NOVA SCOTIA COURT OF APPEAL

Citation: *Chapman v. C.A. Realty, in Bankruptcy*, 2018 NSCA 81

Date: 20181018
Docket: CA 470539
Registry: Halifax

Between:

Avis E. Chapman

Appellant

v.

C.A. Realty, in Bankruptcy,
Nova Scotia Power Inc., a body corporate

Respondents

Judges:	Fichaud, Saunders and Bryson, JJ.A.
Appeal Heard:	September 18, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Bryson, JJ.A. concurring.
Counsel:	Appellant in person Christopher G. Keirstead, for the respondent C.A. Realty Joseph F. Burke and Jack Townsend, for the respondent Nova Scotia Power Inc.

Reasons for judgment:

[1] The appellant sued her neighbour, as well as Nova Scotia Power Inc. ("NSPI") claiming damages for what she described as a disruption, obstruction, interference and encroachment of her property.

[2] The case was heard in a 3-day trial before Nova Scotia Supreme Court Justice Joshua M. Arnold. After considering the evidence and the written and oral submissions of the parties Arnold, J. reserved judgment and later filed a written decision in which he dismissed the claim with all parties bearing their own costs.

[3] Ms. Chapman appeals, alleging various errors by the trial judge in accepting, interpreting and relying upon certain witnesses' testimony.

[4] For the reasons that follow I would dismiss the appeal with costs.

[5] I will begin with a brief description of the circumstances giving rise to this dispute and will add such other details as may be required during my analysis of the issues.

Background

[6] This summary of the facts is taken primarily from the decision of Justice Arnold (now reported 2017 NSSC 271) and from the respondents' facta. I accept counsels' review of the evidence as being a fair and accurate account.

[7] In simple terms, this litigation arises over a boundary and lawful use dispute between land owners in Amherst. There is a store located at 17 Lawrence Street on land owned by Consumers' Community Co-operative ("Consumers' Co-op") and occupied by Co-op Atlantic ("Co-op Atlantic"). In these reasons, unless the context requires otherwise, I will refer to these two corporations collectively as "Co-op". There is a private residence and rug gallery located on the adjoining property at 19 Lawrence Street which is owned by the appellant, Ms. Avis Chapman. She is self-represented on appeal, as she was at trial. Ms. Chapman purchased the property in 2001 from Mr. Ronald Fury, her predecessor in title.

[8] In April 2010, Ms. Chapman brought an action against Co-op, and NSPI, seeking damages and other remedies for losses she claimed to have suffered by their interference with her property.

[9] Ms. Chapman claimed to have two exclusive rights-of-way: one for a driveway and another in the rear of Co-op's property where NSPI's electrical utility infrastructure is located. She demanded that NSPI's infrastructure be relocated. She also sought a declaration confirming and defining the extent of her rights-of-way; an injunction to compel the respondents to remove their equipment, to properly position a fence on the line between the properties, and to complete various repairs; a further injunction preventing them from interfering with her "exclusive rights-of-way" and from driving across her property; together with unquantified general damages for obstruction and interference with her use and enjoyment of her land.

[10] Through various bankruptcy proceedings in New Brunswick and Nova Scotia under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, it was ultimately ordered that C.A. Realty Limited ("C.A. Realty") be substituted in the style of cause for Co-op.

[11] In 1997, Co-op wished to expand its operations which required installing a loading dock. To do so it purchased part of the property at 19 Lawrence Street from Mr. Fury. In the agreement between Fury and Co-op, Co-op granted Mr. Fury a right-of-way over a driveway to be constructed on the area acquired by Co-op, and the parties agreed to construct a fence between the properties. In the deed, Mr. Fury was granted a right-of-way over the land located on the northwesterly side of the location of the fence.

[12] Later, in December 1997, at Co-op's request, NSPI installed two power poles and overhead lines between the properties. NSPI also installed a transformer near the northern corner of the Co-op building. The NSPI infrastructure was to provide enhanced electrical service to Co-op. Although both poles, the guy-wire, and the transformer are located entirely on the C.A. Realty property, the appellant claimed that they are located within the right-of-way.

[13] A Release was executed in 1998 whereby Mr. Fury received payment in exchange for allowing the placement of NSPI's power poles on the right-of-way. The Release permits Co-op and NSPI to enter upon the right-of-way to maintain the poles. The Release is binding upon all of Mr. Fury's successors and assigns. However, it was never registered.

[14] In 2000, Ms. Chapman visited the property and saw the NSPI infrastructure that had been previously erected. The driveway, fence and loading dock had also been completed.

[15] Ms. Chapman hired a lawyer and a surveyor through whom she became aware of other issues regarding the land. A 1997 plan showed that Mr. Fury did not own the driveway on the property. The appellant sought and received a $6,000 reduction in the purchase price.

