues that in the alternative, should I find that the language of the Packard Deed reveals some latent ambiguity, the relevant extrinsic evidence supports his or her respective positions.

27. As noted above, the clause in the Packard Deed that gives rise to the present dispute is:

> …containing thirteen acres, more or less, excepting thereout the right of way or road extending from the lands of Donald Sutherland to the Public Highway aforesaid, and also the land on which the "HALL" is situated.

28. The dispute between the parties concerns what the word "excepting" means in this context as well as what was intended by using the words "right of way or road" to describe the Sutherland Road. Ms. Bailey submits that this clause should be interpreted as merely recording prior interests: the right of way extending from

the public highway to the Sutherland lands and the conveyance of the Hall Property. Mr. Stonehouse submits that a proper interpretation of the clause reveals Ms. Packard's intention to retain title to the Sutherland Road in fee simple title, and that accordingly he now holds title to the Road by virtue of the interest he acquired from Ms. MacQuarrie by Quit Claim Deed.

A. Mr. Stonehouse's Argument

29. Mr. Stonehouse argues that the technical legal meaning of the word "excepting" was intended by the parties. He submits that the term indicates an intention on the part of the grantor to exclude a designated part of a property from the conveyance and retain the fee simple interest in the excepted portion. He submits that the use of this term clearly excepted a fee simple interest in the Sutherland Road from the 1927 grant, which interest was retained by Ms. Packard and ultimately passed to her heirs, including Ms. MacQuarrie.

30. Mr. Stonehouse submits that a correct interpretation of the words "right of way or road" does not defeat his argument. He argues that in the Deed "right of way" and "road" are used as synonyms. In 1927, he suggests, the disputed land was commonly referred to as "a right of way" by some and "the Donald Sutherland Road" by others. Mr. Stonehouse also argues that "right of way" cannot be

intended to bear its technical legal meaning, since it is legally impossible to "except" a right of way by deed. Further, he submits that since Ms. Packard did not retain an interest in any adjoining lands, she did not intend to retain a right of way for herself since she did not retain a parcel that would act as the dominant tenement. Mr. Stonehouse also submits that no right of way was ever granted to the Lynch Property, and that the reservations in the previous deeds to the Bailey Property were not effective.

31. Mr. Stonehouse also argues that the exception of the Hall Property reinforces his interpretation; since Ms. Packard did not hold title to the Hall Property she excluded it from the conveyance with the same language as the "right of way or road". She wanted to exclude both from the conveyance.

32. Although Mr. Stonehouse submits that the Deed is unambiguous, he argues in the alternative that extrinsic evidence supports his interpretation of the Deed's language. He counters Ms. Bailey's argument that it "defies logic" for Ms. Packard to retain the fee simple in a narrow strip of land by suggesting that her likely motivation was to retain the road for general public use. Aside from the comment in Mr. Stonehouse's affidavit and the argument in his brief that the Sutherland Road was frequently used by the public generally, he offers no evidence to support this argument. I find that there is insufficient evidence upon which to conclude that

the Road was used frequently by members of the public other than the residents of the Lynch, Stonehouse, and Bailey Properties.

B. Ms. Bailey's Argument

33. Ms. Bailey argues that the purpose of the contentious clause in the Packard Deed is merely to record prior interests: the right of way in favour of the Lynch Property and the previously-conveyed Hall Property. She submits that the word "excepting" is not intended to bear its technical legal meaning, and does not indicate that Ms. Packard intended to retain a fee simple interest in the Sutherland Road.

34. Ms. Bailey submits that the apparent conflict generated by the use of the terms "right of way or road" is resolved by interpreting "road" as modifying "right of way" by either describing the location of the right of way, characterizing its use, or both. Ms. Bailey initially presented an alternative argument based on the doctrine of repugnancy, but withdrew this argument in her supplemental submissions on the application of the *Conveyancing Act*.

35. Should I find that the wording of the Deed conceals some latent ambiguity and that the matter cannot be resolved within the "four corners of the deed", Ms.

