

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Swaine v. Hackney, 2010 NSSM 83

BETWEEN:

REDNAEL SWAINE and ELIZABETH SWAINE

CLAIMANTS

- and -

JUDITH ANN HACKNEY

DEFENDANT

DECISION ON JURISDICTIONAL ISSUE

DATE OF DECISION: December 17, 2010

PLACE OF HEARING: Written submissions only

HEARD BEFORE: Patrick L. Casey, Q.C.
Small Claims Court Adjudicator

COUNSEL: Donald L. Pressé, on behalf of the Claimants
James D. MacNeil, on behalf of the Defendant

BACKGROUND

- (1) Rednael Swaine and Elizabeth Swaine claim the sum of \$25,000.00 special damages plus general damages of \$100.00 and costs against the Defendant, Judith Ann Hackney.
- (2) The Claimants and the Defendant are the owners of neighbouring properties on Boutilliers Point Road in Boutilliers Point, Nova Scotia. The Defendant has a ten foot (10') right of way over the Claimants' property. The Claimant alleges that the and that the Defendant cut down a number of trees without the Claimants' permission and that those trees were on the property of the Claimants and as a result they have suffered damages.
- (3) The Defendant has not filed a Defence to the Notice of Claim.
- (4) The matter was set down for hearing in the Small Claims Court of Nova Scotia on October 5, 2010, however, both parties, through their counsel, have placed a jurisdictional issue before the Court. They have, by consent, made written submissions on the jurisdictional issue and neither has elected to call evidence and they wish to rely solely on the written submissions.
- (5) The position of the Defendant is that the Small Claims Court of Nova Scotia does not have jurisdiction to hear the claim. If the Claimants are successful on the jurisdictional issue the matter will proceed to a full hearing in the Small Claims Court of Nova Scotia.

SUBMISSIONS ON BEHALF OF THE PARTIES

- (6) The purpose of the right of way is for the Defendant or subsequent owners of the Defendant's property to gain access to St. Margaret's Bay. Further it provides them with the right to construct a boat house on the Claimants' property, near the shore of St. Margaret's Bay. The right of way was created by a Grant of Easement in 2005, registered on title.
- (7) The Defendant admits that she did cut down trees and remove other debris from the right of way in order to gain access to St. Margaret's Bay.
- (8) The Defendant's position is that she had the right to remove the trees and other debris since they limited her access to the shore, that, in essence, she had certain rights as the owner of the right of way to clear off the right of way as necessary to exercise ownership of it and have the use of it. Her position is that these rights are ancillary to her ownership of the right of way.
- (9) The Defendant takes the position therefore that the Court that decides this issue must necessarily decide what rights, if any, are ancillary to the right of way in order to determine whether the Defendant is liable to the Claimant, and further, that since the Court must decide what rights are ancillary to the use or enjoyment of this particular right of way, that this goes beyond the jurisdictional authority of the Small Claims Court.
- (10) The Claimants take the position that even if this Court is required to decide the issue of what rights may or may not be ancillary to the right of way, the Small Claims Court of Nova Scotia has jurisdiction to decide this.

THE LAW

- (11) The Small Claims Court of Nova Scotia is a creature of statute. The jurisdiction of the Court is limited to that which the legislature has seen fit to give to it.
- (12) The *Small Claims Court Act*, R.S.N.S. 1989, c.430, sets out the jurisdiction of the Court in Section 9 and it includes adjudicating upon a monetary claim “in respect of a matter or thing arising under a contract or tort” within the monetary jurisdiction of the Court (which is \$25,000.00 inclusive of general damages but exclusive of interest) in addition to the other matters within the Court’s jurisdiction as outlined in Section 9. Section 10 specifically precludes persons from making a claim in the Small Claims Court of Nova Scotia “for the recovery of land or an estate or interest therein”.
- (13) If the claim in this case, therefore, includes a claim for the recovery of land or an estate or interest in land, then it is beyond the jurisdiction of the Small Claims Court of Nova Scotia.

DECISION ON THE JURISDICTIONAL ISSUE

- (14) Counsel have provided various cases for consideration which I have had the opportunity to review.
- (15) In *MacKay v. Dauphinee*, 2008 CarswellNS 312, The Honourable Justice A.J. LeBlanc of the Nova Scotia Supreme Court dealt with the issue of whether an Adjudicator of the Small Claims Court of Nova Scotia erred by dismissing an Application for an Order under the *Sale of Land Under Execution Act* granting leave to sell land. Justice LeBlanc held in that case that an Execution Order, the purpose of which was to enforce payment of a Judgment and which resulted in the sale of real property, should not be considered a claim for the recovery of land or an interest in land. The Appeal was allowed and it was found that the Small Claims Court did in fact have jurisdiction to issue such an Order.
- (16) Justice LeBlanc stated as follows at paragraph 20 of his Decision:

