<u>NOVA SCOTIA COURT OF APPEAL</u>

Citation: *Penney v. Langille*, 2018 NSCA 43

Date: 20180523
Docket: CA 465436
Registry: Halifax

Between:

Jacob Frederick Penney

Appellant

v.

Bedford Reid Langille, David Charles Campbell, Sharon Joan Campbell, Stanley R. Sutherland, Barry Vernon Sutherland, Heather Ann Emmett, Scott Cullan and Rose Marie Hatt

Respondents

and

Registrar General of Land Titles

Intervenor

Judges:	Bryson, Saunders, and Van den Eynden, JJ.A.
Appeal Heard:	April 9, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bryson, J.A.; Saunders and Van den Eynden, JJ.A. concurring
Counsel:	Kathryn M. Dumke, Q.C. and Caitlin Plummer (articled clerk), for the appellant Ian R. Dunbar and Robert Mroz, for the respondents Jeremy P. Smith, for the Intervenor

Reasons for judgment:

Introduction

[1] All parties own residential lots which border Caribou Lake in Caribou Village subdivision, Middle New Cornwall, Lunenburg County. The property of the appellant, Jacob Frederick Penney, includes an undersized strip of land next to the lake, originally known as Lot 8A. The respondents claimed they had a right-of-way over Lot 8A to the lake which they had used over the years, primarily to launch small boats.

[2] Mr. Penney purchased his property in 2010. Concurrently, his property was migrated into the registry in accordance with the *Land Registration Act*. The migration made no mention of a right-of-way to the lake over Mr. Penney's land. When Mr. Penney discovered that the respondents claimed to have a right-of-way, he disagreed. The respondents then successfully applied to court to have the parcel registry amended to include their claimed right-of-way.

[3] Mr. Penney now challenges the Honourable Justice C. Richard Coughlan's finding that the respondents were granted rights-of-way over his land to Caribou Lake (2017 NSSC 133). Alternatively, he says that Justice Coughlan was wrong to order correction of the registration of the parcel registries, because he failed to properly balance the equitable factors in s. 35(6) of the *Land Registration Act*, S.N.S. 2001, c. 6.

[4] The respondents counter that the judge made no legal error in his interpretation of their deeds, and to the extent that surrounding circumstances may be taken into account, made no palpable and overriding error with respect to those circumstances. The respondents say that it was unnecessary for the judge to consider s. 35(6) of the *Act* once he had found that they had rights-of-way which are overriding interests enjoying "super priority" over other interests in accordance with s. 73(1) of the *Act*.

[5] Mr. Penney has also appealed what he describes as an error "in fact and in law" finding that a prescriptive easement had been established. This point was rightly not pressed in oral argument. The judge made no finding of a prescriptive easement. He found that the respondents had been granted express rights-of-way. He then proceeded to consider whether correction of the parcel register was "just and equitable" as he thought s. 35(6) of the *Act* required.

[6] The Registrar General of Land Titles has intervened to support the propriety of the judge's consideration of s. 35(6). He says the judge was right to address the statutory factors respecting whether to correct the register. He takes no position on the merits of the appeal.

[7] Accordingly, this appeal gives rise to these issues:

1. Did the respondents' deeds create rights-of-way to Caribou Lake in their favour?
2. If so, was it necessary to apply the equitable factors in s. 35(6) of the *Act* regarding whether to correct the registry?
3. If so, did the judge err by deciding to correct the registry?

[8] For the reasons set out below, Justice Coughlan did not err in concluding that the respondents' deeds granted them rights-of-way to Caribou Lake. Moreover, that interpretation was consistent with contemporary and subsequent use of the property in question.

[9] Having decided that the respondents enjoyed a right-of-way which constitutes an overriding interest within the meaning of s. 73(1)(e) of the *Act*, and having determined that there was evidence of continuous use of the right-of-way, it was unnecessary for the judge to consider the equitable factors criteria in s. 35(6) of the *Act*.

The judge did not err in interpreting the deeds

[10] On April 21, 1983, the parties' predecessors (with the exception of Bedford Reid Langille who was an original party) entered into an agreement with Eugene O. Barkhouse and Bryon B. Barkhouse confirming ownership and anticipating further conveyances in Caribou Village as depicted on a 1982 subdivision plan prepared by Ronald G. Wentzell, N.S.L.S., and approved by the Development Officer for the Municipality of the District of Lunenburg in 1983.