Bailey argues that the relevant extrinsic evidence supports her interpretation. She compares the language of the Packard Deed to previous conveyances of the Bailey Property, and notes that in both 1877 and 1885 the Property was conveyed with a reservation of the right of way leading to the lands of Donald Sutherland (the Lynch Property).

36. Ms. Bailey also notes, as does Mr. Stonehouse, that the Bailey Property did not include the Hall Property at the time of the 1927 conveyance from Ms. Packard to Mr. Baillie. However, she uses this fact to reinforce her argument that the technical meaning of "excepting" was not intended, since Ms. Packard could not have intended to retain the fee simple interest in property to which she did not have title at all.

37. Ms. Bailey further submits that Ms. Packard could not legally have retained for herself a right of way without also retaining a dominant tenement, and that therefore the legal meaning of "excepting" clearly was not intended.

38. With respect to the objection raised by Mr. Stonehouse that Ms. Packard could not have excepted a right of way from the conveyance because there is no express grant of an easement in the title abstract to the Lynch Property, Ms. Bailey cites *Knock v. Fouillard*, 2007 NSCA 27 at para 46, as authority for the submission

that there is no legal requirement for such an express grant in order for a grantor to create an easement, provided that the grantee is sufficiently identified.

Law

A. Does the *Conveyancing Act*, R.S., c. 97, apply to the interpretation of the Packard Deed?

39. A preliminary question that arises is whether the Nova Scotia *Conveyancing Act*, R.S., c. 97, and in particular section 11(1) of the Act, is applicable to the interpretation of the Packard Deed. The parties provided me with supplemental submissions on this issue after Ms. Bailey raised it following the hearing.

40. Section 11(1) of the *Conveyancing Act* states as follows:

> A conveyance shall be read as a whole and if it contains contradictory provisions the later provisions shall be effective.

41. This section forms one of the bases for the three governing principles set out in *Knock v. Fouillard*, 2007 N.S.C.A. 27.

42. Mr. Stonehouse took the implicit position that section 11(1) of the *Conveyancing Act* could be applicable to the Deed, but argued that the principle

would not operate in this case because there is no contradiction in the wording of the Deed. As noted above, Mr. Stonehouse submits that there is no contradiction or ambiguity created by the phrase "right of way or road", and that therefore there is no scope for the application of section 11(1) of the *Act*.

43. Ms. Bailey agrees that section 11(1) of the *Conveyancing Act* does not apply in this case, but on the basis that the Act itself cannot apply to the Packard Deed because the Deed was executed prior to the enactment of the original legislation in 1956. Implicit in this argument is the conclusion that the Act was not intended to have retroactive effect.

44. In fact, the first part of the *Conveyancing Act* was enacted in 1912 (*An Act respecting short forms of conveyances*, S.N.S. 1912, c. 2) and therefore was in force at the time the Packard Deed was executed in 1927; however, Part II of the *Act*, including section 11(1), was not enacted until 1956 (*An Act to simplify conveyance*, S.N.S. 1956, c. 3). Although the relevant portion of the legislation was enacted only after the Deed was drafted and executed, it is possible that its interpretive principles could apply to the Deed if the legislation was intended to apply retroactively to Deeds executed prior to the coming into force of the *Act*.

45. The general rule is that "statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act" (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 at 279). While in *Gustavson* the Court referred only to retrospectivity, this has subsequently been referred to by the Court as the "presumption against retroactive legislation" (*Quebec (Attorney General) v. Quebec (Expropriation Tribunal)*, [1986] 1 S.C.R. 732 at para 45).

46. Both the Supreme Court of Canada and the Nova Scotia Court of Appeal have distinguished retroactivity from retrospectivity: a retroactive statute is one that "makes the law different from what it was prior to its enactment" (*R. v. Nova Scotia Pharmanceutical Society*, [1991] N.S.J. No. 169 at para 55, citing Elmer Driedger, **The Construction of Statutes**, 2d ed. (Toronto: Butterworths, 1983) at 186, and see *Hayward v. Hayward*, 2011 NSCA 118 at para 22), whereas a retrospective statute is one that "opens up a closed transaction and changes its consequences, although the change is effective only for the future" (ibid). Both types of statutes can attract the presumption against retroactivity as cited in *Gustavson*, although the presumption only arises with respect to a retrospective statute if the change in prejudicial (*Brosseau v. Alberta (Securities Commission*), [1989] 1 S.C.R. 301 at para 48).

