NOVA SCOTIA COURT OF APPEAL
Citation: *Gallagher v. Gallagher*, 2016 NSCA 2

Date: 20160126
Docket: CA 438701
Registry: Halifax

Between:

James Curtis Gallagher

Appellant

v.

David Raymond Gallagher and
Evelyn Shirley Gallagher

Respondents

Judges:	MacDonald, C.J.N.S.; Farrar and Bourgeois, JJ.A.
Appeal Heard:	December 8, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of MacDonald, C.J.N.S.; Farrar and Bourgeois, JJ.A. concurring
Counsel:	Douglas B. Shatford, Q.C. and Catherine M. Hirbour, for the appellant
	Jeremy Smith and Alison Morgan, for the respondents

Reasons for judgment:

[1] A disagreement between two brothers over a narrow strip of land in Mapleton, Cumberland County has made its way to this Court.

BACKGROUND

[2] The dispute involves the proper boundary line between James Gallagher's blueberry field and his brother David's and sister-in-law Evelyn's adjoining maple sugar woods. Each sibling hired a surveyor whose lines marginally overlapped, resulting in a narrow swath of disputed land.

[3] James' surveyor, Thomas Giovannetti, opined that a firebreak, bulldozed back in the 1960's to protect the maple stand, represented the dividing line.

[4] David and Evelyn's surveyor, Walter Rayworth rejected that theory. Instead he found historic blazes on the ground, supporting a line that would place the firebreak (and an additional narrow strip) entirely on David and Evelyn's land.

[5] Justice E. Van den Eynden of the Supreme Court (as she then was) rejected the firebreak theory, accepting instead David and Evelyn's proposed line. She also rejected James' alternate adverse possession claim.

[6] Citing several alleged errors, James now asks this Court to overturn that ruling.

[7] For the reasons that follow, I would dismiss the appeal. Simply put, I would defer to the judge's factual findings (supported by the evidence) and her correct application of the law to those facts.

ISSUES AND STANDARD OF REVIEW

[8] In his factum, James identifies the following issues:

> ISSUE 1
>
> Did the Learned Trial Judge err in law by failing to apply the relevant principles to determine a boundary line to the evidence and facts as she found them?
>
> a) Did the Learned Trial Judge err in law by failing to apply the relevant principles of a common boundary to the evidence and facts as she found them?

i. Did the Learned Trial Judge err in law by misapprehending the evidence as presented at trial and reaching incorrect conclusions or incorrect inferences when she found that the failure to refer to the firebreak in the 1974 Deed was determinative that the parties did not recognize the firebreak as a boundary?

ii. Did the Learned Trial Judge err in law by erroneously rejecting the evidence of one of the surveyors?

b) Did the Learned Trial Judge err in law by failing to apply the relevant principles of the conventional line to the evidence and facts as she found them?

c) Did the Learned Trial Judge err in law by failing to consider the relevant principles of estoppel?

ISSUE 2

Did the Learned Trial Judge err in law by failing to apply the relevant principles of the effect of the use and occupation of land to the evidence and facts as she found them?

a) Did the Learned Trial Judge err in law by failing to consider the use and occupation of the Blueberry Lands by James Gallagher and his predecessors in title to the evidence and facts as she found them?

[9] To the extent that these issues might involve stand-alone legal questions, we would apply a correctness standard, meaning that our view of the law would prevail. On the other hand, we would defer to the judge's factual findings and inferences drawn from those facts, given her advantage of viewing this evidence first-hand. As such, we would interfere only in the face of palpable overriding error. Often, factual issues are blended with legal issues. In such circumstances, the same deferential standard will apply. For each of these propositions, see *Housen v. Nikolaisen*, 2002 SCC 33 and the now hundreds of decisions that have followed it.

[10] Now to the appellant's alleged errors.

ANALYSIS

1(a)(i) – Did the Learned Trial Judge err in law by misapprehending the evidence as presented at trial and reaching incorrect conclusions or incorrect inferences when she found that the failure to refer to the firebreak in the 1974 Deed was determinative that the parties did not recognize the firebreak as a boundary?

[11] Both properties were once part of a larger 200 acre tract owned by one W.J. Brown. It was comprised of approximately 150 acres of blueberry fields and 50 acres of sugar woods.

[12] Back in 1952 Mr. Brown agreed to sell the blueberry fields to James and David's father, Mr. Curtis Gallagher. Curtis would take immediate possession and pay for the land over time. This culminated in Curtis receiving his deed in 1974.

[13] Mr. Brown (through his company) retained the sugar woods until 1991, when David and Evelyn purchased them.

