SUPREME COURT OF NOVA SCOTIA
Citation: *Roode v. Johnston,* 2018 NSSC 293

Date: 20181120
Docket: Pic No 409920
Registry: Pictou

LEO ROODE and WENDY ROODE

Plaintiffs

and

THE ATTORNEY GENERAL OF NOVA SCOTIA, REPRESENTING HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA
and

GLENN ROBERT JOHNSTON, DEBORAH GAIL JOHNSTON AND ALYSSA ROSE JOHNSTON AND THE ESTATE OF HELEN BARID AS REPRESENTED BY EDWARD F. BAIRD, PERSONAL REPRESENTATIVE

Judge: The Honourable Justice N. M. Scaravelli

Hearing: Pictou, Nova Scotia, , May 7, 8, 9, and 10, 2018

Decision: November 20th, 2018

Counsel: J Gregory MacDonald, QC for the Plaintiffs

Brian Casey, QC and Allison Reid for the Defendants – Johnston

Introduction:

[1] The plaintiffs Leo Roode and Wendy Roode are spouses of each other and are permanent residents of land and dwelling located at Baywatch Lane, Caribou Island, Pictou County, Nova Scotia, being PID00808741.

[2] The defendants Glenn Johnston and Deborah Johnston are spouses of each other. The defendant Alyssa Johnston is their daughter. They reside in Truro, Nova Scotia and are the registered owners of land and seasonal dwelling continuous to the north and east of the plaintiff's property extending to the shores of the Northumberland Strait, being PID00808758.

[3] Named defendants, the Attorney General of Nova Scotia and the Estate of Helen Baird have taken no position and have withdrawn as parties to the action.

[4] The Plaintiffs bring action under the *Quieting of Titles Act*, R.S.N.S. 1989, c. 382 and the *Land Registration Act,* R.S.N.S. 1989, c. 258 claiming the following relief:

1. An order quieting the title to a 50' x 102' portion of the defendant's land based on adverse possession (50 foot lot).
2. An order declaring a right of way by prescription in their favor over the existing pathway situate on the said lands of the defendants

providing access from the plaintiff's land to the beach of the Northumberland Strait.

[5] The 50 foot lot being claimed and possessory right of way are as shown on a plan of survey dated February 13th, 2014 prepared by Wadden Survey Limited.

Adverse Possession

[6] The civil burden of proof in an adverse possession claim rests squarely on the adverse possessor's shoulders. The principles of adverse possession were summarized by our Court of Appeal in *Podgorski v. Cook*, 2013 NSCA 47:

> 49 It will be useful to remind ourselves of the relevant principles before turning to their application to the facts:
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> (1) The law presumes the legal owner to be in possession; i.e., that seizin follows title. This presumption is not compromised because the owner is not in actual occupation, (*Ezbeidy v. Phalen*, (1957), 1957 CanLII 351 (NS SC), 11 D.L.R. (2d) 660 (N.S.S.C.) approved in *Fralick* at ¶ 40);
>
> (2) To oust the legal owner, it is necessary to establish actual adverse occupation which is exclusive, continuous, open and notorious for the requisite period of 20 years, (*Fralick*, ¶ 40);
>
> (3) The conduct of the possessor must be that of an owner which would exclude the true owner from the land, (*Brown v. Philips et al*, (1963) 1963 CanLII 209 (ON CA), 42 D.L.R. (2d) 38, (Ont. C.A.) approved in *Fralick*, ¶ 40);
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> (4) A possessor may have constructive possession of more than what he occupies if he has colour of title - i.e., a deed - whether or not the deed is valid, (*MacDonald v. MacCormack*, 2009 NSCA 12 (CanLII), ¶ 93). Otherwise, he can only claim what he actually occupies;
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> (5) To claim constructive possession, the adverse possessor must have a *bona fide* belief that he has title, (*MacDonald v. MacCormack*, ¶ 94);