47. I do not find any language in Part II of the *Act* that suggests the Legislature intended it to have retroactive or retrospective effect. The purpose of the Part is set out in section 9(1), which provides that the "purpose of this Part is to permit simpler conveyances and conveyancing but not to restrict conveyancing to the forms and methods herein set out." This language suggests an intention to simplify the language used in the drafting of conveyances for the future. There is no suggestion that the legislation was intended to apply either retroactively or retrospectively to Deeds drafted before the coming into force of the *Act*.

48. Applying the interpretive principle set out in section 11(1) of the *Act* would give the legislation retroactive force, since any change to interpretation generated by the section could apply so as to alter the effect of the Deed at the time of the conveyance, not only for the future. As a result, the statute attracts the presumption against retroactivity as cited in *Gustavson*, and given that there is no express language in the legislation indicating that retroactivity was intended, the presumption is not rebutted.

49. I conclude that section 11(1) of the *Conveyancing Act* does not apply to the interpretation of the Packard Deed. In any event, to the extent that the section

applies to strike later provisions in the event of an inconsistency I would not find it necessary to resort to this principle in this case.

B. What principles govern the interpretation of the Packard Deed?

50. In interpreting the Packard Deed, my starting point is the "rule of universal application", as set out by Kerwin J. in *Cotter v. General Petroleums Ltd*., [1951] S.C.R. 154, at paragraph 35:

> A rule of universal application in the construction of deeds was stated in Mill v. Hill [(1852) 3 H.L. Cas. 828 at 847; 10 E.R. 330], as follows: 'The general rule of construction is, that the Courts, in construing the deeds of parties, look much more to the intent to be collected from the whole deed, than from the language of any particular portion of it."

51. This approach was expressed by Jones J. (as he then was) in *Saueracker v. Snow* (1974), 14 N.S.R. (2d) 607 (S.C.), at paras 20-21 as follows:

> The general principles applicable to the interpretation of a deed are set forth in paragraphs 13 and 24, Volume 5, of the *Canadian Encyclopedic Digest*, Second Edition, as follows:
>
> 13. Construction – General Rule. The Court must, if possible, construe a deed so as to give effect to the plain intent of the parties. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrarily overborne by any presumption. The intention of the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it, and effect should, if possible, be given to every word of the document. Where, judging from the language they have used the parties have left their intention undetermined, the Court cannot on any arbitrary principle determine it one way rather than another. Where an uncertainty still remains after the application of all methods of construction, it may sometimes be removed by the election of one of the parties. The Courts look much more to the intent to be collected from the whole deed than from the language of any particular portion of it.
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> 14. Extrinsic Evidence.

> Patent and Latent Ambiguities. An ambiguity apparent on the face of a deed is technically called a patent ambiguity – that which arises merely upon the application of a deed to its supposed object, a latent ambiguity. The former is found in the deed only, while the latter occurs only when the words of the deed are certain and free from doubt, but parol evidence of extrinsic or collateral matter produces the ambiguity – as, if the deed is a conveyance of 'Blackacre', and parol evidence is adduced to show there are two places of that name, it of course becomes doubtful which of the two is meant. Parol evidence therefore in such a case is admissible, in order to explain the intention of the grantor and to establish which of the two in truth is conveyed by the deed. On the other hand, parol evidence is uniformly inadmissible to explain an ambiguity which is not raised by proof of extrinsic facts, but which appears on the face of the deed itself. A subsequent will cannot be used to construe an earlier deed of settlement nor as evidence that the testator intended to include an additional person among the beneficiaries under the settlement.
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> Extrinsic Evidence as to Latent Ambiguities Generally. Extrinsic evidence is always admissible to identify persons and things to which the instrument refers.
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> Provided the intention of the parties cannot be found within the four corners of the document, in other words, where the language of the document is ambiguous, anything which has passed between the parties prior thereto and leading up to it, as well as that concurrent therewith, and the acts of the parties immediately after, may be looked at, the general rule being that all facts are admissible to interpret a written instrument which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as tend only to show that the writer intended to use words bearing a particular sense are to be rejected.