[14] It would appear that David and Evelyn were also interested in eventually acquiring the blueberry fields. But that was not to be. Instead, in 2000, Curtis added his wife Mabel to the deed, and in 2002 they were conveyed to James. By this time, Curtis had not been well and Mabel signed the deed on his behalf pursuant to a power of attorney.

[15] As the judge observed, this turn of events triggered the rift between the brothers and the ensuing boundary line dispute:

> [6] David Gallagher wanted to purchase the blueberry lands from his parents; however, in 2002 the bulk of the lands were conveyed to James Gallagher. About two years prior to this, Mr. Gallagher conveyed his land to himself and his wife as joint tenants and also executed a power of attorney appointing his wife, Mrs. Gallagher. At the time of the conveyance of land to James, Mr. Gallagher was not well and Mrs. Gallagher executed the deed in her own capacity and as power of attorney for Mr. Gallagher.
>
> [7] This appears to have created a long standing and deep fracture in the relationship between David and James and between David and his mother. In 2012 David Gallagher retained a surveyor to determine the location of the boundary between the sugar woods land and the blueberry lands. James subsequently retained a surveyor. Each surveyor established a different boundary line.
>
> [8] The description in the deed is not determinative of the boundaries. There are no earlier survey plans available to assist. The establishment of a firebreak (intended to mitigate the risk of fire spreading to the sugar woods when blueberry bushes were burned) is central to the dispute.
>
> [9] James Gallagher asserts the firebreak is key to establishing the common boundary line. David and Evelyn Gallagher assert it is nothing more than a firebreak with a limited and intended purpose and the fire break was placed entirely on property to which they hold title. They also assert there is insufficient

> evidence to establish ownership by James Gallagher through adverse possession. Mrs. Gallagher supports James' position.

[16] James' entire case rested on one fundamental assertion – a common agreement between the parties and their respective heirs that the firewall represented the boundary line. The judge, therefore, found it curious that Curtis' 1974 deed made no such reference:

> [22] In the 1974 deed from Mr. Brown to Mr. Gallagher it uses the same boundary description as the agreement of purchase and sale. If Mr. Brown and Mr. Gallagher had, between 1952 and 1974, agreed that the bulldozer swath would be treated as a binding and definitive common boundary line (which line would need to be notionally extended to the end of the adjoining lands) one would expect that to be reflected in the deed. If that was their agreement and intention those terms are not reflected in the deed. Nor, as noted, are they captured anywhere in writing.

[17] James takes issue with this inference, asserting that it is too speculative. He explains in his factum:

> 36. With respect, the Appellant submits that this is speculative and that the Learned Trial Judge committed an error in drawing an incorrect inference from the lack of reference to the firebreak/bulldozer swath in the 1974 Deed. The absence of an amended description within the 1974 Deed does not support such an inference. There may be a number of reasons for which Curtis Gallagher and William Brown would not have amended the description.

[18] After all, adds James, would not a similar inference apply to the power pole that David and Evelyn were purportedly relying on to make their case:

> 37. It is also noteworthy that the point or monument on the Mountain Road that identified the boundary point is a blazed tree. David Gallagher asserted that the boundary line ended at a power pole. However, this power pole was not mentioned in the 1974 Deed description, nor was it mentioned in the 1991 Deed description when David Gallagher acquired title to the Sugar Woods from the Brown family. David Gallagher asserted that his father told him that the line ran over to the power pole (Trial Decision, Appeal Book, Volume 1, Tab 3, at page 12 paragraph 34).
>
> 38. Prior to his purchase of the Sugar Woods in 1991, David Gallagher must have known that the power pole was the boundary line point for the property. This begs the question: If David Gallagher knew with certainty that the power pole was a clear indicator of the boundary line, why leave it out of the 1991 Deed?

> 39. The Learned Trial Judge took notice that no mention was made of the firebreak/bulldozer swath in the 1974 and 1991 Deed descriptions. The Trial Judge's argument was that failure to refer to the bulldozer swath/firebreak demonstrated that the parties had no intention of making that the boundary. It is respectfully submitted that the failure to mention the power pole in the 1974 and 1991 Deeds should be found to be indicative that it was not the parties' intention that it should be the end boundary point.

[19] Respectfully, this ground of appeal has no merit for three reasons. Firstly, it was perfectly appropriate for the judge to draw this inference. The 1974 deed was drafted just a few years after the firewall was created. If it represented the boundary line, one would expect to see it referenced to the deed. This is a far cry from the palpable and overriding error James must establish to successfully challenge this finding.

