NOVA SCOTIA COURT OF APPEAL
Citation: ***Stonehouse v. Bailey***, 2014 NSCA 50

Date: 20140521
Docket: CA 411231
Registry: Halifax

Between:

William Daniel Murphy Stonehouse

Appellant

v.

Julie Angela Bailey and Marie MacQuarrie

Respondents

Judges:	Fichaud, Beveridge and Bryson, JJ.A.
Appeal Heard:	May 13, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $2,000, per reasons for judgment of Fichaud, J.A.; Beveridge and Bryson, JJ.A. concurring
Counsel:	Stacey L. England, for the appellant Jeremy P. Smith, for the respondent

Reasons for judgment:

[1] Mr. Stonehouse and Ms. Bailey dispute the title to a road that borders their properties in Earltown, Colchester County. The issue turns on the interpretation of a 1927 deed.

Background

[2] The Respondent Julie Bailey's land ("Bailey Property") comprises thirteen acres and sits north of, and adjacent to the Sutherland Road. Its conveyancing history is:

> (1) In 1877, a warranty deed from Charles Graham and his wife Christy conveyed to Charles Marsh a parcel that included the Bailey Property, the Sutherland Road and the Community Hall property ("1877 Deed"). The deed included wording "[r]eserving the right of way from Said Donald Sutherland's land to the main post road".
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> (2) In 1885, Charles Marsh and his wife Mary conveyed the land to Alexander Baillie ("1885 Deed"). The deed included the words "… reserving the right of way from said Donald Sutherland's land to the Main Post Road".
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> (3) In 1897, Alexander Baillie conveyed the Community Hall property to the Community of Earltown ("1897 Deed").
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> (4) In 1925, Alexander Baillie died, and his will devised his realty to his sister Elizabeth Packard. This included the Bailey Property and the Sutherland Road.
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> (5) In 1927, a warranty deed from Elizabeth Packard conveyed the property to her nephew Daniel Baillie, described as "containing thirteen acres, more or less, *excepting thereout the right of way or road* extending from the lands of said Donald Sutherland to the Public Highway aforesaid, and also the land on which the 'HALL' is situated" ("1927 Deed"). I have italicized the words that are the focus of the appeal.

> (6) In 1940, a warranty deed from Daniel Baillie and his wife Flora conveyed the Bailey Property to Peter McNutt, grandfather of the Respondent Julie Bailey. The deed said "excepting thereout the right of way or road extending from the lands of said Donald Sutherland to the Public Highway aforesaid, and also the land on which the 'Hall' is situated".
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> (7) In 1987, Peter McNutt conveyed the property to John and Jennie McNutt. This deed omits "or road" from the exception, and reads "… Containing 13 acres more or less excepting a right of way from lands of Donald Sutherland to the public highway and land on which the hall is situate".
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> (8) In 2002 a warranty deed from John McNutt conveyed the Bailey Property to his niece, the Respondent Julie Bailey.
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> (9) In 2004, the Bailey Property was migrated under the *Land Registration Act*, S.N.S. 2001, c. 6.

[3] The Appellant Mr. Murphy Stonehouse owns another parcel ("Stonehouse Property") that he acquired in 1990 by a warranty deed. The Stonehouse Property runs southeast along the Sutherland Road for 119 feet to the border of the Bailey Property.

[4] Since December 2008, Mr. Stonehouse and Ms. Bailey have had a percolating dispute respecting Mr. Stonehouse's use of the Sutherland Road. Ms. Bailey's affidavits say Mr. Sutherland has damaged her property, caused flooding and blocked passage. She sought to prevent him from using the Road to which she asserts title. Mr. Stonehouse denied doing anything inappropriate. Their dispute reached the courts. But that litigation is not under appeal here.