This statement of universal approach has been affirmed in a number of cases: see *Swinemar v. Hatt* (1980), 41 N.S.R. (2d) 453 (S.C.); *Herbst v. Seaboyer* (1994), 137 N.S.R. (2d) 5 (C.A.); *Kolstee v. Metlin*, 2002 NSCA 81 at para 65; and recently in *3209292 Nova Scotia Ltd. v. MacDuff*, 2011 NSSC 363 at para 13 per Scaravelli J.

52. The principles governing the interpretation of deeds were recently summarized by the Nova Scotia Court of Appeal in *Knock v. Fouillard*, 2007 NSCA 27, per Fichaud J.A. at para 27:

> In the interpretation of a conveyance it is important to recall three governing principles:
>
> (a) First, it is unnecessary to use a particular incantative word of "grant." The *Conveyancing Act*, R.S.N.S. 1989, c. 97, s. 10(2) says that a conveyance "does not require ... any special form of words." LaForest, *Anger and Honsberger, Law of Real Property* (3rd ed. - looseleaf, Canada Law Book) vol. 2, para 17:20.20(b) says:
>
> > It is not necessary to use the word "grant" or any other particular words to create an easement by deed, so long as the words used show an intention to create an easement which is recognized in law. Where, on the face of the deed there appears a manifest intention to create an easement, that intention will be given effect if the words of the deed can bear that construction.
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> > To the same effect: *Halsbury's Laws of England* (4th Edition), vol. 14, para 50. The question is whether the deed's words show an intent that there be a right-of-way not conditioned on prescriptive rights.
>
> (b) Second, to ascertain whether the words show this intent, the court should construe the document as a whole, if possible giving meaning to all its words. The *Conveyancing Act*, s. 11(1) says: "A conveyance shall be read as a whole and if it contains contradictory provisions the later provisions shall be effective." Fridman, *The Law of Contract* (5th Edition), p. 457 says:
>
> > The contract should be construed as a whole, giving effect to everything in it if at all possible.
> >
> > No word should be superfluous (unless of course, as happened in one instance, it is truly meaningless and can be ignored).
> >
> > This principle applies to the interpretation of a deed: Anger and Honsberger, para 25:40. *Gale on Easements* (Sweet v. Maxwell, 17th ed.) para 9-14 says:
> >
> > > In the case of an express grant the language of the instrument must be referred to. The court will have regard to the conveyance as a whole, including any plan that forms part of it, even though the plan is not mentioned in the parcels or is said to be for identification purposes only.

> In *Wheeler v. Wheeler* (1979), 25 N.B.R. (2d) 376 (C.A.), the deed's text granted a remainder interest to an individual who was not identified as a grantee in the deed's premises. The court (para 5) cited this principle - construction as a whole - to uphold the conveyance of the remainder. Here, the 1993 deed does not identify Mr. Knock as a "grantee," but the schedule contains the wording concerning the right-of-way. The court must try to give meaning to that wording. The words are not shelved just because they appear in the schedule.

(c) Third, the court's first task is to determine whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes, motives or recollections. The primary source is the document, not the psyche. *Fridman*, p. 15 states:

> > Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions ...
> >
> > Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed and if so, upon what. This is specially true where a document containing their agreement has been prepared and signed by the parties. If the plain wording of the document reveals a clear and unambiguous intent, it is not necessary to go further.