> (6) But there can be no constructive possession based on the possessor's belief where his deed does not include the land over which possession is claimed, (*MacDonald v. MacCormack*, ¶ 95; *Mason v. Mason Estate*, (1999), 1999 CanLII 2804 (NS CA), 176 N.S.R. (2d) 321 (C.A.), ¶ 31 to 33; *R. B. Ferguson Construction Ltd. v. Nova Scotia (Attorney General)*, (1989) 91 N.S.R. (2d) 226 (N.S.C.A.); *Rafuse and Rafuse v. Meister*, (1979) 32 N.S.R. (2d) 217 (N.S.C.A.) at ¶ 22-25; *Wood v. LeBlanc*, (1904) 1904 CanLII 71 (SCC), 34 S.C.R. 627 (S.C.C.)).
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> (7) The type of possession required varies with the nature of the land :
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> Whether there has been sufficient possession of the kind contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute. Possession must be considered in every case with reference to the peculiar circumstances, for the facts constitution possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession.
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> Anger and Honsberger, *Law of Real Property,* 3rd Ed., 29:60:80

[7] In this case the plaintiffs do not claim possessory title as trespassers or by color of title. The plaintiffs claim they and their predecessors in title believed they were the true owners of the 50 foot lot beginning in 1967 only to discover in the 1990's, as a result of surveys, that the lot formed a portion of the defendants lands acquired by their family predecessors in 1971. The plaintiff claims these circumstances are those of mutual mistake.

[8] Under the circumstances of this case, the analysis of adverse possession is contextual as opposed to a strict technical analysis of the elements of adverse

possession. *Gould v. Edmonds*, 2001 NSCA 184. In *Gould* the Nova Scotia Court of Appeal cited the following with approval.

> **53** Among the authorities relied on by the appellant, to be further considered below, is **Bacher v. Wang**, [2000] O.J. No. 3146 in which Nordheimer, J. stated at s. 24 and 25:
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> > ... [T]he respondent relies on *Elias v. Coker*, [1990] O.J. No. 982 (Dist. Ct.) where Lang D.C.J. said, at p. 10:
> >
> > > When a claim for adverse possession centres on a piece of land as small as the one in issue here, the claimants must show continuous use of every inch.
>
> I make two observations with respect to the above quotation. First, it is clear that the words used cannot be taken literally since it is virtually impossible to use "every inch" of any piece of property "continuously". Secondly, the *Elias* case dealt with the situation where the claimant of the property could fairly be characterized as a trespasser, that is, a person who occupied the property with knowledge that it belonged to someone else. The authorities draw a very sharp distinction between cases where the claimant is a trespasser and cases, such as the one before me, where the claimant occupies the property in the mistaken belief that it is hers only to find out many years later that the legal title to the property actually belongs to someone else. In the latter cases, the requirements for actual possession are less rigidly applied.

Review of Evidence

[9] The land owned by both parties once formed part of a 144 acre parcel of land conveyed to Charles Baird in 1943. Caribou Island is bounded on the north by the Northumberland Strait and was known as cottage country over the years.

[10] In 1957 Gordon Johnston, father of the defendant Glenn Johnston purchased a lot of land on the corner of Caribou Island Road on what is now known as Baywatch Lane from Charles Baird and his wife Barbara Baird. The deed of conveyance included a right of way to the lot from the public highway and a

further right of way to the beach on the shore of the Northumberland Strait. Charles Baird conveyed the remainder of his lands to Archibald Baird in 1961.

[11] Gordon Johnston and his wife Ina Johnston were very close friends with William Nelson and Margaret Nelson, parents of the plaintiff of Wendy Roode. The Johnstons and Nelsons resided in Hilden, Colchester County with their children at the time Mr. Johnston acquired the Caribou Island lot.

[12] Around 1958-1959 the Johnstons built a seasonal cottage on their lot. William Nelson assisted in the construction of the cottage. In 1966, Encouraged by the Johnstons, Mr. Nelson purchased from Archibald Baird a 100' x 102' lot contiguous to the northern boundary of the Johnston lot facing north towards the Northumberland Strait. The purchase price was $100. The deed of conveyance contained a right of way from the public road to their lot but did not contain a provision for a right of way to the beach as in the Johnston deed. Mrs. Nelson testified that her and her husband William Nelson assumed the right of way in their deed extended to the beach.

[13] She further testified that, encouraged by the Johnstons, the Nelson's decided to build a seasonal cottage in 1967 only to discover they were unable to obtain a permit as their lot was undersized. Mr. Nelson met with Archibald Baird in February 1967, and subsequently told Mrs. Nelson that Mr. Archibald agreed to

sell him the 50' lot for $225. Mrs. Nelson was not present when this discussion took place. However, Mrs. Nelson testified that Mr. Nelson was upset he would have to pay more money for half the lot size he previously purchased from Mr. Baird. He believed the price would be $50.

