NOVA SCOTIA COURT OF APPEAL
Citation: *Muir v. Day*, 2022 NSCA 34

Date: 20220428
Docket: CA 513235
Registry: Halifax

Between:

David Muir and Carol Winnifred Muir

Appellants

v.

John J. Day and Judith A. Day

Respondents

Judge:	Derrick, J.A.
Motion Heard:	April 21, 2022 in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed with costs
Counsel:	Colin Bryson, Q.C., for the appellants John O'Neill, for the respondents

Decision:

Introduction

[1] On January 18, 2022, Justice John Keith of the Nova Scotia Supreme Court released a written decision in a right-of-way dispute between the Days and the Muirs (2022 NSSC 20). He ordered a declaration of an easement in favour of the Days over a portion of a Disputed Driveway for the purpose of travelling to and from their cottage property. The Order stated the easement did not include the right to park on the Disputed Driveway or otherwise on the Muir property. The Muirs are appealing the Order.

[2] Justice Keith's Order includes a direction to the Muirs to remove a garage and a portion of fence obstructing the Disputed Driveway. The provision in the Order states:

> The Respondents at their expense shall take all necessary steps to remove obstructions constructed on the Disputed Driveway and in particular, the garage and that part of the fence built across the Disputed Driveway. If these obstructions are not removed and free access returned in respect of the Disputed Driveway by May 31, 2022, the Applicants shall be entitled to take such steps as are necessary to complete the work with reasonable, associated costs being at the Respondent's sole expense.

[3] The Muirs have sought a stay pursuant to *Civil Procedure Rule* 90.41. They argue the financial cost and personal effort associated with moving the garage and fence justify staying Justice Keith's Order until the appeal is determined.

[4] For the reasons that follow, I am not persuaded the legal requirements for a stay have been made out. I have concluded the Muir's motion should be dismissed.

The Legal Principles Governing Motions for a Stay

[5] A stay is a discretionary remedy. As the filing of a Notice of Appeal does not suspend the enforcement of the order being appealed from, a stay may be required to "achieve justice as between the parties in the particular circumstances of their case" (*Hendrickson v. Hendrickson*, 2004 NSCA 98 at para. 11, per Saunders, J.A. quoting *Widrig v. R. Baker Fisheries Ltd.,* 1998 NSCA 20.

[6] The discretionary power to enter a stay is structured by the "*Fulton*" test (*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23). Under the *Fulton* test,

the party seeking the stay carries the burden of showing, on a balance of probabilities: (1) an arguable issue for appeal; (2) they would experience irreparable harm if the stay was to be denied; and (3) the balance of convenience favours a stay. The balance of convenience concerns the question of whether the appellant will suffer greater harm if there is no stay than the respondent will suffer if a stay is granted.

[7] In the event the applicant for a stay cannot satisfy the primary test's three criteria, exceptional circumstances may justify the granting of a stay on the basis of it being "fit and just" to do so (*Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45 at para. 23). Mr. Bryson for the Muirs indicated he is not suggesting this is an "exceptional circumstances" case that qualifies for a stay under the secondary test.

[8] I am reminded by *Fulton* that the "fairly heavy burden" borne by the applicant/appellant is warranted "considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal" (*Fulton*, supra at para. 27).

[9] The parties agree these principles govern the motion.

Applying the Legal Principles

Arguable Issue for Appeal

[10] The Muirs have advanced two grounds of appeal: (1) that the trial judge erred in law in concluding that reciprocal and mutual easements exist in law in Nova Scotia, and if they do, that a reciprocal and mutual easement applied in the facts of this case; and (2) that the trial judge erred in concluding the Days had demonstrated possessory claim to the easement found.

[11] In deciding in favour of the Days on the basis of finding a reciprocal and mutual easement over the Disputed Driveway, Justice Keith relied on what he described as the leading decision, *Barton v. Raine*, (1980) 114 D.L.R. (3d) 702, from the Ontario Court of Appeal (leave to appeal to the Supreme Court of Canada denied). In *Barton*, the court found an easement could be implied in circumstances where neighbours, a father and son, were held to have had a common intention that they would each have the use of a driveway located on both of their properties.