[16] The surveyor prepared a location certificate which detailed the alleged encroachments.

[17] Despite her knowledge of these issues, Ms. Chapman went ahead and bought the property in 2001. She made no formal complaint regarding the alleged encroachments until 2005 when she began to assert an exclusive use of the two rights-of-way over a portion of C.A. Realty's property, including the area where the NSPI infrastructure was situated.

[18] She claimed that the NSPI infrastructure had encumbered her rights-of-way and interfered with her use and enjoyment of the property. She said she wanted more space for customer parking at her rug gallery business, and that the loss of parking space devalued her property. In addition to establishing the boundaries of the rights-of-way, she also demanded that NSPI remove its infrastructure, and pay her unspecified damages for her loss.

[19] At trial, Ms. Chapman testified on her own behalf and called Mr. Walter Rayworth, a surveyor who had prepared a plan (Plan 2673) for Ms. Chapman, prior to her buying her home in 2001.

[20] The respondent, C.A. Realty, called three witnesses: Mr. Brian Creighton, Q.C., a property lawyer in Amherst who was directly involved in some of the transactions material to this dispute; Mr. Brian Inglis, a former CEO of Co-op; and Mr. Harry McIntosh, a land surveyor who had conducted a survey to establish the boundary line between the properties. Mr. McIntosh was qualified as an expert in the area of "legal surveying" and his expert's report was admitted in evidence at trial.

[21] As its only witness NSPI called Mr. Brad Roy, a Transmission and Distribution Supervisor for NSPI. His testimony related to some of the interaction between the parties as well as providing details concerning NSPI's practices generally, and the requirements for their infrastructure on site.

[22] After considering all of the evidence and submissions, Arnold, J. reserved, and later filed a comprehensive written decision rejecting the appellant's claim. His reasons for doing so are concisely set out in the Analysis and Conclusion sections of his decision:

Analysis

[48] Where a right-of-way is created by an express grant, its scope and extent are determined according to the language of the grant: *PATCO Developments Ltd. v. 3195972 Nova Scotia Ltd.*, 2016 NSSC 9, 2016 CarswellNS 15, at para 32. C.A. Realty submits that the grant of right-of-way is ambiguous, and that extrinsic evidence is therefore required. The relevant law is summarized in *Goulden v. Nova Scotia (Attorney General)*, 2013 NSSC 253, 2013 CarswellNS 610:

> 13 When the words of a deed are not ambiguous, either in themselves or when applied to the land in question, the intention of the original grantor is to be taken from the words of the description in the deed. No further rules of interpretation are required: *Herbst v. Seaboyer* (1994), 137 N.S.R. (2d) 5 (N.S. C.A.), at para. 15; *MacDonald v. McCormick*, 2009 NSCA 12 (N.S. C.A.), at para 73. A latent ambiguity occurs when the words of a document on their face do not admit a different possible meaning, but surrounding circumstances show that two or more different meanings are possible. A party may demonstrate that a latent ambiguity exists, and attempt to resolve it, by adducing extrinsic evidence, including evidence of subjective intention. A patent ambiguity, by contrast, is "apparent from the face of the document": *Taylor v. City Sand & Gravel Ltd.*, 2010 NLCA 22 (N.L. C.A.), at para. 21; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d edn. (Toronto: Lexis Nexis Butterworths, 2012) at §2.8.5.

[49] C.A. Realty says the ambiguity must be settled by reference to the expert opinion of Mr. McIntosh, the intentions of the Co-op and Mr. Fury at the time of the transaction, Mr. Fury's subsequent acceptance of the boundaries of the right-of-way and the plaintiff's knowledge of the boundaries when she bought the property. On the evidence, I am satisfied that this is an appropriate situation to use extrinsic evidence as an aid to interpretation.

[50] C.A. Realty argues that the right-of-way does not extend over the rear part of its property. Its purpose is to provide access to the street for Mr. Fury and his successors in title. This is apparent from the subsequent conduct of Mr. Fury, and is supported by the expert's report. The location of the right-of-way is defined by the fence, which was already in place when the plaintiff bought the property. Her knowledge of the location of the fence and the edge of the driveway at the time she bought the property justifies the application of the doctrine of *caveat emptor*: see *Saueracker v. Snow* (1974), 14 N.S.R. (2d) 607, 1974 CarswellNS 249 (S.C.T.D.), at para. 30. In *Buchanan v. Saulnier* (1983), 25 A.C.W.S. (2d) 320, 1983 CarswellNS 547 (S.C.T.D.), where the court said:

> 16 Having come to these conclusions, I am satisfied from the evidence that there were mistakes in drawing the deeds. There is evidence of this. When the conveyance from Boutilier to Burton was drafted in 1951, it did not reflect the intention of the parties in that the most logical meaning of the words used, looked at without any evidence of surrounding