[14] As Mr. Nelson did not have the resources to purchase the lot, Gordon Johnston loaned him the $225 on an IOU which Mr. Nelson eventually paid off in two years. Mrs. Nelson produced a hand written "receipt" containing two entries for the purchase of both lots. Both entries bearing the signatures of Archibald Baird as follows:

> Received from William Nelson $100 for payment of lot of land.
>
> Archibald Baird
>
> $225 received on property, February 5, 1967.
>
> Archibald Baird

The 50' lot is contiguous to the north of the existing Nelson lot at the time. According to Mrs. Nelson, Gordon Johnston and William Nelson stepped off the measurements for this lot. Unknown to Mrs. Nelson through the years, there is no deed in existence conveying the 50' lot to the Nelsons. Of relevance is a deed dated December 2nd, 1971 from Archibald Baird to Donald and Verna Yorke conveying lands to the west of the original Johnston and Nelson lots extending

northward from Caribou Island Road along their western boundaries a distance of 250'. This measurement would encompass the western line of the original Nelson lot as well as the western boundary of the 50' lot they believed they purchased. The logical inference is that Archibald Baird considered the 50' lot to be the property of William Nelson.

[15] Believing they owned the disputed lot, the Nelsons constructed a cottage. Gordon Johnston and two of his sons assisted in the building process. The cottage was built on the first lot purchased by the Nelsons. Referring to photographs over the years and the Wadden survey, Mrs. Nelson testified they occupied and used the 50' lot as part of their property over the years by mowing the grass, parking vehicles, and utilizing the horseshoe pit. Around 1974-1975, the Nelsons created and maintained a garden on the northwestern portion of the lot. The garden existed until 1999. Mrs. Nelson planted bushes on the northeast corner area of the lot. There was never any objection over the years to their use and occupation of the 50' lot.

[16] Over the years the Johnstons acquired other parcels of land from Mr. Baird. By deed date December 2nd, 1971 Ina Johnston acquired a beach front lot from Baird, a portion of which is contiguous to the north of the Nelson property. Eventually, through surveys in the 1990's it would be determined that this lot

encompasses the 50’ lot. Over the years the Johnstons acquired other lots of lands to the south and east of the Nelson lot.

[17] Mrs. Nelson acknowledged that Mr. and Mrs. Johnston would regularly enter their property including the 50’ lot, as neighbours and close friends over the years. Both Mr. Johnston and Mr. Nelson died in 1987.

[18] In 1991 the plaintiffs acquired title to the original Nelson lot by way of deed from Margaret Nelson, mother of Wendy Roode. The deed of conveyance did not include the 50’ lot. Mrs. Nelson testified she assumed the deed would have included this lot purchased from Mr. Baird.

[19] Mrs. Roode testified they continued to occupy and utilize the 50’ lot in the same manner as her parents did when she was a child staying at the cottage in the summers over the years. The last year for the garden was 2006. The Roode’s built a permanent home on the original cottage lot in 2007. During the process of excavation and building, they placed gravel on the 50’ lot and planted shrubs. In 2011, the plaintiffs placed large rocks on a portion of their gravel way to stop persons visiting the defendant’s neighbouring cottage from driving on the area. Mrs. Roode assumed they acquired the 50’ lot as part of their deed when acquired the property from her mother.

[20] The defendant Glenn Johnston was conveyed the remaining Johnston lots by deeds in the years 1989 – 1992. In 1996 the defendants conducted a survey of their lands for the purposes of consolidation. This survey revealed the 50' lot formed part of the defendant's lands. Mrs. Roode testified the survey was conducted while they were not on Caribou Island and she was not contacted by the defendants following the survey.

[21] A 1999 survey conducted on behalf of the plaintiffs confirmed the 50' lot to form part of the defendant's lands. In 2007 Mr. and Mrs. Roode migrated their land for mortgage purposes. The migration did not include the disputed lot.

[22] Following migration of the defendant's property in 2012, the plaintiffs received a letter from the defendants legal counsel objecting to their crossing of the defendant's lands to access the beach. As well, they were directed to remove the gravel and trees planted on the 50' lot. The letter contained a notice pursuant to section 74(2) of the *Land Registration Act* advising the plaintiff's of the 10 year time limit to assert their claim based upon use or occupation. This letter and notice resulted in the action commenced by the plaintiffs.