[5] In 2011, after a title search, Mr. Stonehouse concluded that Ms. Bailey did not own the Sutherland Road. It was his view that the 1927 Deed from Elizabeth Packard retained for Ms. Packard the fee simple in the Sutherland Road. Mr. Stonehouse sought out one of Ms. Packard's descendants, the Respondent Marie Danella MacQuarrie. On February 9, 2011, Ms. MacQuarrie gave Mr. Stonehouse a quit claim deed to an interest in the Sutherland Road. Ms. MacQuarrie testified that her interest would be one sixteenth.

[6] On May 12, 2011, Ms. Bailey applied to the Supreme Court of Nova Scotia for a declaration that Ms. MacQuarrie had no property interest in the Sutherland

Road before February 9, 2011, the date of the quit claim, and that her quit claim to Mr. Stonehouse is invalid.

[7] Justice LeBlanc heard the matter on March 21, 2012. Ms. MacQuarrie was named as a Respondent, and testified but took no position. Justice LeBlanc described the issue as:

> 25. The sole issue argued before me on this application is whether the 1927 Deed from Elizabeth Packard to Daniel Baillie included the Sutherland Road in the conveyance, or whether the Road was retained by the grantor.

[8] On December 24, 2012, Justice LeBlanc issued a decision (2012 NSSC 448) granting Ms. Bailey's application. The judge held that the 1927 Deed was ambiguous, and permitted the use of extrinsic evidence. With the assistance of extrinsic evidence, the judge interpreted the 1927 Deed as having granted the fee simple in the Sutherland Road to Daniel Baillie. The judge's Order of May 28, 2013 stated that Ms. MacQuarrie did not have a property interest in the Sutherland Road before February 9, 2011, and that her deed to Mr. Stonehouse was invalid.

[9] Mr. Stonehouse appealed to the Court of Appeal. In this Court, Ms. MacQuarrie again is named as a Respondent. She did not appear and takes no position.

Issue

[10] The issue is - Did Ms. Packard's 1927 Deed retain for Ms. Packard a fee simple in the Sutherland Road? If so, then Ms. Bailey, as a successor to the 1927 grantee, has not acquired the fee simple in the Road, and Mr. Stonehouse's appeal would be allowed. If not, then Mr. Stonehouse acquired no interest in the Road by the quit claim from Ms. MacQuarrie, and his appeal would be dismissed.

Standard of Review

[11] This Court applies correctness to issues of law, including legal issues that are extractible from questions of mixed law and fact. The Court applies palpable and overriding error to issues of fact and to questions of mixed fact and law from which no legal error is extractable. A palpable and overriding error is one that is both clear and determinative.

[12] The interpretation of the 1927 Deed is an issue of law, subject to correctness.

Analysis

[13] The parties accept that the words "reserving the right of way" in the 1877 Deed retained merely a right of way to the grantors Charles and Christy Graham, and that the Deed granted a fee simple in the Sutherland Road to Charles Marsh. The same words in the 1885 Deed reiterated that reservation. Immediately before the 1927 Deed, Ms. Packard had a fee simple in the Sutherland Road, subject to the right of way reserved by the 1877 and 1885 Deeds.

[14] The issue turns on the meaning of the words "excepting thereout the right of way or road" in Ms. Packard's 1927 Deed.

[15] Mr. Stonehouse points out that the 1927 Deed used the word "excepting", instead of "reserving" that appeared in the 1877 and 1885 Deeds from Ms. Packard's predecessors in title. He says the changed wording is significant. He submits that "excepting" excises the entire legal interest – the fee simple – of the excepted parcel from the grant, while "reserving" just retains a partial interest for the grantor. Accordingly, goes the argument, Ms. Packard excised the fee simple in the Sutherland Road from her 1927 Deed to Daniel Baillie.

[16] I'll start with Justice LeBlanc's comments. Referring to the phrase "right of way or road" in the 1927 Deed, the judge said:

> 67. … Once again though, the use of the words "right-of-way or road" present a challenge however, I find Ms. Bailey's submissions regarding the meaning of the word "road" in this context to be persuasive. The phrase "right of way" is intended to bear its legal meaning, in the sense that the Deed is referring to the interest on the land running in favour of the Lynch Property. The word "road" modifies "right of way" by specifying both the location of the right of way and the manner in which it is used (i.e. as a road). …

The judge concluded that the "right of way" was the designating term and "road" was the modifier, instead of the other way around, and that "right of way" bore its legal meaning. So the 1927 Deed excepted the right of way, not the fee simple.