“It is important to understand what the legislature intended by the phrase “the recovery of land or an estate or interest therein” in Section 10(a) of the *Small Claims Court Act*. Clearly s. 10(a) restricts the Court from involving itself for the recovery of possession of real property or to have the Court involve itself in any application for partition of land or to adjudicate upon claims of possession or rights of way. Furthermore, I acknowledge that the Court should not preside over a claim of constructive trust or resulting trust, insofar as they affect the recovery of land. Nor should it involve itself in adjudicating any claim by any person under the *Matrimonial Property Act*.” (emphasis added)
- (17) In that case Justice LeBlanc held that the granting of a Certificate of Judgment pursuant to the *Sale of Lands Under Execution Act* did not create an interest in land, since the essence of that legislation was to enforce payment of a Judgment which had already been granted.
- (18) In *Emin v. Gilliatt* (1976) 22 N.S.R. (2d) 595, the Nova Scotia Supreme Court Trial Division was asked to interpret the terms of a right of way. The Court held as follows:

“The responsibility of the Trial Court in cases of this sort is to determine what reasonable interpretation should be placed upon the wording of this right of way so that the Plaintiff is entitled to the right which attaches to his land, and the Defendant

is not subjected to any undue hardship as a result of the use by the Plaintiff over that area”.

- (19) This case does not specifically comment upon the jurisdiction of the Small Claims Court, but does confirm that the Supreme Court has jurisdiction to interpret a right of way.
- (20) In *VanAmburg v. Halifax Condominium Corp No. 267* (2007) N.S.J. No. 256, Adjudicator J. S. Barnett of the Nova Scotia Small Claims Court dealt with the issue of whether Section 10(a) of the *Small Claims Court Act* excluded the jurisdiction of the Small Claims Court in a case where the Claimant, an owner of a condominium unit, was seeking exclusive rights of possession of part of the common elements of the condominium, namely, a parking space. Adjudicator Barnett decided that the Small Claims Court did not have jurisdiction since the determination of whether or not the Claimant was entitled to exclusive possession of a parking space was in essence a claim for the recovery of land or an interest in land.
- (21) Both parties also cited the case of *Marier v. Lalonde* (2007) N.S.J. No. 571, which involved a dispute between neighbouring land owners, however, in that case there was no issue raised concerning the jurisdiction of the Court under Section 10(a) and it involved issues of contractual interpretation.
- (22) In *Harrison v. Corbett* (2006) N.S.J. No. 333, Adjudicator W. A. Richardson of the Small Claims Court of Nova Scotia dealt with the issue of whether the right of way as described to the purchaser of a property was the same as what was contained in the Property Condition Disclosure Statement and whether the purchaser was entitled to terminate the Contract of Purchase and Sale. Adjudicator Richardson held that the purchaser was not entitled to void the transaction and was liable to the vendor. The case was essentially one of contract interpretation, however, and the issue of whether Section 10(a) applied was not before the Court.
- (23) There are many cases in which this Court has been asked to interpret contractual provisions such as, for example, in an Agreement of Purchase of Sale, which may touch upon matters relating to the ownership of real estate including rights of way. These are essentially contractual issues and within the jurisdiction of the Court.
- (24) However, even though the Small Claims Court of Nova Scotia has jurisdiction involving any issue up to its monetary limits if it is a claim involving a contract or tort, if the claim involves determination of an issue concerning recovery of land or an interest in land then it is beyond the jurisdiction of the Court although framed in contract or in tort.
- (25) In other words, if in order to resolve the contract or tort issue the Court is asked to determine an issue involving the recovery of land or an interest in land then the claim is beyond the jurisdiction of this Court.
- (26) In his lengthy reasons in the *VanAmburg v. Halifax Condominium Corp No. 267* case, Adjudicator Barnett states the following:

“51. Reference can also be made to the decision of Chief Justice MacKeigan for a five member panel of the Nova Scotia Supreme Court Appeal Division in *Nova Scotia (Attorney General) v. Gillis*, [1980] N.S.J. No. 401 (S.C.A.D.) in which he stated at para. 19:

Here there is not the slightest doubt that the Supreme Court has since the founding of the colony enjoyed and exercised power to determine title as between subject and subject and as between subject and the Crown. Clothed in what are to us the mysteries of ancient forms of actions and rules of real property law, actions of possession, trespass and ejectment and suits in equity for injunctions or declaration were available for adjudication of most title disputes. The Revised Statutes of 1864 provide procedural and substantive support for such proceedings: for example, c. 134, "Of Pleading and Practice" esp. ss. 139-173 re ejectment; c. 124 "Of Proceedings in Equity"; c. 154, "Of Limitations", etc.

52. Chief Justice MacKeigan continued at para. 21 as follows:

The old writs and remedies are still available although in new dress and form, and were supplemented in 1961 by the *Quieting Titles Act, supra*. They are indeed still available for Supreme and County Court determinations of title to "ungranted Crown lands," as they were in the pre-Confederation cases cited above."