> In the process of interpretation, a court may not utilize the parties' subjective wishes, motives or intent to alter the unambiguous and objectively manifest intent in the deed's wording. *Fridman*, pp. 443-4 and cases cited; *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 at p. 518-520; *Bauer v. Bank of Montreal* (1980), 110 D.L.R. (3d) 424 (S.C.C.) at p. 432; *Anger v. Honsberger* para 17:20.30(a) quoted below at para 60.

53. Although Fichaud J.A.'s comments in *Knock* are directed toward ascertaining whether the deed creates an easement, several of the principles are applicable more generally to the interpretation of a conveyance. Further, although Fichaud J.A. cites the *Conveyancing Act* as authority for the first and second

principles noted above, the principles in fact reflect the common law approach to the interpretation of deeds, notwithstanding their codification in the Act, and therefore my earlier conclusion that the *Conveyancing Act* itself does not apply to the interpretation of the 1927 Packard Deed does not preclude my applying the principles as articulated in *Knock*.

54. With respect to the meaning of "excepting thereout", the parties referred me to the discussion in *McDonell Estate v. Scott World Wide Inc.* (1997), 160 N.S.R. (2d) 349, 1997 CarswellNS 285 (N.S.C.A.) at paras 12-13, *per* Flinn J.A. on the distinction between an "exception" and a "reservation":

> 12 To explain the distinction between an "exception" and a "reservation", I refer to the following, which appears in Anger and Honsberger on Real Property, 2nd ed., vol. 2, 1982 at pp. 1289-91 :
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> > In Cooper v. Stuart, (1889) 14 App. Cas. 286 (P.C.) at pp. 289-90, Lord Watson described an exception to be "that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately and the subject of it does not pass to the grantee.
> >
> > . . . . .
> >
> > Technically, the term "reservation" implies something in the nature of a rent, but it is frequently used to signify some incorporeal right which the grantor is to have over what is granted, such as the right to hunt or fish, or a right of way. It then operates as a regrant of the right by the grantee to the grantor. Where a grant to a railway company reserved to the grantor one good and sufficient crossing, it was held that the reservation operated as a regrant of a right of way and was not an exception of part of the land conveyed.
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> 13 The terms are defined in Black's Law Dictionary, 6th edition, as follows:
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> > Exception. An exception operates to take something out of the thing granted which would otherwise pass or be included. Such excludes from the operation of

> conveyance the interest specified and it remains in the grantor unaffected by the conveyance.
>
> Reservation. A clause in a deed or other instrument of conveyance by which the grantor creates, and reserves to himself, some right, interest, or profit in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving it; such as rent, or an easement. Reservation occurs where (the) granting clause of the deed operates to exclude a portion of that which would otherwise pass to the grantee by the description in the deed and "reserves" that portion unto the grantor .....

55. The terms "exception" and "reservation" are defined in the *Nova Scotia Real Property Practice Manual* (C.W. MacIntosh, Q.C., (Markham: Lexis Nexis, 1988 (looseleaf)) as follows:

> There is a definite distinction in effect between a reservation from the property described and an exception from the property. A reservation is a right created and retained by the grantor, while an exception takes something out of the estate granted. In other words, a reservation, unlike an exception, confers only a limited right to use the land to which it applies. It does not purport to retain title to the subject land. In contrast an exception has the effect of retaining title to the excepted lands in the grantor. So if it is desired by the grantor to convey a smaller parcel to the grantee, the wording "excepting therefrom (the portion to be retained" should be used, while if [it] is intended to convey the land subject to a particular interest the word "reserving" should precede the interest to be retained.
>
> In the case of a reservation or exception from a grant, such a reservation is construed in favour of the person from whole title it detracts. If the exception is uncertain and the grant is clear, the grant is operative but the exception fails. (5-39(4))

56. These definitions were drawn from *Gibbs v. Grand Bend (Village)*, [1995] O.J. No. 3709, 26 O.R. (3d) 644 (C.A.) per Finlayson J.A.