[23] Mrs. Roode testified that prior to the events resulting in this action there was never any objection to the Nelson/Roode families use and occupation of the 50' lot.

[24] The defendant Glenn Johnston acknowledged that his parents Gordon and Ina Johnston were close friends with William and Margaret Nelson and that his father encouraged Mr. Nelson to buy land from Archibald Baird. Both families utilized their cottages during the summer seasons over the years. Glenn Johnston eventually acquired all of the remaining lots required by his mother and father over the years.

[25] One of the lots acquired by his parents in 1971 encompassed the 50' lot. A cottage was built on a portion of the lot to the east of the Nelson property. The defendants began using that cottage in the summers beginning around 1985. They also rented out the cottage for a few summers.

[26] Glenn Johnston acknowledged there were no boundary markers on lots in the area prior to the 1996 survey. His purpose in conducting the survey was to sell lots. Mr. Johnston did not approach the plaintiffs following the survey.

[27] Mr. Johnston's evidence regarding the Nelson and Roode's use or lack of use of the 50' lot was often unclear or contradictory and, therefore, unreliable as was any evidence of usage on his behalf. Mr. Johnston was unaware the 50' lot was part of his deed until the 1996 survey.

[28] The defendants objected to Mrs. Nelson's evidence regarding the conversation to buy the 50' lot between Mr. Nelson and Archibald Baird on the basis of double hearsay. This evidence is relevant to the Nelson's mistaken belief in ownership of the lot. The evidence would meet the test of necessity and relevance. In any event, considering the circumstances surrounding the statement, I find there is sufficient reliable corroborative evidence for admissibility.

[29] The defendants further contend that the Nelson's possession of the 50' lot was interrupted every time Gordon and Ina Johnston entered the lot as cottagers. That they would be in possession of the lot each time. The defendants rely on *Spicer v. Bowater Mersey Paper Co*., [2004] N.S.J. 104 NSCA. However, as stated, in this case context must drive the exclusivity analysis.

[30] In cases of mutual mistake the court can draw an inference that a claimant intended to exclude everyone including the true owners , see *Gould*, supra.

[31] Based upon the evidence I am satisfied the Nelson's believed they were the true owners of the 50' lot since 1967. Further, that the true owners of the land mistakenly believed that the Nelsons and their successors, the plaintiffs, owned the 50' lot, only to discover otherwise from the 1996 survey. Under these circumstances the true owner's entry would have been by permission either by

express or implied. The facts in this case are distinguishable from the facts in *Bowater* where there was no mistake in ownership.

[32] I find that, in the context of this case, entry with permission of the occupier would not restart the adverse possession period. In *Henneberry v. Compton* 2014 NSSC 298 adverse possession was found to a driveway where the respondents had used it by permission.

[33] Keeping in mind that the requirements for adverse possession are less rigidly applied where the claimants believe they owned the property, I am satisfied that the acts of possession by the Nelsons, including mowing grass, parking vehicles, utilizing a horseshoe pit, planting bushes and creating and maintaining the garden (since 1975) are consistent with the acts of an owner in possession of a seasonal resident. The Nelson's adverse occupation and use continued from 1967 until Mrs. Nelson's daughter, the plaintiff and her spouse Leo Roode took possession of the 50' lot in 1999, a period well in excess of 20 years. The plaintiffs continued their adverse possession until these proceedings.

[34] The defendants submit that the plaintiffs cannot rely on their predecessor's possession as the plaintiff's never received the 50' strip in their deed from Mrs. Nelson.

[35] Given that adverse possession for a 20 year period extinguishes a true owner's title, there can be no ground on which to challenge the plaintiff's title. The failure to include the 50' lot in the deed to the plaintiff's and the parcel registrar is not determinative. It does not revive the title lost by the defendants when the limitation period expired where the plaintiffs moved to claim adverse possession within 10 years of the registration of the defendant's parcel pursuant to section 74(2) of the *Land Registration Act*.

[36] In this case the adverse possession was complete before the plaintiff's registration through predecessors in title. As stated in Anger and Honsberger, at 29:60:80.

> … the possession of the trespasser and those thus claiming through them constitutes one continuous possession for the purpose of making up the statutory period. A person who succeeds the trespasser in possession has a good a right as if the occupied the whole period.

[37] As a result, the defendants rights, title and interest in the 50' lot have been extinguished.