[20] Secondly, I am not persuaded by the telephone pole comparison. David and Evelyn at no time represented this to be a boundary line monument that one might see referenced in a deed description. They simply told their surveyor that they believed the boundary line to be in the vicinity of this pole. According to Mr. Walter Rayworth, in his affidavit of October 23, 2013, they were right:

> 29. Upon our arrival there, I checked where the trial line would hit the Lynn Road (By RTK) and found that this line was one metre from the power pole originally pointed out to me earlier that day by David Gallagher.

[21] Thirdly, this finding, even if it could be challenged, had a limited effect on the outcome. Instead it represented only one of five reasons why the judge favoured David and Evelyn's proposed line:

> [34] I prefer and accept the evidence of David Gallagher for the following reasons:
>
> > 1. I accept the argument advanced on behalf of David and Evelyn Gallagher that a fire break has a limited and intended purpose. It is to protect against the spread of fire; not to delineate against ownership or to keep people out; such as a fence.
> >
> > 2. The firebreak is no more than a bulldozer swath to protect against fire; something that would make abundant sense for Mr. Brown to do. Since taking possession of the property in 1952, Mr. Gallagher was ramping up the cultivation of wild blueberries; particularly, with more effort in the 1960's. Mr. Brown had retained lands which included the sugar woods and he needed to take protective steps. If Mr. Gallagher did share in the costs; it would not be significant and in any event sharing in

> the cost to hire a bulldozer operator to edge a swath in the ground does not in and of itself conclude a definitive boundary line.
>
> 3. The 1974 deed did not mention the firebreak as a boundary line. If this was the agreement between the two owners at the time; one would expect that to be reflected in the deed. They choose not to do so.
>
> 4. David Gallagher's evidence that his late father told him the boundary line between the two properties started near a power pole across the road from their home and ran north-easterly was independently corroborated and born out to be accurate by the survey conducted by Mr. Rayworth.
>
> 5. In my view, the evidence of David and Evelyn Gallagher is generally consistent with the opinion of surveyor Rayworth; which opinion I prefer and accept for reasons I will articulate.

[22] For all these reasons, I would dismiss this ground of appeal.

1(a)(ii) – Did the Learned Trial Judge err in law by erroneously rejecting the evidence of one of the surveyors?

[23] The judge was clearly unimpressed with Mr. Giovannetti:

> [35] Mr. Giovannetti was retained by James Gallagher to provide an opinion on the common boundary line. He was retained after Mr. Rayworth marked his survey line of the common boundary.
>
> [36] Mr. Giovannetti's expert reports go beyond critiquing Mr. Rayworth's expert reports. Without mincing words he alleges Mr. Rayworth:
>
> - Ignored blaze evidence;
> - Used suspect blaze evidence;
> - Ignored occupation evidence and the significance of the fire break;
> - Relied on inferior evidence including the evidence provided by his client and thereby acted in a partial manner;
> - He acted in a manner *"contrary to the responsibilities of the surveyor in regards to his or her duty to the public and the Court as a Professional Surveyor"*. That is a direct quote from page 19 on his November 20, 2013 report. On page 12 of his May 23, 2013 report he also asserts professional rule breaches by Mr. Rayworth; and
> - In his final supplemental report of February 24, 2014 he accused Mr. Rayworth of *"gross error"*. On page 3 he goes on again to repeat, unequivocally, his opinion regarding failures of Mr. Rayworth and indicates it is hard to understand how a seasoned surveyor could have

made these mistakes. In his affidavit evidence he also states the Rayworth proposed boundary line misrepresented the evidence.

[37] I reject these assertions of wrongdoing entirely. In my view, Mr. Giovannetti's assertions are unwarranted, unfair and border on an inappropriate personal attack.

[38] Based on the evidence, I have serious concerns with Mr. Giovannetti's opinion. For the following reasons I reject his opinion that his proposed "best fit line" is the common boundary:

1. Mr. Giovannetti characterized blaze 15 as not representative of an old blazed tree. He referred to the marks on the tree as blemishes or scars brought about by the fence wire on the tree rubbing, or perhaps a downed limb scrapped, or bruised, the tree. If blaze 15 was not dismissed; it would be problematic for his proposed "best fit" line. Mr. Rayworth's evidence and the photos establish the markings are well above the wire fence. I reject Mr. Giovannetti's dismissive explanation and find these to be blazes placed for the purpose of marking the boundary line in question;

2. The proposed "best fit line" has to go through some superimposed constructs to make it work; including the use of a transition line;

3. Elevating the use of a bulldozer blade swath or fire break to that of a fence, is a stretch in these circumstances;

4. I find Mr. Giovannetti was not impartial. He entered the fray of advocacy. Under cross examination he acknowledged that in his email communications with counsel for James Gallagher he used language of bullying and you get the justice you can pay for. I find these references were directed towards Mr. Rayworth;

5. Furthermore, under cross examination, he acknowledged he reviewed the briefs filed on behalf of David and Evelyn Gallagher. He made suggestions to counsel for James Gallagher on how to refute arguments and gave his views on the burden of proof; and

6. During the course of the trial when counsel for James Gallagher was examining a witness he got counsel's attention and slipped him a note.