[11] As contemplated by the agreement, on April 21, 1983 Byron Bernard Barkhouse and Eugene Oswald Barkhouse granted warranty deeds to the respondent Bedford Reid Langille and the predecessors of the other parties. With the exception of Mr. Penney's predecessor, all deeds provided for rights-of-way in the following language:

> SUBJECT TO a perpetual, free and uninterrupted right-of-way in common with others for all purposes over a certain fifty foot wide right-of-way leading to and from public Highway No. 466 situated as shown in the Plan hereinbefore mentioned.
>
> TOGETHER WITH a perpetual, free and uninterrupted right-of-way in common with others for all purposes over a certain fifty foot wide right-of-way leading to and from Public Highway No. 466 situated as shown in the Plan hereinbefore mentioned.
>
> TOGETHER WITH a perpetual, free and uninterrupted right-of-way in common with others for all purposes over Lot. No. 8B as shown on the Plan hereinbefore referred to; the said Lot No. 8B being a strip of land along the boundary line of lands of Edmund R. Saunders and extending to the shore of Caribou Lake.

[12] Importantly, Mr. Penney's predecessor's deed from the Barkhouses, executed the same day, is slightly different. Lot 8B is described as subject to a right-of-way:

> The aforesaid Lot. No. 8B being ***subject to*** a perpetual, free and uninterrupted right-of-way in common with others for all purposes over Lt. No. 8B as shown on the Plan hereinbefore referred to; the said Lot No. 8B being a strip of land along the boundary line of lands of Edmund R. Saunders and extending to the shore of Caribou Lake.
>
> [Emphasis added]

[13] Lot 8B was a small under-sized lot, bordering Caribou Lake, giving Mr. Penney's predecessor access to the lake.

[14] On a plain reading, all of the deeds executed on April 21, 1982 gave a right-of-way to each grantee over the fifty-foot road running through the subdivision and *subjected* each person's deed to a similar right-of-way in favour of others. In the case of Lot 8B, mentioned in the third paragraph quoted above, the deeds to all but Mr. Penney's predecessor granted a right-of-way "for all purposes" over Lot 8B. Lot 8B connects the fifty-foot right-of-way to Caribou Lake. In the case of Ms. Robar, from whose title Mr. Penney's derives, Lot 8B was *subject* to a perpetual right-of-way "for all purposes". That was because the fee simple interest in Lot 8B was being conveyed to Ms. Robar by the Barkhouses on that same day.

[15] Mr. Penney takes issue with the interpretation that any right-of-way is granted to Caribou Lake. He says the exception respecting Lot 8B simply clarifies that the fifty-foot right-of-way goes over part of Lot 8B. It is true that the fifty-foot right-of-way partly traverses Lot 8B. Mr. Penney goes on to say that the

balance of the reservation merely describes Lot 8B, but does not purport to be a grant of right-of-way over Lot 8B to the lake. He adds that the Wentzell plan does not depict a right-of-way over Lot 8B.

[16] The problems with this interpretation are:

1. It makes the third reservation over Lot 8B completely redundant. The fifty-foot right-of-way depicted on the plan shows that it runs across Lot 8B and a number of other lots. Why would it be necessary to single out Lot 8B as subject to the fifty-foot right-of-way while failing to mention any other lots subject to that right-of-way?
2. Where, as here, the grant of the fifty-foot right-of-way incorporates the Wentzell plan by reference, resort may be made to the plan to locate the right-of-way. It is not necessary to name the lots which are clearly depicted on the plan and which are subject to the right-of-way, (see, for example, *Knock v. Fouillard*, 2007 NSCA 27, ¶ 27). There was no need to name Lot 8B to make it subject to the fifty-foot right-of-way.
3. The Penney interpretation also ignores the difference between the language in the deeds to the other subdivision owners and the deed to Ms. Robar (Mr. Penney's predecessor). Their deeds say, "together with . . . a right-of-way over Lot 8B" and Ms. Robar's deed says, ". . . subject to a right-of-way over . . . 8B". The grant in the other deeds complements the reservation in the Robar deed and makes sense because Ms. Robar owned the fee simple interest in Lot 8B.
4. Finally, the Penney interpretation is inconsistent with contemporary and later use of Lot 8B as a right-of-way since at least 1983.

[17] While it would be helpful if the Wentzell plan depicted the right-of-way over Lot 8B to Caribou Lake, it is not fatal because the plan is not the source of the grant—the deed is. The language in the third quoted paragraph (¶ 11 above) describes both the right-of-way and Lot 8B in the same opening sentence. The second sentence says that Lot 8B borders on Caribou Lake. Plainly an unrestricted right-of-way "over Lot 8B" would be coterminous with the lot bordering the lake. Mr. Penney's interpretation—that this clause merely refers to Lot 8B, not a right-of-way over Lot 8B to the water—renders the paragraph meaningless and, as earlier described, redundant.