57. I have also referred to the discussion on exceptions and reservations in Di Castri's *The Law of Vendor and Purchaser* (Toronto: Carswell, 1988 (looseleaf)):

> …An exception is always a part of the thing granted and, if valid, the thing excepted remains with the grantor with the like force and effect as if no grant thereof had been made, whereas a reservation is a clause in a deed whereby the grantor reserves some new thing to himself out of the thing granted and not *in esse* before. (Vol. 2 at §437)

58. I also believe in addition to the comments set out in the previous two paragraphs that of the term "excepting" can also refer to the situation where a portion of the property being conveyed as been previously conveyed by the grantor such as in this case, the "Hall property".

59. As the aforementioned principles indicate, in interpreting the Packard Deed I must consider the language of the Deed in its entirety, attempting to give meaning to all of its provisions harmoniously. The goal is to determine the intention of the parties, Ms. Packard and Mr. Baillie, as revealed by the language chosen. I am concerned with the objective meaning intended by the parties in the language of the Deed, not what the parties subjectively intended by their choice of words.

Interpretation of the Packard Deed

60. In keeping with the "rule of universal application", it is necessary for me to consider not only the clause at issue, but the entire description of the conveyance in order to ascertain the objective meaning of the language of the deed. The relevant portion of the Packard Deed reads as follows:

> ALL that certain lot, piece or parcel of land situate, lying and being at Earltown Village, in the Country of Colchester, abutted, bounded and described as follows: -- Bounded on the North by lands of Alexander S. Douglas, on the East by lands of Donald Sutherland, on the South by lands of Robert E. McKay, and on the west by the Public Highway, lands owned or occupied by Mrs. John R. MacKay and lands owned or occupied by Mrs. Barbara MacKenzie, containing thirteen acres, more or less, excepting thereout the right of way or road extending from the lands of said Donald Sutherland to the Public highway aforesaid, and also the land on which the "HALL" is situated.

61. I find that there is no patent ambiguity on the face of the Packard Deed. At first blush, the language of the "excepting thereout" clause indicates that Ms. Packard was excluding the fee simple interest in both the Sutherland Road and the Hall Properties from the conveyance to Mr. Baillie, and retaining these interests for herself. This interpretation is consistent with the legal meaning of "excepting", which indicates that a designated part of the property is being excluded from the property with the fee simple retained by the grantor, or had been previously conveyed by the grantor or a predecessor in title.

62. In *McDonell Estate, supra*, at paras 12-13, Flinn J.A. noted that an "exception" is legally distinct from a "reservation." Mr. Stonehouse's interpretation of the word "excepting" is supported by reference to the 1877 Deed of the Bailey Property from Charles Graham to Charles Marsh and the 1885 Deed from Charles Marsh to Alexander Baillie, both of which use the language of "reserving" the right of way rather than "excepting." Although these facts are

extrinsic to the Packard Deed, they can properly be considered in order to ascertain the objective meaning of the language used by the parties in 1927. The specific use of the word "excepting" in the Packard Deed suggests a meaning distinct from the previous Deeds, which used the term "reserving."

63. The reference to the "right of way or road" in the Packard Deed does render Mr. Stonehouse's interpretation of "excepting" more difficult to accept. If the word "road" alone had been used, the clause would clearly indicate an intention that the fee simple interest in the Sutherland Road remain with Ms. Packard; however, the use of "right of way or road" appears to conflict with this strict interpretation of "excepting" since a right of way is not the type of interest that could be "excepted" from a conveyance by the grantor (see *McDonell Estate*, supra). Mr. Stonehouse suggests that the terms "right of way or road" in this context are intended as synonyms, and that "right of way" was not intended to carry its technical legal meaning. He submits that both "right of way" and "road" were terms used by the residents of Earltown to describe the Sutherland Road at the time the Packard Deed was drafted. Although I do not believe that Mr. Stonehouse has adduced sufficient evidence to establish that Earltown residents generally called the Sutherland Road a "right of way", I do find that this is a plausible interpretation in the

circumstances, particularly given the overarching goal of giving meaning to all the words of the Deed where possible.