> circumstances, would indicate an intention to convey away the entire shore lot, including the rights-of-way. But I am satisfied that that was not the intention of the parties and this is most evident from the fact that Mr. Hazlitt Boutilier and members of his family remained in possession of the shore lot and had access to it from the time they sold to Mr. Burton in 1951 up until the time the shore lot was sold to Mr. Beckett in 1966. I am also satisfied that a mistake was made in the conveyance when Mr. Burton sold to Mr. Saulnier in 1969. The same description was used in that deed as had been used in the conveyance from Boutilier to Burton. I am satisfied that there was no reason for Mr. Burton to know that the descriptions should have changed, he simply sold what he acquired. As I have indicated, I am satisfied to accept Mr. Burton's evidence that Mr. Saulnier was shown the eastern line as I have described it.[sic] and he knew what lie [sic] was buying The deed as drafted did not reflect the agreement of the parties. I am satisfied that neither Mr. Burton nor Mr. Saulnier knew the description did not correctly describe the land that had been agreed to be sold and to be purchased. I am satisfied there was a mutual mistake.
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> …
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> 21 Mr. Saulnier's claim for indemnification against Mr. Burton is dismissed as I am satisfied Mr. Saulnier was aware that he was purchasing lands up to the fence line I have described as the Burton fence. The plaintiff has not proven any damages. I do not feel it can be said that going to Prince Edward Island for a vacation was as a result of any action taken by Mr. Saulnier. The only act of trespass was committed in 1980 when the fence was constructed by Mr. Saulnier across the top of the so-called right-of-way to the south of the Johnson's Point Road.

[51] As C.A. Realty points out, when Ms. Chapman viewed and purchased the property, the NSP infrastructure was in place and visible. Even if it did interfere with the right-of-way, it would have been a patent defect, and the doctrine of *caveat emptor* would apply: *Hambrook v. Saunders* (1991), 116 N.B.R. (2d) 91, 1991 CarswellNB 250 (Q.B.), at paras. 28-29.

[52] In this case, the fence was the original monument of the location and extent of the rights-of-way. Other than natural boundaries, this is the highest-ranking category of evidence of original boundaries, according to the surveyors' hierarchy of evidence: see *Goulden* at para. 16. The expert, Mr. McIntosh, concluded that the boundary of the right-of-way was established when the fence was built in its present position. I accept the expert's opinion, and I agree that the fence is the proper boundary of the right-of-way.

[53] C.A. Realty offers various alternative arguments, in the event that the court rejected the argument that the fence was the original monument. I would like to refer to one in particular: I agree that even if the fence did not mark the actual boundary, there is no substantial interference with the plaintiff's rights.

Ms. Chapman complains that she would have more parking spaces available to her if the utility pole and guy wires were removed. In *Voye v. Hartley*, 2002 NBCA 14, 2002 CarswellNB 627, the court said:

> 25 It is trite law that only a "substantial interference" by the owner of the servient tenement with the enjoyment by the owner of the dominant tenement of the right of way is actionable. In *West v. Sharp*, Mummery L.J. defines what is meant by "substantial interference," at para. 35:
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> > Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. *He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him . . . .* [Emphasis in *Voye*.]
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> See, as well, *Keefe v. Amor* (1964), [1965] 1 Q.B. 334 (Eng. Q.B.) , at p. 347, per Russell L.J. and *Tibbitt v. Hobbs* (2000), [2001] E.W.J. No. 2709 (Eng. C.A.) , at para. 21, online QL (EWJ). Whether a particular activity amounts to a substantial interference is not a question of law but one of fact.

[54] On the facts of this case, I am satisfied that even if there were any infringement of the right-of-way, it would not substantially interfere with the plaintiff's use of the right-of-way for its intended purpose of providing access to the street. The right-of-way was not created to allow for increased parking.

[55] I would also accept that the plaintiff appears to be asserting a right of control over the right-of-way that is incompatible with its nature as an easement. The right apparently being asserted by the plaintiff at least implicitly threatens to deprive the owner of the servient tenement of control of its own land, which is inconsistent with the limited nature of an easement: see J.R. Grant and P. Morgan, *Gale on Easements*, 19th edn. (London: Sweet & Maxwell, 2012), at §1-03.

Conclusion

[56] I am satisfied that the property boundary and the boundaries of the easement that resulted from the Co-op's purchase of land from Mr. Fury at 19 Lawrence Street are as described by Mr. McIntosh and Mr. Creighton, and also as described by Mr. Rayworth on cross-examination.

[57] The property boundary is the fence line between the two properties, and where the fence line is disrupted by the Co-op loading dock, the property line continues along the intended boundary from the fence line to the end of the property.