[18] Parenthetically, a later 1991 plan in Mr. Penney's title does depict a lane over Lot 8B to Caribou Lake.

[19] The relevant interpretative principles applied by the judge are summarized by the respondents in their factum, quoting from the Court in *Purdy v. Bishop*, 2017 NSCA 84 at ¶ 15:

> [15] The law requires that a contract be "read . . . as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract", (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 47). Surrounding circumstances assist the Court in interpreting the language used by the parties, but does not displace it, (*Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, ¶ 57).

[20] In resolving the case as he did, Justice Coughlan referred to the usual leading authorities with respect to interpretation of deeds and the legal character of rights-of-way, relying upon *Knock* and *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, amongst others. No issue is taken with his reliance on this law.

[21] As previously described, the right-of-way to Caribou Lake was omitted from the description in Mr. Penney's parcel when it was migrated under the *Land Registration Act* in 2010. The omission was discovered because local residents continued to make occasional use of the right-of-way to obtain access to Caribou Lake, including the launching of boats. These users also did some basic maintenance on the right-of-way to ensure access to the lake.

[22] When the users of the right-of-way were questioned by Mr. Penney, it came to light that they purported to do so as of right. Investigations ensued and the absence of the right-of-way to the lake in Mr. Penney's parcel was uncovered. The respondents then applied for rectification of the parcel registration.

[23] Bedford Reid Langille is the only party to this litigation who is an original party to the 1983 deeds. He testified, and the judge found, that he had used the right-of-way since 1983 to and including 2012 to launch and retrieve an 18-foot boat. He maintained the right-of-way, leveled it with gravel that he had purchased and cleared grass and debris.

[24] Mr. Penney's predecessor, Karen Robar, acknowledged the existence of a right-of-way over Lot 8B and its use by Mr. Langille, amongst others. She testified:

Q. Now, the, if I talk about the, the laneway to the shore…

A. Mm-hmm.

Q. …do you know what I'm referring to?

A. Yes.

Q. It's my understanding that you knew the laneway to the shore was a right of way?

A. Yes.

Q. During the time you owned the property?

A. Yes.

Q. And would you refer to it as a common right of way?

A. It always was referred to as a common right of way.

Q. And what, what does that mean, "common right of way"?

A. Anybody that had property in the vicinity could use it. That's my understanding.

Q. And in terms of the actual use that, that it saw, you, you're aware that Mr. Langille used the right of way?

A. Every now and then. Not very often, but yes.

Q. To put, to put the boat out and bring…

A. Yeah.

Q. …the boat back? Is that…?

A. Yeah.

Q. That's what he's testified to.

[Emphasis added]

[25] The judge found as a fact that prior to purchasing his property Mr. Penney had reviewed the aforesaid 1991 plan of the property which showed "laneway to shore" on Lot 8A.

[26] The judge made no error of law when interpreting the deeds as granting a right-of-way to the subdivision owners over Lot 8A, as it then was, to Caribou Lake. To the extent that he considered surrounding circumstances, he did not make any palpable and overriding error in doing so.

Did the judge err in applying s. 35(6) of the Land Registration Act?

[27] The respondents assert that, having found a right-of-way, the judge needed do no more, relying upon s. 73(1) of the *Act* which says:

> 73 (1) Notwithstanding anything contained in this Act, the following interests, whether or not recorded or registered, and no other interests, ***shall be enforced with priority over all other interests*** according to law . . .
>
> (e) an easement or right of way that is being used and enjoyed;
>
> [Emphasis added]

[28] The respondents say that a right-of-way that is in use has a "super priority" and should be enforced by the Court without resort to s. 35(6) of the *Act*. Certainly, as the judge recognized, s. 73 is an exception to the mirror and curtain principles contemplated by the *Act*, described in *Brill* and cited by the judge (¶ 36). That exceptional character appears in the opening words of s. 73(1) and is acknowledged in *Brill* (¶ 162). Although overriding interests are effective without recording, the holder of such interests may record them (s. 47(4)). Obviously, this would better reflect the *Act*'s mirror principle.

[29] Mr. Penney insists that it is necessary for the judge to consider s. 35(6) of the *Act*, and, in doing so, he erred. He submits that the respondents already have lake access and do not need the use of the right-of-way. He claims that the respondents have only made "sporadic use" of the right-of-way. The respondents failed to provide a "full abstract" at the hearing before Justice Coughlan. Accordingly, it was "impossible to consider the circumstances of the registration in full".