[12] Justice Keith quoted from the Canadian Encyclopedic Digest to explain the equitable principle of the reciprocal and mutual easement:

> **55** The Canadian Encyclopedic Digest, Easements II.5(f) states:
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> > **§237** The second exception to the general rule that a grantor must reserve expressly in a grant any right he or she intends to retain over the tenement granted, is the reciprocal and mutual easement. A conveyance by a common owner which makes no mention of a right-of-way over a driveway between two properties may, by necessary inference from the circumstances in which the conveyance was made, establish a common intention on the part of the grantor and grantee that, after the conveyance, each of them would continue to use the driveway in the same manner that it had been used prior to the conveyance.

[13] Justice Keith found "the obvious and necessary inference" from the circumstances surrounding the deed from a previous owner to Carol Muir was "very clearly sufficient to demonstrate a reciprocal and mutual easement" in favour of the Days over the part of the Disputed Driveway located on the Muir Property. Justice Keith held:

> **71** In sum, the common intention which attaches to the Disputed Driveway benefits both sides equally and recognizes a reciprocal right to access their cottage properties. In so far as parking is concerned, the Disputed Driveway is not a one-way street which favours the Days over the Muirs.

[14] On the issue of prescriptive rights, Justice Keith found:

> **87** In sum, between 1979 forward, there is ample evidence to demonstrate that the owners of the Day Property…exercised continuous, open, and notorious use of the Disputed Driveway for well over the 20 years necessary to establish prescriptive rights. A prescriptive right in favour of the owners of the Day Property (as the dominant tenement) arises over that part of the Disputed Driveway located on the Muir Property solely for the purposes of travelling to and from the Day Property, and not parking on the Muir Property.

[15] The brief submitted by the Muirs on the stay motion sets out the issues they will be addressing in their appeal:

> The concept of reciprocal and mutual easements has not been addressed in Nova Scotia at the appellate level. It has been addressed twice at the Supreme Court level, in the case under appeal and, as noted in paragraph 54 of Justice Keith's decision, in *PATCO Developments Ltd v. 3193972 Nova Scotia Ltd*, 2016 NSSC

> 9. It is submitted that this concept remains debatable and thus meets the arguable issue test.
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> The finding that there was a right of way by prescription was based on a factual finding, so is not so easily overcome on appeal. Regardless, the Appellants will submit that the decision was based on a palpable error. At the hearing, the Respondents' evidence focussed on their claim of entitlement to use the gravel driveway to get to the parking area on the Appellants' property that they claimed they had a parking easement over. More to the point, it is submitted that the Respondents' evidence did not actually demonstrate a 20 year history of driving along the gravel drive to their property. It will be submitted that this is an important factual distinction missed by Justice Keith, and thus there was not the evidentiary support for a prescriptive right of way to the Respondents' property. It is submitted that this meets the arguable issue test.

[16] Mr. O'Neill, on behalf of the Days, took aim at both grounds of appeal, suggesting the Muirs had failed to identify a ground of appeal with a realistic chance of success and arguing that establishing a palpable error in Justice Keith's factual findings would prove challenging. However, he did acknowledge the "arguable issue" requirement is a low bar to clear.

[17] As Chambers judge, I am to assess the "arguable issue" question without speculating about the outcome of the appeal or scrutinizing its merits. The focus is on whether the Muirs have advanced grounds of appeal that, if established, qualify as having "sufficient substance to be capable of convincing a panel of the court to allow the appeal…" (*Westminer Canada. Ltd. v. Amirault* (1993), 125 N.S.R. (2d) 171 at para. 11 (C.A.)).

[18] It is not readily apparent to me the Muirs have failed to satisfy the "arguable issue" test. They are advancing a question of law – whether reciprocal and mutual easements are recognized in law in Nova Scotia – that has not been previously addressed by this Court. My assessment does not involve drilling down into the merits of the appeal. Furthermore, in this case, taking a closer look at the viability of the grounds of appeal is unnecessary. The "arguable issue" question is ultimately diminished in significance by the more pronounced controversy between the parties on the stay motion: whether the obligations imposed on the Muirs, pursuant to Justice Keith's Order, will cause them irreparable harm. I have concluded irreparable harm has not been established.