> [58] Schedule C to the Deed grants an easement to the owner of 19 Lawrence Street, providing for a two-foot strip of lawn immediately adjacent to the fence. The easement is as depicted by Parcel "E" in Mr. McIntosh's 2013 Plan, which is the yellow highlighted portion of Exhibit 2, Tab 29. Parcel "E" stops at a jog in the property line. From that point to the back of the Co-op property there is no easement. The boundary that runs straight back from that jog to the end of the fence line is simply the property boundary line. From there onward, Co-op owns one side and Ms. Chapman owns the other side. Anything outside of Parcel "E" is not part of the easement.
>
> [59] The area of lawn where the transformer and utility pole are located are not part of the easement. The utility pole, guy wires and transformer located midway along the property do encroach on the easement. However, the doctrine of *caveat emptor* applies. Additionally, there is no substantial interference with Ms. Chapman's rights concerning the intended use of the right-of-way. Ms. Chapman's claims are also incompatible with the right-of-way's nature as an easement. Ms. Chapman's claim is dismissed.
>
> [60] The parties will bear their own costs.

[23] Before considering the issues on appeal, I will first address two preliminary matters.

Preliminary Matters

[24] At the start of the hearing we dealt with two matters. The first concerned an objection raised by Ms. Chapman regarding a supplementary appeal book prepared but not yet filed by the respondents. She felt that her consent was required for such a document to be filed with the Court. Counsel for NSPI argued that preparation of the supplementary appeal book was required because of the deficiencies in the record on appeal filed by Ms. Chapman, as well as her non-compliance with the *Civil Procedure Rules* with respect to the contents of her factum. In particular, counsel for the respondents pointed out that the appellant had not filed all of the documentary evidence that did form the record at trial, and that she had included other documentation that was not admitted at trial. We reserved and said that we would deal with that objection during the course of our deliberations.

[25] The second matter, closely connected to the first, concerned an objection raised by the respondents regarding the documentation included within Ms. Chapman's factum and her appeal book(s) which were not part of the record at trial. The basis for this objection was further compounded by Ms. Chapman's handing up to the panel during the hearing what I will describe as a "compendium" which contained papers from the trial that were altered (for example, diagrams and plans with certain parts highlighted in different colors) or were entirely new pages that had never been part of the trial record.

[26] The respondents' counsel were generously restrained in their objections, since Ms. Chapman was an inexperienced and self-represented litigant. Nonetheless, they properly alerted the panel to the fact that Ms. Chapman's submissions on appeal relied, in part, upon documentary evidence that was never admitted at trial. Again, we reserved on this objection and said we would take it into account during the course of our deliberations and rule on these matters in our decision.

[27] I do not agree that Ms. Chapman's consent was required before the respondents could produce and file a supplementary appeal book. Because of her non-compliance with the *Rules* it was entirely appropriate for the respondents to assist us by filing a supplementary appeal book to accurately complete the record. In any event, the respondents' counsel advised that whatever they had intended to include in their supplementary appeal book was all part of the trial record and simply consisted of the pleadings, exhibits and pre-trial briefs that Ms. Chapman had left out. Accordingly, this material would be found in the trial record in any event, is properly before the Court on appeal, and I have considered it as required.

[28] Dealing with the second matter, the respondents' objection is well-founded. To the extent that the appellant included any new material in her factum, her appeal book(s) or her compendium, I have ignored those materials which do not in any way comply with the *Rules* surrounding the admission of fresh evidence. To the extent that her filings accurately duplicate what <u>was</u> before the trial judge, I am satisfied that he considered it, and exercised his authority in choosing what weight, if any, to give to it during the course of his deliberations.

[29] Having dispensed with these two preliminary matters I will turn now to the issues on appeal.

Issues

[30] In her Notice of Appeal dated November 18, 2017, Ms. Chapman lists four grounds of appeal:

1. Inaccurate/misleading testimony by Brian Creighton regarding the "Agreement of Purchase and Sale Contracts, and regarding Deed prepared by Mr. Creighton. [sic]
2. Inaccurate/misleading testimony by Walter C. Rayworth regarding the Survey work and Plans.
3. Possible mis-interpretation by the Court of testimony of James McIntosh.

> 4. Possible misunderstanding of locations of "Rights-of-Way driveway versus "lawn use EASEMENT". [sic]

[31] In terms of relief, the appellant asks that the appeal be allowed, the judgment in the court below "rescinded" and that we "include Damages and reparations to the Appellant".