(27) This passage places some historical context upon the limits to the jurisdiction of the Small Claims Court of Nova Scotia as set out in paragraph 10(a) of the Act.

(28) A right of way is an easement over another person's property and can be created by contract, by statute or by usage.

(29) An owner of a right of way is the owner of an interest in land. A "right of way" is defined in *Black's Law Dictionary* as follows:

"The right of passage or of way is a servitude imposed by law or by convention, and by virtue of which one has the right to pass on foot, or horseback, or in a vehicle, to drive beasts of burden or carts, through the estate of another. When this servitude results from the law, the exercise of it is confined to the wants of the person who has it. When it is a result of a contract, its extent and the mode of using it is regulated by the contract."

(30) The New Brunswick Court of Appeal in *Gormley v. Hoyt* (1982) 43 N.B.R. (2d) 75, found that the following principles apply when considering the rights of the owner of a right of way and the rights of the servient tenement:

"The owner of right-of-way, in the absence of agreement with the owner (of the land) over which it passes, has the burden of maintaining the right-of-way including the right to enter upon for the purpose of making it effective."

And further as follows:

"...the owner of the freehold over which the right-of-way passes has no right to remove rock, gravel or other material, even though he himself owns the material, if the removal has the effect of making the roadway less convenient for those

enjoying the right-of-way, likewise he has no right to obstruct reasonable access to persons having such right-of-way.” (Emphasis added)

- (31) The British Columbia Court of Appeal in *Kasch v. Goyan* (1993) 32 R.P.R. (2d) 297, held that an easement allowing access to the seashore includes the right to construct a walkway.
- (32) *Jones v. Prichard* (1908) 1 C.H. 630, stands for the proposition that there are certain ancillary rights associated with the grant of an easement which may be implied from the nature of the easement and other circumstances.
- (33) In the *Nova Scotia Real Property Practice Manual* at page 13-134, the law is summarized as follows:

“The express grant of an easement is also the grant of such ancillary (sic) rights as are reasonably necessary for its exercise and enjoyment. An ancillary (sic) right must be necessary for use and enjoyment of the easement, not merely convenient, or usual in the district. Thus, the grantee of an easement for a watercourse through his neighbour’s land may, when reasonably necessary, enter upon his neighbour’s land for the purpose of repairing and maintaining such watercourse.”
- (34) In *MacKenzie v. Matthews* (1999) 28 R.P.R. (3d) 1, the Ontario Court of Appeal held that as part of the rights ancillary to a right of way running from a road to the lakeshore the owner of the right of way had the right to install a dock and park cars on the right of way.
- (35) The Honourable Justice Suzanne Hood of the Nova Scotia Supreme Court in *Carter v. Milford* (2010) N.S.J. No. 327, held as follows:

“I conclude it is a substantial interference with her rights to have the trees planted on the road access which limits her ability to access her property. It is now not as convenient to access her property by motor vehicle or on foot or otherwise because of the location of the trees.”
- (36) These cases where rights ancillary to a particular right of way are being considered and interpreted deal with the common-law property rights of either or both of the dominant or servient tenements.
- (37) I now turn to the Defendant’s position in this case. The Defendant says that as a right incidental to their ownership of the right of way they can enter upon the right of way and cut trees and remove debris so that they can enjoy the use of the right of way. Does this mean that the Court will be asked to decide an issue involving the recovery of an interest in land? The Court is not being asked to decide whether the Defendant owns the right of way, nor whether the trees and debris that were removed were on the right of way. Those matters are not in dispute. The issue is whether the Defendant had the right to remove the trees and debris as part of its rights incidental to the right of way.
- (38) In order to resolve this issue the Court will be required to interpret the document granting the right of way to the Defendant and also to consider the rights of the Defendant at common law or otherwise pursuant to the right of way. As stated in the rebuttal submissions on behalf of the Defendant “adjudication of this claim will require this Court to determine the “rights *in rem*” of the parties in this right of way. This is what is excluded by Section 10(a).” I agree with this submission. This Court has jurisdiction to resolve issues within its jurisdiction between parties but does not have

jurisdiction to resolve property issues which may affect not only the current owners but also future owners of the property interest in question.

- (39) It may be that the Defendant does not have any such rights by contact at common law or otherwise and it may be therefore that the Claimants will be successful, however, that is not the issue before me. The issue is one of jurisdiction. Since this Court would be asked to decide an issue involving a determination of the extent of the property rights of the parties in this case, this is a matter that is beyond the jurisdiction of this Court.
- (40) I will add one final comment and that is that when considering the term “recovery” in Section 10(a) of the *Small Claims Court Act*, I note that the term is used in different contexts legally. It is not limited to “recovery” of a debt, although this is the most common context in which it is used, however, the term applies to obtaining a right of property and it is the use of the term in this broader context that has been considered in this case.

Dated at Dartmouth, Nova Scotia,
on December 17, 2010.

Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimants
Copy	Defendant