NOVA SCOTIA COURT OF APPEAL
Citation: *Cleary v. Laamanen*, 2018 NSCA 12

Date: 20180213
Docket: CA 463945
Registry: Halifax

Between:

Roy Francis Cleary, Gertrude Thelma Cleary, and Suzanne Cleary
Appellants

v.

Neil Carl Laamanen & Crystalle Lynne Laamanen
Respondents

Judges:	Farrar, Oland and Bryson, JJ.A.
Appeal Heard:	February 1, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Oland, J.A.; Farrar and Bryson, JJ.A. concurring
Counsel:	Jonathan Hooper, for the appellants Alex Embree, for the respondents

Reasons for judgment:

[1] In order to give each of several family members a lot, Roy and Gertrude Cleary twice subdivided their property in Elmsdale, Nova Scotia. This created five lots with rights of way.

[2] Neil and Crystalle Laamanen (the "Laamanens") acquired Lot 5 in 2010. Disputes arose as to the location and scope of that property's rights of way. The Laamanens applied for declarations that they could widen and reroute the roadway within those rights of way. Mr. and Mrs. Cleary own land between Lot 5 and the public road, and one of the rights of way runs across their land. They, together with their daughter, Suzanne Cleary, who owns Lot 4 (collectively, the "Clearys") sought an injunction against the Laamanens to stop them from plowing snow and to prevent their proposed changes and uses of the rights of way. They also claimed damages, for damage caused to their property.

[3] Justice Ann E. Smith of the Nova Scotia Supreme Court granted the Laamanens' application and awarded them costs. She dismissed the Clearys' proceeding. The Clearys appeal: (a) her Order dated April 26, 2017 and decision on the merits (2017 NSSC 55); and (b) her Order for costs dated June 7, 2017 and decision on costs (2017 NSSC 153).

[4] For the reasons which follow, I would dismiss the appeal.

Background

[5] The deed to Lot 5 described two rights of way, one 66 feet wide and the second 86 feet wide:

> **ALSO the unrestricted right of the grantee, his heirs, assigns and agents, of ingress and egress over, along and upon the sixty-six foot (66') right of way** extending from the southeast boundary of the Old Post Road across the remainder of Lot 1, Douglas & Barbara Walsh Subdivision, and **which sixty-six foot (66') right-of-way is shown as General M Drive on the plan** referred to in the preamble;
>
> **ALSO an eighty-six foot (86') right-of-way lying parallel and adjacent to the southwest boundary of Lot 4**, Roy & Gertrude Cleary Subdivision and which right-of-way extends from the east boundary of the

> remainder of Lot 1, Douglas & Barbara Walsh Subdivision, across the aforesaid Lot 4, to the northwest boundary of Lot 5, Roy & Gertrude Cleary Subdivision.
>
> [Emphasis added]

[6] Although General M Drive is described as 66 feet wide, the travelled roadway along it was generally only 12 – 13 feet wide. Before the judge, the Clearys argued that that right of way was for ingress and egress, and the 12 – 13-foot travelled roadway was sufficient for that purpose. They submitted that the new roadway, shoulders and ditches proposed by the Laamanens amounted to an unreasonable use.

[7] On appeal, the Clearys raise the following grounds of appeal:

(a) the judge erred:

(i) by failing to consider whether the proposed commercial use of the right of way would overburden it;

(ii) by accepting the subjective intentions of the Laamanens in determining that the road widening plan was reasonable;

(iii) in determining that the language of the right of way was clear and unambiguous;

(iv) by failing to consider the evidence of the other dominant tenement owners and grantees who share the right of way with the Laamanens, in deciding that the road widening plan was reasonable;

(b) she erred in determining that the Clearys had sought to limit the right of way to the size of the existing travelled way; and

(c) she erred in deciding the quantum of costs.

Proposed Commercial Use and Overburdening

[8] The Clearys had sought an injunction to prevent the Laamanens from using the right of way over General M Drive for a commercial use. Lot 5 is zoned "mixed use," which permits residential, institutional, commercial, industrial, and resource uses. The judge heard evidence that, using a company he had formed, Neil Laamanen hoped to start a business to design and build prototype aviation parts on that property, which would increase traffic on the right of way.

[9] The judge rejected the Clearys' argument that this proposed use would overburden it, and turn it from a private road to a public road. She wrote:

> [86] It is both unnecessary and undesirable for the Court to comment on whether the commercial use anticipated by Neil Laamanen would be permitted by the terms of the grant; i.e. whether commercial use would overburden the private right of way and turn it into a public road. That is a matter to be determined on the evidence if and when such use occurs, and the parties seek findings by the Court.

[10] The Clearys argue that the judge erred by failing to address their argument that the use by a company, or its customers or suppliers, rather than by the Laamanens themselves, was beyond the scope of the grant of the right of way. They emphasize that the company is not a grantee of the right of way, and submit that the judge was obliged to decide whether the proposed use was for a commercial purpose which would overburden the right of way.

[11] I see no error which would justify this Court's intervention. Mr. Laamanen plans to open this business; it is not yet operational. His evidence estimated the types and frequency of vehicles that would drive over the right of way when the specialized business he is contemplating is up and running. Whether such uses would overburden the right of way is contingent on future events which may never happen or which may be different. It was not necessary that the judge deal with arguments regarding uses which were still speculative. I would dismiss this ground of appeal.

Reasonableness of Changes Sought

[12] The Clearys submit that the judge relied solely on the Laamanens' "subjective intentions" in determining the reasonableness of their proposal to widen the road, and so failed to consider whether it was consistent with the terms of the grant of right of way and reasonable. Those "subjective intentions" were their anticipated future use of Lot 5, and their evidence that the widths of the rights of way were important to them when they purchased the property with that commercial use in mind.