[32] Unfortunately, and as already explained, much of the material Ms. Chapman filed does not comply with the *Civil Procedure Rules* regarding the preparation of a proper factum and appeal record. Her bound materials are not paginated and are very difficult to follow. The appellant's four grounds of appeal are not clearly addressed in her factum, and seem to relate exclusively as she put it, to her "differences of opinion" with Arnold, J.'s assessment of the evidence. Similarly, the appellant's written and oral submissions do not easily track the trial record and simply reiterate her same arguments and opinions, heard and rejected, by Arnold, J..

Standard of Review

[33] The issues the appellant raised in her grounds of appeal each involve questions of fact or inferences of fact. It is settled law that we will only intervene in such circumstances if we are satisfied that the trial judge's analysis and conclusions are the product of palpable and overriding error. See for example, *McPhee v. Gwynne-Timothy*, 2005 NSCA 80. To the extent that the appellant's fourth ground of appeal triggers any kind of legal inquiry, I would view the issue, at best, as perhaps raising a question of fact, mixed with an inextricable point of law for which the standard of review is also palpable and overriding error. See for example, *Keddy v. Keddy Estate*, 2017 NSCA 78.

[34] Respectfully, it appears to me that the appellant's real complaint is a dissatisfaction with the trial judge's findings and conclusions tied to a request that we retry the case, conduct our own new and independent analysis of the evidence, and substitute our findings for those of Arnold, J. Respectfully, that is a fundamental misunderstanding of our limited role on appeal. See for example, *MacDuff v. 3209292 Nova Scotia Limited*, 2013 NSCA 31.

Analysis

[35] But for certain points (for example, NSPI taking no position on the boundary issue), C.A. Realty and NSPI adopted shared or similar positions in opposing the appellant's claim. For that reason, I will refer to them collectively as "the respondents", unless the context otherwise requires.

[36] Each of the respondents fairly and accurately addressed the issues, the evidence and the law in demonstrating why each of the appellant's arguments ought to be rejected.

[37] In all but one respect (which I will explain later at ¶66 in these reasons) I accept the respondents' submissions in seeking to uphold the trial judge's decision. Accordingly, the analysis that follows tracks the respondents' shared positions and will, in particular, borrow heavily from the arguments advanced by C.A. Realty Limited.

Issue #1: Did the trial judge err in accepting allegedly inaccurate/ misleading testimony of Mr. Creighton regarding the Agreement and/or the Deed?

[38] Mr. Creighton is a property lawyer in Amherst. He conducted the 1997 property transaction between Mr. Fury and Co-op. He explained that Co-op wanted to build a below-grade loading dock and needed slightly more land to do it. Mr. Creighton was instructed to arrange a collegial sale of land between Mr. Fury and Co-op and to prepare a driveway easement between the parties to the sale. He located the original version of the agreement. Schedule A shows the location of the new boundary that would exist following the grant of the easement. Schedule B shows the location of the intended new fence between the two properties.

[39] Mr. Creighton testified there was no intended "lawn easement" that would give Mr. Fury the lawn space in the area of the loading dock/transformer. According to Mr. Creighton, the "lawn" referred to in the agreement is very limited, comprising two feet on each side of the fence. Co-op agreed to run the fence to the back of the properties. However, due to safety issues, Co-p instead ran the fence to the loading dock area. He said the driveway had been angled in originally, but that when the loading dock was built, the driveway had to be moved and straightened out. The lawn area by the loading dock was never part of the right-of-way (ROW). Co-op granted the ROW over the driveway at the time it was built.

[40] I see no reason to suspect there is anything inaccurate and/or misleading with regard to Mr. Creighton's testimony. He was retained to handle the property transaction, and is the only witness who testified about it. He had a vivid recollection of the circumstances. He recalled the objective and collegial nature of the deal. He said the ROW related only to the driveway and there was never an intention to create a lawn easement that would give Mr. Fury (or the appellant) the

lawn in the area of the loading dock/transformer. In doing so, he relied upon the original version of the agreement, together with the schedules which showed the new boundary and the new fence. He insisted that the "lawn" comprises just two feet on each side of the fence. Mr. Creighton's testimony is consistent with that of both surveyors and the other witnesses.

[41] I would dismiss this ground of appeal.

Issue #2: Did the trial judge err in accepting allegedly inaccurate/ misleading testimony of Mr. Rayworth regarding the survey work and plans?

[42] Mr. Rayworth is a retired land surveyor. In 1997, he was retained to prepare a survey of the properties. In preparing Plan 2673, he conducted research and a physical survey of the properties.

[43] When shown a clean unmarked copy of the plan on cross-examination, Mr. Rayworth's memory was refreshed. The broken line that appears on the plan was intended to depict the boundary line between the properties. The location of an iron bar, which the appellant had been relying on, had nothing to do with the boundary line between the properties. Mr. Rayworth's testimony revealed that the appellant's claims relied heavily on an inaccurate version of the plan and a misunderstanding as to the location and significance of that particular iron bar.