Prescriptive Easements

[38] An easement by prescription has several factors in common with possessory title. However, the adverse use of an easement does not result in dispossession or extinguishment of the true owner's title to the property. The usage must be open,

continuous and unobstructed, without permission of the owners from time to time. As with adverse possession, use may be by successive occupiers.

[39] Prescription in case of easements, are dealt with in sections 32, 33 and 34 of the *Real Property Limitations Act*, S.N.S. 2014 c. 35 (formerly the *Limitations of Action Act*).

[40] Section 32 establishes two periods of adverse use, 20 and 25 years. After 20 years use the easement may not be defeated by proving that it had first existed at anytime prior to the 20 year period. After 25 years use the easement is deemed to be absolute and indefeasible and cannot be defeated by abandonment, non-use or interruption.

[41] Pursuant to section 34 the relevant period of use must immediately proceed the bringing of the action. Section 33 states that the 20 year period of use must be without interruption.

[42] The usage does not have to be exclusive but must be "as of right" and not pursuant to any express or implied permission from the owner of the adjacent land.

[43] The other method for establishing an easement based on usage, is by the application of the Doctrine of Lost Modern Grant. This doctrine presumes that if actual enjoyment has been shown for 20 years, an actual grant had been made

when the enjoyment began but the deed granting the easement has been lost. The presumption is rebuttable.

[44] The time of usage to establish prescription on lost modern grant is counted from the outset of the use, whereas the time of usage under the *Act* is counted backwards from the time the action has commenced under the *Act.* The requirement for establishing an easement under both methods are the same. *Mason v. Partridge*, 2005 NSCA 144.

[45] The right of way to the beach in issue extends from the original Nelson lot to the shore of the Northumberland Strait as shown on the Wadden plan of survey.

[46] Over the years the Bairds conveyed in excess of 50 lots on Caribou Island. As the area was cottage country, most conveyances granted access to the beach. The conveyance of the Nelson lot did not provide for a right of way to the beach, Whereas the lots surrounding the Nelson property did.

[47] The Nelsons, their children and surrounding families all used a pathway to the beach (original pathway) extending from the Nelson lot. This usage continued in the context of seasonal cottage owners from the time the Nelsons built their cottage in 1967 until the conveyance to their daughter, the plaintiff Wendy Roode, in 1991. The plaintiffs continued to use the original pathway until around 2006

when a “portion” of the original pathway was straightened and widened in order to allow the trucking of boulders to the beach to support the bank. This pathway referred to as “King Freight Lines Path” (named after the trucking company that hauled the rock) was then used by the plaintiff (and others) until 2012 when the plaintiffs received a notice from the defendant’s lawyer, resulting in this actions.

[48] The Nelsons and the plaintiffs never sought permission from the Bairds, Johnstons or defendants to use the pathways to the beach nor did the defendants or their predecessors ever inhibit access through the years.

[49] The defendants accessed the beach from behind their own cottage which was adjacent to the east of the plaintiff’s property and the pathway used by the plaintiffs and others.

[50] The defendants acknowledge the plaintiff’s claim of usage from the late 1960’s. However, in 2006 as a result of the bank getting higher, the defendant’s rock work caused a portion of the original path to be relocated. The defendant’s submit this partial relocation of the path caused the clock to start running again in terms of calculating years of usage. The period of usage from 2006 – 2012 is only six years.

[51] The defendants did not provide authority that changing of a portion of an existing right of way interrupts or extinguishes the users existing right.

[52] The straightening of the path did not constitute an obstruction that was adverse to the plaintiffs. The intention in carrying out the rockwork was to protect the beach and not to interfere with the plaintiff's usage. The plaintiffs continued to use the altered path following the construction work.

[53] In this case the evidence supports a finding that there was continuous, open and unobstructed use of the original pathway as altered from 1967 to 2012 by the plaintiffs and predecessors. No permission was ever requested nor is there any evidence of permission expressed or implied. The usage was with the knowledge of Archibald Baird, Gordon Johnston and the defendants as owners from time to time of the adjacent lands. The inference to be drawn is that there was acquiescence on the part of the owners at the time.

[54] As a result, I find the plaintiffs have established an easement in the form of a right of way from their lands over the pathway to the beach of the Northumberland Strait, as shown on the Wadden plan of survey.

[55] The plaintiff's counsel shall prepare an order for approval as to form.

[56] The plaintiffs are entitled to costs. I will accept written submissions on costs within 30 days in the event the parties are unable to agree.

Scaravelli, J.