[39] I find Mr. Giovannetti acted in a manner that crossed the line into advocacy as opposed to an independent expert providing objective evidence to the court. I found his general approach to be adversarial.

[40] For these reasons, I reject the opinion of Mr. Giovannetti respecting the placement of the boundary line and afford little to no weight to his evidence.

[24] Before us, James asserts that the judge allowed her critique of Mr. Giovannetti as an advocate to overshadow the merits of his opinion. He explains in his factum:

> 43. Mr. Giovannetti in his report described why he placed the line at a different location. The Trial Judge rejected Mr. Giovannetti's entire opinion or gave it little weight primarily because of her view that Mr. Giovannetti lacked objectivity and was an advocate. With respect, the Trial Judge did not care for Mr. Giovannetti's criticisms of Mr. Rayworth and may have intended to reject Mr. Giovannetti's evidence and opinion concerning his evidence and Mr. Rayworth's method of determining his "best fit line." The Trial Judge, in so doing, also rejected Mr. Giovannetti's evidence that the line established by the parties was the firebreak which had been placed on the ground by the original parties to the 1952 Agreement. Mr. Giovannetti's evidence is consistent with Mr. Rayworth's evidence in that they agree that the firebreak was a physical, observable boundary.
>
> 44. The Trial Judge accepted the line laid down by Mr. Rayworth as the common line or "True Line" as described in the 1974 and the 1991 Deeds. This is a finding of fact. The Trial Judge, in rejecting the entirety of Mr. Giovannetti's opinion, neglected to consider his opinion which was supportive of a conventional line.

[25] Again, there is no merit to this ground of appeal. As noted in the above passage, the judge listed six reasons for rejecting Mr. Giovannetti's opinion. The first three addressed her reasons for rejecting this opinion on its merits. As well, I again note the deference owed to the judge. It was for her and not us to weigh this evidence.

1(b) – Did the Learned Justice err in law by failing to apply the relevant principles of the conventional line test to the evidence and facts as she found them.

[26] No one disputes the fact that adjoining landowners can agree upon a "conventional" boundary line that may be at variance with the deed descriptions. To support this, both sides refer to *Robichaud v. Ellis*, 2011 NSSC 86, where McDougall J. relies on the work of Professor Norman Siebrasse:

> [27] The doctrine of conventional lines is described in the following terms by Norman Siebrasse in "The Doctrine of Conventional Lines," 44 U.N.B.L.J. 229, at 229:
>
> > The doctrine of conventional lines may be concisely stated as follows: if neighbouring parties intend to settle the boundary between them, then any boundary line agreed to by them is binding on the parties and their

> successors in title notwithstanding that it is not the true line according to the deeds or Crown grant.

[27] James insists that the parties and their heirs agreed that the fire break would be the conventional boundary line. However, this is just another collateral attack on the judge's unassailable factual findings that no such agreement existed. There is no merit to this ground of appeal.

1(c) – Did the Learned Trial Judge err by failing to apply the relevant principles of estoppel.

[28] This ground of appeal is a non-starter. The judge did not consider the principles of boundary line estoppel because she had no reason to. Estoppel, in this context, could only apply if the judge found the fire break to be an agreed-upon or recognized boundary line. A.W. La Forest, Anger and Honsberger's *The Law of Real Property*, 3rd ed., (loose-leaf), (Toronto: Thompson Reuters, 2015), Volume 2, Chapter 18 at para 18:20.20(c) explains:

> The equitable principle of estoppel is relevant to the establishment of a boundary. *Halsbury's Laws of England* states:
>
> > If a party takes possession of a piece of land under an expectation created or encouraged by and with the consent of the true owner, that he shall have an interest in the land and upon the faith of such promise or expectation and without objection by the true owner lays out money on the land or alters his position to his detriment, the court shall compel the true owner to give effect to such promise or representation.
>
> Before estoppel can be evoked, both elements must be present. **There will be no estoppel unless it can be shown that the parties agreed to or recognized the new line as a boundary and that the party claiming the new boundary altered their position detrimentally.**
>
> [Emphasis added]

[29] As noted earlier in my analysis, according to the trial judge, the fire break was never recognized as the boundary line.