[44] In my view, there is no basis to suggest that Mr. Rayworth gave inaccurate or misleading testimony. He conducted the survey work in 1997 and was the only witness who testified about it. Once he had an opportunity to review the exhibits, he had a strong recollection of the circumstances. He confirmed the boundary location, said the ROW only related to the driveway, and testified there was no intended lawn easement. Mr. Rayworth's evidence is consistent with that of Mr. McIntosh and the respondents' other witnesses.

[45] I would dismiss this ground of appeal.

Issue #3: Did the trial judge err in interpreting the testimony of Mr. McIntosh?

[46] Mr. McIntosh was qualified as an expert, able to give opinion evidence in the field of legal surveys. His report was admitted into evidence. In preparing his report, Mr. McIntosh conducted title searches at the Registry of Deeds, reviewed plans and deeds, and carried out a field survey where he measured features and located boundary evidence and field markers. The scope of his report dealt with

the location of the property boundaries, the location and scope of the ROW and the location of the NSPI infrastructure.

[47] As to the location of the boundary line between the properties, Mr. McIntosh concluded that the boundary he found was the same as the one found by Mr. Rayworth in 1997. It runs along the fence line until a jog in the property where the fence stops. Thereafter, it runs along the intended fence line, straight to the back of the property. He also confirmed that the location of the iron bar emphasized by the appellant had nothing to do with the boundary line between the subject properties.

[48] Regarding the location and extent of the ROW, Mr. McIntosh opined that the ROW was situated along the fence, and, where there was no fence, along the intended boundary. He testified that the ROW stops, however, at a jog in the property line, after which there is no easement.

[49] It was created when Mr. Fury sold the property to Co-op. The deed refers to a fence to be constructed. The fence is the original monument of the boundary of the ROW. An original monument in its original location marks the boundary. The original boundary of the ROW was to be ten feet from, and parallel to, the property line. The fence was not installed as agreed upon, due to safety issues with the loading dock. Mr. McIntosh therefore followed the fence line to the back of the property in determining the property boundary.

[50] Mr. McIntosh depicted the ROW by Parcel "E" in his plan. He relied on the Rayworth plan and said the ROW is as depicted on that plan, except where the fence is misaligned. He, therefore, concluded that Parcel "E" stops at a jog in the property line. From that point to the back of the C.A. Realty Property, there is no easement. Therefore, in his expert opinion, anything outside of Parcel "E" was not part of the ROW.

[51] According to Mr. McIntosh, the lawn referred to in the agreement is the lawn that exists for two feet on either side of the fence. In his opinion, the rear area of lawn claimed by the appellant (where the transformer is located) is not part of the ROW. Mr. McIntosh’s testimony as to the location of the ROW corresponded with that of Mr. Rayworth on cross-examination, and that of Mr. Creighton.

[52] Regarding the location of the NSPI infrastructure, Mr. McIntosh confirmed that the transformer on the rear lawn of the C.A. Realty Property was not on the ROW, nor was the NSPI utility pole at the front of the property near Lawrence

Street. However, the utility pole and guy-wires located midway down the driveway are located on the ROW.

[53] I am not persuaded the trial judge misinterpreted Mr. McIntosh's testimony. Mr. McIntosh was the only witness qualified as an expert. His expert opinion regarding the location of the boundary line between the properties is consistent with the Rayworth plan. Further, his opinion regarding the location of the ROW is consistent with the testimony of Messrs. Creighton and Rayworth and Plan 2673, except where the fence is misaligned. Mr. McIntosh emphasized that Parcel "E" is the entirety of the ROW, and there is no back lawn easement. Consistent with Mr. Creighton's testimony, he concluded that the lawn referred to in the agreement is the lawn that exists for two feet on either side of the fence. Mr. McIntosh confirmed that the transformer on the rear lawn of the C.A. Realty Property is not on the ROW, nor is the NSPI utility pole at the front of the property near Lawrence Street. This is consistent with all of the evidence presented at trial and is only inconsistent with the "different opinions" asserted by the appellant.

[54] I would dismiss this ground of appeal.

Issue #4: Did the trial judge err in determining the location of the ROW and/or alleged lawn use easement?

[55] It is clear that Arnold, J. carefully reviewed all of the evidence before reaching his conclusions. It is not for us to retry those findings and substitute our view of the facts for his.

[56] The trial judge relied on the testimony of Mr. Creighton (property lawyer), Mr. Rayworth (land surveyor) and the expert opinion of Mr. McIntosh (land surveyor) in determining the location of the ROW and the non-existence of the alleged lawn use easement.

[57] Arnold, J. found that the deed between Co-op and Mr. Fury defined the transfer of property rights between the parties. The finding was supported by the expert opinion of Mr. McIntosh.