Irreparable Harm

[19] In *Colpitts*, Justice Beveridge described what is meant by irreparable harm:

> **48** Irreparable harm is informed by context. This was described by Cromwell J.A., as he then was, in *Nova Scotia v. O'Connor*, 2001 NSCA 47:
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> > [12] The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in *R.J.R.-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
> >
> > [13] However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at s. 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[20] The Muirs' claim of irreparable harm is advanced through Mr. Muir's affidavit. Attached as an exhibit is a quote of $13,800 from a contractor itemizing the projected costs of: relocating the garage from the Disputed Driveway; returning the garage to its current location should the appeal be successful; dismantling the portion of the fence that obstructs the Disputed Driveway and moving it back in the event the appeal succeeds. Mr. Muir notes the quote does not include the additional cost of tearing up the concrete pad on which the garage is situated. Mr. Muir further cites as irreparable harm the effort and time involved in him removing and storing the contents of the garage during the process of its relocation and then putting everything back once it has been moved. He says these steps would have to be repeated in reverse if the appeal is successful.

[21] Mr. Muir notes that his effort and time are not compensable because it cannot be quantified. He queries how he would obtain an Order for payment of the garage-relocation costs if the appeal is allowed. He describes the required expenditure as money wasted.

[22] Mr. O'Neill says that if the appeal succeeds the task of calculating compensation for Mr. Muir's effort and time is an exercise courts can handily perform. I agree. Assigning a dollar value to the time spent by Mr. Muir would not be a complicated exercise. As for the garage and fence relocation costs, I raised with counsel *Civil Procedure Rule* 90.48(1)(e) and the very broad powers that can be exercised by the Court of Appeal:

> 90.48 (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the Judicature Act or any other legislation the Court of Appeal may do all of the following:
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> …
>
> (e) make any order or give any judgment that the Court of Appeal considers necessary.

[23] Neither Mr. Bryson nor Mr. O'Neill identified any basis for *Rule* 90.48(1)(e) being applied so narrowly as to preclude this Court ordering reimbursement of the Muirs for costs associated with the garage and fence if they are successful on appeal. I also note that Mr. Day indicates in his affidavit that he is "willing to provide security or an indemnity to enforce Justice Keith's Order pending the hearing of the Muir's appeal". This was reiterated by Mr. O'Neill in oral submissions. It seems to me, given these statements, the Days would be hard pressed to argue against a compensatory order being made in favour of the Muirs should the appeal be allowed.

[24] Having to pay out money to comply with an Order that is under appeal by itself does not establish irreparable harm. There is no evidence the financial and personal costs of compliance will create a burden that is beyond the capacity of the Muirs to bear. The evidence indicates the Days can and would reimburse for expenditures by the Muirs in the event the appeal succeeds. *Civil Procedure Rule* 90.48(1)(e) provides the Muirs with a mechanism for asking this Court to order compensation if the lower court order is overturned.

[25] I find the Muirs have not made out irreparable harm.

Balance of Convenience

[26] Had the Muirs made the case for irreparable harm, I would have to determine where the balance of convenience lay. The Muirs would have to establish the burden of the garage-relocation outweighed the continued disadvantages the Days will experience if they are unable to obtain the benefit of the right-of-way access provided by Justice Keith's Order.

[27] I do not accept, as was suggested, that a stay would merely impose on the Days an inconvenience they have coped with for the past three years. I was provided with video clips – evidence from the trial – of the steep, rough path the Days must currently use to access their cottage. In one clip, Judith Day is shown navigating the pathway with deliberate caution to avoid a fall. Her affidavit

describes the significant limitations she experiences due to osteoarthritis, particularly in relation to mobility. Both Days provided affidavit evidence of other impacts caused by the current location of the garage and fence: no front door vehicle access to their cottage; emergency vehicles not having front door access; inability to have ease of access for moving furniture or appliances in or out of the cottage; and elderly friends not being able to visit as they are unable to negotiate the rocky path. They each identified that time will erode their ability to enjoy the cottage as the aging process and Mrs. Day's osteoarthritis progress.

[28] Although it is not necessary for me to determine the balance of convenience issue as the Muir's stay motion falls at the irreparable harm hurdle, I am satisfied the balance of convenience would favour the denial of a stay.

Conclusion

[29] The Muirs have failed to satisfy the primary *Fulton* test for a stay. Their motion is dismissed. The Days sought costs. Costs will be payable by the Muirs in the amount of $750, inclusive of disbursements.

Derrick, J.A.