[13] The judge did not fall into error as the Clearys submit. Rather, her extensive decision on the merits shows she specifically recognized that:

> [77] A determination as to the nature and extent of a right of way, like its scope, begins with the words of the grant. "[T]he 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": *Knock v. Fouillard*, 2007 NSCA 27, at para. 220.

[14] It is clear from a review of her decision that the judge considered the reasons the Laamanens sought the changes they proposed, and the affidavit and *viva voce* evidence before her. She applied the legal test of reasonableness to the evidence and found that it was reasonable to widen the roadway to allow vehicles to pass with ease, to be able to clear snow in an efficient manner, and to avoid future unpleasantness. I would dismiss this ground of appeal.

Rights of Way Unambiguous

[15] In ¶ 53 of her decision on the merits, the judge held that:

> … There was nothing ambiguous about the width or location of the right of ways deeded to the Laamanens. The purpose of the right of way over General M Drive is for "ingress and egress." The purpose of the right of way over Lot 4 is for access to Lot 5… .

She added that, although the Clearys may have agreed to the rights of way only in order to obtain subdivision approval:

> [62] The Laamanens are entitled to receive what they bargained for when they received their deed to Lot 5, i.e. an unrestricted 66‑foot wide right of way over General M Drive and an 86‑foot right of way over Lot 4.

[16] The Clearys submit that such passages show that the judge focused only on the location and width of the rights of way, and erred in determining that the language of the rights of way was clear and unambiguous as to scope. They argue that in construing the rights of way, she should have examined surrounding circumstances: *Oostdale Farm v. Oostveg*els, 2016 NSSC 146. According to the Clearys, in this case, these circumstances would include the description of one of the rights of way as only "unrestricted" rather than as "unfettered" by other grantees who share that right of way, and how much wider the proposed roadway together with its shoulders and ditches would be in comparison to the width of the existing travelled right of way.

[17] In my view, the judge was correct when she stated that there was nothing ambiguous about the width or location of the rights of way associated with Lot 5 or the nature of the rights conveyed. She made no factual error regarding the creation

and the use of the rights of way. No authorities were provided in support of the distinction between "unrestricted" and "unfettered" rights of way or limitations on changes within the dimensions of a right of way, except where found to be an unreasonable use. Moreover, resort to surrounding circumstances is only taken when the words are not clear and unambiguous. I would dismiss this ground of appeal.

Evidence of Others

[18] The Clearys argue that the judge failed to consider material evidence, namely, that of the other dominant tenement owners and grantees of the rights of way, who also use them and who were opposed to the Laamanens' proposal.

[19] The evidence of those three dominant tenement owners, who were not parties to the proceeding, was contained in their affidavit evidence. They expressed concern that, if the roadway were widened, that would result in increased maintenance costs and upkeep, and vehicles likely driving faster along the right of way. The judge found that, based on the evidence before her, the changes proposed were reasonable and did not constitute overbearing. They then would not cause "unreasonable interference" with the rights of the other dominant tenement owners. I see no error committed by the judge in giving little to no weight to the statements or speculation presented by the other owners.

Rights of Way Limited to Size of Roadway

[20] In her decision on the merits, the judge wrote:

> [56] The Clearys **in essence** want the Court to rewrite the legal description to the Laamanens' deed to modify the wording of the right of ways from a 66-foot width and an 86-foot width right of way to read, "the current 12 foot graveled roadway" on General M Drive and "86 feet less any portion on which Suzanne Cleary harvests maple syrup from maple trees."
>
> [Emphasis added]

[21] According to the Clearys, the judge erroneously found that they sought to limit the width of the rights of way to the width of the current travelled way, when they had always recognized the full width, but opposed the widening of the travelled way on the basis that it was unreasonable. They argue that the judge erred in law and fact by considering their objections as limited to width and

location, rather than purpose and use, and thus limiting the scope of her interpretation to width and location.

[22] This issue is one of mixed fact and law, reviewable on a standard of palpable and overriding error. I see no such error committed by the judge. A review of the record and the decision as a whole supports her determination that the Clearys had sought to limit the enjoyment of the rights of way to the actual travelled way and demonstrates that she had considered their purpose and use as well as their dimensions and location.

The Costs Decision

[23] The judge awarded the Laamanens costs. The parties were unable to agree and filed written submissions. In her costs decision, the judge exercised her discretion to award lump sum costs. She considered the Laamanens' settlement offer to be a significant factor, and ordered a total costs award of $84,254.75.

[24] According to the Clearys, the judge incorrectly interpreted the terms of that settlement offer and this materially impacted her decision to award 75% of actual legal costs, being $75,000. They point out that she stated that the Laamanens offered to settle for "$60,000 including HST and disbursements," when the offer actually stated that it would be "an amount to be determined by a judge" and noted that "total legal costs incurred . . . is approximately $60,000, including HST and disbursements."

[25] The Clearys are correct that the judge erred with regard to the terms of the settlement offer. However, this Court will intervene in a costs award only if the trial judge made an error in principle or the costs award is plainly wrong: *Casavechia v. Noseworthy*, 2015 NSCA 56 at ¶ 43. I see no error in principle in her settlement of costs, and am not persuaded that the costs award is plainly wrong or that the percentage of the legal fees she determined to be reasonable was affected by her error in regard that settlement offer.

Disposition

[26] I would dismiss the appeal. Counsel for both parties sought costs on appeal of 40% of the costs awarded at hearing. I would award the Laamanens costs of $20,000, inclusive of disbursements.

Oland, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.