[58] At trial, C.A. Realty claimed that a particular section of the deed was ambiguous and that such ambiguity ought to be resolved by admitting extrinsic evidence concerning the specific property in question and the subsequent conduct of the parties to the agreement. The impugned section of the deed said to be ambiguous states:

> RESERVING unto the Grantor an exclusive right of way for persons and vehicles over the driveway on the hereinbefore described lands (which driveway may be relocated by the Grantee in accordance with an agreement between the Grantor and Grantee dated the 1st day of October, 1997) and the exclusive right of way over all land located on the northwesterly side of a fence to be constructed between the driveway to be constructed by the Grantee for the Grantor and the driveway and loading dock to be constructed by the Grantee for its own use, which right of way shall be for the sole use of the Grantor and no other persons and which right of way shall be for the benefit of the Grantor and his remaining lands, and his heirs, successors and assigns, and is a burden on the Grantee, its lands and its successors and assigns, and provided that the Grantee shall have no right to occupy or use the land on the Grantor's side of the fence, and the Grantee shall not grant to any other party the right to use the land on the Grantor's side of the fence.

[59] Arnold, J.'s finding that this part of the deed was ambiguous and that extrinsic evidence ought to be admitted to aid in its proper interpretation was not appealed. However, I am satisfied that the judge did not err in deciding that this part of the deed was ambiguous and that allowing extrinsic evidence was necessary to guide him in properly interpreting the language contained in the document. In this case, the extrinsic evidence included: testimony regarding the intentions of Co-op and Mr. Fury concerning the rear portion of the lawn; Mr. McIntosh's expert opinion; and Ms. Chapman's knowledge of the location and extent of the ROW as well as the NSPI infrastructure, before she purchased her home.

[60] Arnold, J. correctly applied the relevant case law on the permissible use of extrinsic evidence when interpreting a right-of-way, having considered the principles set out in *Goulden v. Nova Scotia (Attorney General)*, 2013 NSSC 253, and *PATCO Developments Ltd. v. 3195972 Nova Scotia Ltd.*, 2016 NSSC 9. I see no error in the way in which the judge addressed this issue.

[61] Having considered all of the evidence, Arnold, J. found that the ROW did not extend over the rear part of the C.A. Realty land. Its purpose was to provide access to the street for the appellant. This is apparent from the subsequent conduct of Mr. Fury, and is supported by Mr. Creighton's evidence and Mr. McIntosh's expert report.

[62] The fence was the original monument defining the location and extent of the ROW. This is the highest-ranking applicable category of evidence of original boundaries, according to the surveyors' hierarchy of evidence: see *Goulden* at para. 16. Arnold, J. accepted Mr. McIntosh's conclusion that the fence defined the location of the ROW, and that the boundary of the ROW was established when the fence was built in its present position.

[63] During the course of his analysis, the trial judge accepted C.A. Realty's submission that Ms. Chapman's knowledge at the time she bought her property triggered the application of the doctrine of *caveat emptor* against her. He said:

> [51] As C.A. Realty points out, when Ms. Chapman viewed and purchased the property, the NSP infrastructure was in place and visible. Even if it did interfere with the right-of-way, it would have been a patent defect, and the doctrine of *caveat emptor* would apply: *Hambrook v. Saunders* (1991), 116 N.B.R. (2d) 91, 1991 CarswellNB 250 (Q.B.), at paras. 28-29.
>
> …
>
> [59] The area of lawn where the transformer and utility pole are located are not part of the easement. The utility pole, guy wires and transformer located midway along the property do encroach on the easement. However, the doctrine of *caveat emptor* applies. …

[64] On this point I respectfully disagree. Nothing about the relationship between C.A. Realty and Ms. Chapman sparked an application of *caveat emptor*. With respect, the trial judge's acceptance of C.A. Realty's argument amounts to an error in law. But given the strength of the trial judge's many other substantial and fully-merited reasons for dismissing the appellant's claim, this single error will have no bearing on the outcome.

[65] The doctrine of *caveat emptor* applies to the sale of land. In *Real Estate Transactions*, 2nd ed. (Toronto: Canada Law Book, 2014) at p. 42, Perell, J. puts it as follows:

> The principle of *caveat emptor* "let the buyer beware" concerns the law's treatment of what the vendor is or is not obliged to say or disclose about the property being sold.

Where the vendor is not obliged to make certain disclosures, the law of contract provides protection to the purchaser. Perell, J. elaborates as follows at p. 45:

> The law tells a purchaser to protect himself or herself by the law of contract; that is, by bargaining for protections, or by a careful inspection of the property being purchased. The policy of *caveat emptor* warns the purchaser that his or her rights do not automatically exist and if they do exist, they may be reduced by the closing of the transaction.