2. – Did the Learned Trial Judge err in law by failing to apply the relevant principles of the effect of the use and occupation of land to the evidence and facts as she found them?

[30] Here, James essentially challenges the judge's rejection of his adverse possession claim. In oral argument, his counsel indicated that this aspect of the appeal was no longer being pursued. For the following reasons, this was a wise concession.

[31] The judge accurately highlighted the law in this area:

> [49] From a review of the relevant authorities, the following is a summary of the relevant legal principles:
>
> - A true or paper title owner is presumed to be in possession of their land. A true owner is not required to show they are in possession by occupation or use;
>
> - To oust a title owner, although the burden is on a balance or probabilities, the court should only act on very cogent evidence that establishes the required possession for the statutory period. **(Cook v. Podgorski,** 2013 NSCA 355, para. 58)
>
> - Possession is fact specific. The acts of possession which must be proved with cogent evidence depends on the circumstances of each case and the nature of the land in issue. **(Cook**, para. 49**)**
>
> - The claimant of possessory title (in this case James Gallagher) has the burden of proving with very persuasive evidence that he had possession of the land in question for a full 20 years and that his possession was open, notorious, exclusive, and continuous.
>
> - He must also prove that his possession was inconsistent with the true owner's possession and that his occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession. (**Spicer v. Bowater Mersey Paper Co.,** 2004 NSCA 39 (CanLII) and **Bain v. Nova Scotia Attorney General,** 2005 NSSC 355 (CanLII).)
>
> - A true owner interrupts the adverse possession of an occupier the moment a true owner steps upon the lands. The limitation period begins to run from the time the true owner was last upon the lands; **Hatt v. Peralta**, 2014 NSCA 15 (CanLII).

[32] The judge then accurately captured James' submission in this regard:

> [50] Having established where the appropriate boundary is, James Gallagher's alternate argument is that he acquired the disputed property by adverse possession. That is his burden to bear on a balance of probabilities with clear and cogent evidence.
>
> [51] James Gallagher is only seeking a portion of the disputed lands as highlighted in yellow on exhibit 3 (being the portion of land which essentially comprises the land up to the tree line which wild blueberries were harvested off).
>
> [52] James Gallagher asserts his occupation and his parents before him has been open, notorious, unchallenged, exclusive, and uninterrupted since 1952.
>
> [53] He relies heavily on the bulldozer swath created in 1969 to protect against the spread of fire. James Gallagher argues it is illogical that Mr. Brown would keep a portion of a field if he wanted to retain woodland and sell the balance of his farm property. He argues it is equally logical that Mr. Gallagher would expect to acquire the entire cleared land/fields for farming purposes.
>
> [54] He argues the uses of the disputed property are such that it would not trigger the resetting of the statutory clock.

[33] Then the judge rejected this submission because the claim was neither exclusive, continuous nor adverse:

> [61] I find the true owners in title (being the current owners and the predecessors in title William Brown and then the Limited company) continued to use their land and interrupt the possession of Mr. and Mrs. Gallagher and then James Gallagher. James Gallagher's use while open was not exclusive.
>
> [62] I have considered the nature of the use of the sugar woods property and find the entry of the true owners was sufficient to stop the clock such that James Gallagher, or Mr. and Mrs. Gallagher, never possessed the property for the full statutory period.
>
> [63] There was a natural creep of the wild blueberry crop irrespective of any management. Mr. Gallagher and James Gallagher were in the business of harvesting blue berries. The true title owners were not. If berries were growing up to and across the firebreak they harvested these berries as well; no one else was interested in the crop. Harvesting up to and across the swath is not inconsistent with the true owners' use. In any event, the true owners entered their property fairly regularly and stopped the clock upon re-entry.
>
> [64] For the reasons noted earlier, I find the fire break was just that. No more.
>
> [65] Turning to the question of use by permission, I find the evidence of David Gallagher discussing his purchase of sugar woods with his late father, his father expressing concern of continued access to the crop and that David told his father he could continue to harvest, is more plausible. I accept this evidence. Even

> absent permission, the claim for adverse possession fails for the reasons noted above.
>
> [66] In conclusion, I have determined James Gallagher has failed to satisfy, on a balance of probabilities, that he is entitled to ownership through adverse possession. David and Evelyn Gallagher remain the true owners of the disputed property.

[34] There is simply no basis to challenge any aspect of this analysis.

Disposition

[35] I would dismiss the appeal with costs and disbursements of $16,435 (representing 40% of the trial award).

MacDonald, C.J.N.S.

Concurred in:

Farrar, J.A.

Bourgeois, J.A.