64. However, that does not resolve the matter. I find that the extrinsic fact that Ms. Packard did not hold title to the Hall Property at the time the 1927 Deed was executed, and indeed that she never acquired title to the Hall Property since it had been subdivided from the Bailey Property in 1897, reveals a latent ambiguity with respect to the meaning of the entire "excepting" clause. As noted above, a latent ambiguity is one which does not appear on the face of the deed but is revealed when extrinsic evidence is adduced that produces the ambiguity (*Saueracker v. Snow, supra,* at paras 20-21), such as evidence that two properties bear the same name. In this case, the extrinsic evidence does not produce an ambiguity like the one cited in *Saueracker* where two properties are found to bear the same name, but rather reveals that two different interpretations of the "excepting" clause are possible.

65. When the words of the Packard deed are applied to the surrounding circumstances regarding the Bailey and Hall properties, and ambiguity arises because there are two possible ways of interpreting the excepting clause: The first possible interpretation is that the technical legal meaning of "excepting" was intended and Ms. Packard was intending to except the fee simple interest in the

Hall property as she did not want to convey that property to Mr. Bailey. The second possible interpretation is that the ordinary meaning of "excepting" was intended in the purpose of the clause was merely to specify the boundaries of the Bailey property and the interest to which it was subject. Ultimately, I agree with Ms. Bailey and that a proper application of the relevant legal principles as well as evidence of the circumstances surrounding the Packard deed favour the latter interpretation.

66. Looking at the description of the property as a whole, the metes and bounds, if measured out, include within them the area of the Hall property. The fact that Ms. Bailey did not own the Hall property indicates, therefore, that the word "excepting" was not intended to carry its strict technical meaning, or else she would be purporting to retain for herself a property that she did not own. Rather, the term is used in its ordinary meaning, which is to say that it carries no implication that the property is retained in the grantor; it simply further delineates the boundaries of the property that is being granted.

67. Therefore, the ordinary meaning of "excepting" should also be applied to the "right-of-way or road". Once again though, the use of the words "right-of-way or road" present a challenge however, I find Ms. Bailey's submissions regarding the

meaning of the word "road" in this context to be persuasive. The phrase "right of way" is intended to bear its legal meaning, in the sense that the Deed is referring to the interest on the land running in favour of the Lynch Property. The word "road" modifies "right of way" by specifying both the location of the right of way and the manner in which it is used (i.e. as a road). I find this interpretation of "right of way or road" to be much stronger than the interpretation necessary to accord with the legal meaning of "excepting", since it gives meaning and purpose in the clause to both the terms "right of way" and "road". This is more consistent with the principle cited in *Saueracker* and *Knock* that where possible meaning should be given to each word in the deed, since in Mr. Stonehouse's interpretation the words were treated as mere synonyms, without any evidence that "right of way" was a common name for the Sutherland Road in 1927.

68. It would be inconsistent to apply the legal meaning of "excepting" to the Sutherland Road but not to the Hall property, given that they are contained in the same clause.

69. Another difficulty with this interpretation is that usually a right of way should be "reserved" rather than "excepted". As already noted, however, I do not find that the intention of the parties was to use the technical legal meaning of

"excepting". Just as the purpose of the clause "excepting thereout…the land on which the "HALL" is situated" is to describe the limitations on the property being conveyed, "excepting thereout the right of way or road" is intended to indicate that the fee simple conveyance of the Bailey Property to Mr. Baillie was burdened by the right of way in favour of the Lynch Property. In other words, just as the Deed indicates that Mr. Baillie is not obtaining the fee simple interest in the Hall Property, the Deed also indicates that Mr. Baillie's interest in the Bailey Property is subject to the right of way in favour of the Lynch Property. In both cases, the language of the Packard Deed reveals an intention to exclude from the conveyance certain designated interests that were already held by other parties.