In *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, Dickson, J. (as he then was), for the Court, stated at p. 723:

> [C]aveat emptor remains a force to be reckoned with by the credulous or indolent purchaser of housing property. Lacking express warranties, he may be in

> difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The rationale stems from the laissez faire attitudes of the 18th and 19th centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.

See also *Edwards v. Boulderwood Development Co.* (1984), 64 N.S.R. (2d) 395 (C.A.).

[66] *Caveat emptor* is a policy of law that relieves the vendor of certain warranties and places the burden on the purchaser of reserving through contract certain warranties, the rights to which may otherwise not exist or be reduced. An easement is not a sale of land. It is also not a personal right but a proprietary right. In other words, when land is sold that is subject to an easement, the right or rights associated with the easement flow with the land, the benefit of which is ensured for successors in title to the dominant tenement, the burden of which binds successors in title to the servient tenement: see J.R. Grant and P. Morgan, *Gale on Easements*, 20th ed. (London: Sweet & Maxwell, 2017) at §1-01. Where there is neither the sale of land nor the opportunity to preserve purchaser rights through contract, nor the risk of rights being reduced or extinguished, as is the case where a successor in title receives the benefit of a previously existing easement, the rationale behind the doctrine of *caveat emptor* is not applicable.

[67] The trial judge's application of *caveat emptor*, and reliance on *Hambrook v. Saunders* (1991), 116 N.B.R. (2d) 91 (Q.B.) at ¶51 of his reasons, in this case confuses the relationship between Ms. Chapman and C.A. Realty, which owned the servient tenement, with Ms. Chapman and Mr. Fury, the vendor of the land she purchased, who owned the dominant tenement. C.A. Realty is a third party to the sale of land to Ms. Chapman. *Caveat emptor* does not apply.

[68] Arguably, C.A. Realty might have raised a defence of estoppel based on an assertion that Ms. Chapman had "notice" of potential problems before she went ahead and purchased her property. Under the former *Registry Act*, the presence of NSPI's infrastructure arguably was constructive notice of the Fury agreement and under the *Land Registration Act*, S.N.S. 2001, c. 6, it may be an overriding interest under s. 73. However, these defences were not pleaded and need not concern us on appeal.

[69] Turning now to the claim of interference, the record here fully supports the judge's conclusion that even if the fence did not mark the actual property, there

was no evidence of any substantial interference with the appellant's rights. Ms. Chapman complains that she would have more parking spaces available to her if the utility pole and guy-wires were removed. However, as Arnold, J. noted, only a substantial interference with the enjoyment of a right-of-way is actionable: *Voye v. Hartley*, 2002 NBCA 14, at ¶25.

[70] I accept Justice Arnold's conclusion that relocating the NSPI infrastructure and/or fence would not be warranted, as the alleged interference constitutes a trifling defect that does not pass the "substantial interference" test. The encroachment would not substantially interfere with the appellant's use of the ROW for its intended purpose of providing access to the street. As the trial judge determined, the ROW was not created to allow for increased parking.

[71] Finally, I agree with the judge's finding that the appellant's alleged right of control over the ROW is incompatible with its nature as an easement. It is settled law that an easement cannot exclude the owner of the servient tenement from its own property. The ROW cannot and does not derogate from C.A. Realty's proprietary and possessory rights in its own land. The appellant incorrectly interprets her rights in relation to the ROW in a manner that is inconsistent with C.A. Realty's ownership of its property. Her claim to exclusivity threatens to deprive C.A. Realty of the servient tenement of control of its own land, which is inconsistent with the limited nature of an easement: see *Gale on Easements*, *supra,* at §1-03.

[72] In sum, the overwhelming evidence offered at trial, and accepted by the judge, confirmed the location of the boundary and the ROW, lending full support to the judge's rejection of the appellant's claims.

[73] I would dismiss this ground of appeal.

Conclusion

[74] At the conclusion of the hearing we invited submissions on costs. As a bankrupt, C.A. Realty did not consider itself to be in a position to either seek or respond to costs. For its part, and while recognizing Ms. Chapman's difficulties as a self-represented litigant, nonetheless, NSPI asked for costs of $2,000 which it said would not come close to providing adequate compensation for the considerable wasted time, effort and expense incurred having to respond to the way in which the appellant presented her appeal. In reply Ms. Chapman said she was not in any position to respond to a $2,000 costs order.

[75] I accept NSPI's submissions. Ordinarily its success here would entitle it to a substantial award of costs, likely augmented to account for the additional work it was forced to undertake due to the appellant's failure in "perfecting" her appeal. However, having regard to the appellant's personal circumstances, I would award NSPI nominal costs of $500.

[76] For all of these reasons, I would dismiss the appeal and award costs of $500 to NSPI.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.