[30] Assuming that s. 35(6) has any application, these considerations do not weigh in favour of Mr. Penney. That the parties have another means of access to the lake is irrelevant to the question of whether the right-of-way exists, and if so, entitlement to use it. "Sporadic" use of a right-of-way does not disentitle the holder of that right to its use.

[31] There is no statutory requirement to provide a "full abstract". If there were, and the failure to provide it had any material impact on the judge's decision, one would have expected Mr. Penney to demonstrate that impact. He made no attempt to do so.

[32] More fundamentally, the respondents are correct that s. 35(6) does not apply because they enjoy an overriding interest. The respondents came to court asking for correction of the parcel registry as authorized by s. 35 of the *Act*.

> 35 (1) A person who objects to and is aggrieved by a registration in a parcel register may commence a proceeding before the court requesting a declaration as to the rights of the parties, an order for correction of the registration and a determination of entitlement to compensation, if any.
>
> [. . .]
>
> (4) The court shall determine the rights of the parties according to law, subject to the following principles:
>
> (a) the person aggrieved may have the registration ***corrected***;
>
> (b) any ***correction of the registration*** shall preserve the right to compensation of a person who obtained a registered interest from a registered owner who registered the interest objected to; and
>
> (c) the court may, where it is just and equitable to do so, ***confirm the registration***.
>
> (5) ***Where the court corrects the registration*** objected to, but the correction of the registration cannot fully nullify the effects of the registration, ***or where the court determines that it is just and equitable to confirm the registration***, the court shall determine which of the parties suffered loss by reason of the registration and order
>
> (a) that any party who suffered loss be compensated in accordance with subsection (7) and Sections 85 and 86; or
>
> (b) payment of damages by one party to another.
>
> (6) ***In determining whether it is just and equitable to confirm the registration objected to***, the court shall consider
>
> (a) the nature of the ownership and the use of the parcel by the parties;
>
> (b) the circumstances of the registration;
>
> (c) the special characteristics of the parcel and their significance to the parties;
>
> (d) the willingness of any of the parties to receive compensation in lieu of an interest in the parcel;
>
> (e) the ease with which the amount of compensation for a loss may be determined; and
>
> (f) any other circumstances that, in the opinion of the court, are relevant to its determination.

> (7) A registered owner is not entitled to compensation or to retention of any of the benefits of a registration made in error unless that owner
>
> (a) believed that the registration was authorized by law;
>
> (b) had no knowledge of the facts that made the registration unauthorized; and
>
> (c) gave consideration for the registered interest or detrimentally relied upon the registration. 2008, c. 19, s. 15.
>
> [Emphasis added]

Amongst other things, s. 92 of the *Act* authorizes the Court to order the registrar to revise a registration.

[33] Section 35 clearly distinguishes between correcting a registration and confirming one. The criteria requiring a "just and equitable" analysis described in s. 35(6) relate to confirming an existing registration—not, as here, correcting an existing registration. The distinction between correcting and confirming registrations runs through s. 35. In subsection 4(a) and (b)—"corrected" and "correction"; subsection 4(c)—confirmation; subsection 5 "correct" versus "confirm", all contrasting correction and confirmation.

[34] The intervenor argues that confirmation and correction are really corollaries; you cannot consider whether to do one without doing the other. If a registration is corrected it is not confirmed; and if not corrected it is confirmed. So the equitable criteria (s. 35(6)) are necessarily engaged. While this argument has some attraction, it is not compelling in this case for three reasons. First, if the equitable criteria were intended to apply to both confirmation or correction, it would have been an easy matter for the legislature to say "in determining whether it is just and equitable to confirm ***or correct*** the registration objected to . . ." Second, it cannot apply to overriding interests owing to the clear and unequivocal language of s. 73(1) that such interests ". . . shall be enforced with priority over all other interests", regardless of whether they have been recorded. Third, since the holder of an overriding interest need not, but is entitled to, record it (s. 47(4)), there is no discretion that could be exercised pursuant to s. 35(6).

[35] Section 35 requires the Court to resolve the rights of the parties "according to law". Section 73(1)(e) tells us what that law is by giving priority to a right-of-way in use as an overriding interest. Section 47(4) allows the holder of such an interest to record it. From this, correction to the register follows, reserving only

the question of compensation, if any. Confirmation—as described in s. 35(6)—has nothing to do with it.

[36] I would dismiss the appeal with costs of $2,500, all inclusive, payable by Mr. Penney to the respondents. There shall be no costs for or against the intervenor.

Bryson, J.A.

Concurred in:

Saunders, J.A.

Van den Eynden, J.A.