70. I have considered Mr. Stonehouse's submission that the contrast between the language used in the 1877 and 1885 Deeds and the Packard Deed demonstrates that the parties intended that Ms. Packard retain the fee simple in the Sutherland Road. In both prior deeds, the parties referred to the Sutherland Road in language almost identical to that used in the Packard Deed, but used the word "reserving" rather than "excepting". The contrast between the language used in the earlier deeds and the Packard Deed arguably suggests that while the previous deeds were merely recording the Sutherland Road as a right of way, the intention of the parties to the Packard Deed was clearly different given the shift in language. However, even if I

found this to be a persuasive point, the argument asks me to infer from the change in terminology used that the parties subjectively intended the words to bear a specific meaning. This type of reasoning is inappropriate to deed interpretation: see *Knock v. Fouillard, supra,* at para 27. The court's role in interpreting the deed is to determine the objective meaning of the language used by the parties in the conveyance – not what subjectively they believed or intended the language to mean.

71. Even if I could consider it, I do not find that the contrast in language necessitates that objectively the meaning of "reserving" and "excepting" were drastically different at the time the Deed was drafted. It is important to consider the context in which the words were used in each individual Deed to ascertain their objective meaning. The clause in the Packard Deed was crafted to address *both* the Sutherland Road and the Hall Property, whereas the 1877 and 1885 deeds referred only to the right of way. Since the Hall Property was no longer a part of the Bailey Property in 1927, it would be inappropriate for the word "reserving" to be used to exclude it from the conveyance. As already discussed, after considering that the strict legal meaning of "excluding" was not intended, the entire clause can be interpreted harmoniously.

72. I find that this interpretation is more consistent with the purpose of the Packard Deed as a whole. After the description of the Bailey Property, the Packard Deed goes on to convey to Mr. Baillie four other properties in Earltown in consideration for a bond of maintenance. The bond of maintenance requires Mr. Baillie to, among other things, provide for Ms. Packard's needs and allow her exclusive use of some areas of the house on the Bailey Property. The overall intention in the Deed seems to be that Ms. Packard was conveying all of her real property in the area to Mr. Baillie, in exchange for his maintenance of her needs until the end of her life. Ms. Bailey's interpretation of the "excepting" clause is therefore most consistent with the overall purpose of the Deed, and it makes the Deed read more harmoniously as a whole.

73. Ms. Bailey also adduced further extrinsic evidence, in the form of Ms. Packard's Last Will and Testament, which reveals that Ms. Packard did not devise any real property by her Will. Ms. Bailey argued that this further supports the inference that Ms. Packard's intention was that she divest herself of all her real property through the 1927 deed. However, as I noted with respect to the language of the 1877 and 1885 deeds to the Bailey Property, I find that this extrinsic evidence regarding the nature of Ms. Packard's Will is only relevant to Ms. Packard's subjective intention with respect to the Packard Deed. It is not helpful in

determining the objective meaning of the language used, and therefore is inadmissible in interpreting the Deed according to the principle in *Knock*, supra.

74. I have considered Mr. Stonehouse's argument that a right of way was never granted in favour of the Lynch Property and that therefore any such interest was extinguished. In my view, this argument is unpersuasive because the sole issue to be decided on this application is whether the fee simple interest in the Sutherland Road was retained by Ms. Packard in the Packard Deed. I have concluded that it was not, and that the objective meaning of the Deed's language suggests that the "excepting" clause serves to describe the boundaries and limitations to the Bailey Property. The issue of whether the right of way is legally enforceable, by either Layton Lynch or Mr. Stonehouse, as against Ms. Bailey is a separate matter and is not germane to the interpretation of the Deed itself.

Conclusion

75. I have concluded that the Packard Deed did convey the fee simple interest in the Sutherland Road to Mr. Baillie. Since Ms. Packard did not retain any title to the Sutherland Road, it follows that her descendants, including the Respondent Ms.

MacQuarrie, acquired no interest in the property. Therefore, Mr. Stonehouse acquired no interest in the Sutherland Road through the Quit Claim Deed executed on February 9, 2011. My findings do not rule on any claim to the use of the right of way by prescription.

76. If the parties cannot agree on costs, they are to file written submissions before January 31, 2013.

LeBlanc J.