[17] Next the principles of interpretation. The parties' submissions discussed the differences between patent and latent ambiguities, a distinction that I don't find helpful. In *Knock v. Fouillard*, 2007 NSCA 27, para 27, this Court referred to three principles that govern the construction of words in a conveyance and the effect of ambiguity. The second principle is "the court should construe the document as a whole, if possible giving meaning to all its words". The third is that

the court should determine "whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes". Later the Court discussed the use of extrinsic evidence to resolve an ambiguity:

> 60. Absent a direction from the words in the deed, the court may draw assistance to resolve ambiguity from the surrounding circumstances at the time of the deed's execution. *Anger and Honsberger*, ¶ 17; 20.30(a) summarizes the approach to determine the extent of a right-of-way by express grant:
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> > … The nature and extent of a right-of-way created by an express grant depends on the proper construction of the language of the instrument creating it. The following rules apply in interpreting the instrument:
> >
> > > (1) The grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect [to] the intention of the parties. (2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant. (3) The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee.

[18] These principles mirror the approved approach to the interpretation of contracts generally, summarized by Justice Iacobucci for the Court in in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129:

> 54. … The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
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> 55. Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. …

Similarly, G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), pp. 440-51, elaborates on the parol evidence rule and its exceptions. Included are the following passages:

> The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing. … [p. 440]

> … There are some real exceptions, by virtue of which a party introducing such evidence is at one and the same time upholding the validity of the written contract yet attempting to have its meaning understood in a certain way.
>
> First, where the contract as written is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. But the court should not strain to create an ambiguity that does not exist. It must be an ambiguity that exists in the language as it stands, not one that is itself created by the evidence that is sought to be adduced. … [pp. 442-43]

See also *Sinclair v. Fierro*, 2014 NSCA 5, paras. 32-33.

[19] Turning to this case, Ms. Packard's 1927 Deed excepted the "right of way or road". The interpretation of this couplet is critical to the outcome.

[20] A "right of way" is an interest in land – *i.e.* an easement. A fee simple is an entirely different interest in land. If "right of way" is the designating term, and "road" a modifier that locates the easement, then clearly the 1927 Deed neither reserved nor excepted a fee simple.

[21] The word "road", on the other hand, can have several meanings. It may designate the fee simple in the land that constitutes the roadway. It may be another way to designate a right of way, or easement over the roadway. Or it may just be a modifier to locate the interest in land that is designated by "right of way", as Justice LeBlanc concluded.

[22] If "road" dominates the couplet by designating the fee simple, as Mr. Stonehouse urges, then what do the adjacent words "right of way" accomplish?

[23] Mr. Stonehouse says that the 1927 Deed treated "right of way" and "road" as synonyms. So "right of way" didn't have its legal meaning, as an interest in land, but was just a vernacular description of the "road".

[24] Mr. Stonehouse's view would mean that the words "right of way" are superfluous. The words would add nothing to the already designated exception of the "road".

[25] I prefer Ms. Bailey's submission, and that of the judge, quoted earlier (para 16). The words "right of way" designate the legal interest – *i.e.* an easement, not a fee simple. The word "road" locates the easement. So all the words "right of way or road" have meaning. Nothing is superfluous. This is consistent with the second principle for the interpretation of deeds, mentioned in *Knock v. Fouillard* (above

para 17) that "the court should construe the document as a whole, if possible giving meaning to all its words".

[26] In *Knock v. Fouillard*, para 60, this Court adopted the principle from *Anger and Honsberger* that, as assistance to resolve an ambiguity, "[t]he grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect [to] the intention of the parties". The situation of this property and its surrounding circumstances confirm the view that the 1927 Deed conveyed a fee simple to the Sutherland Road. I will explain.

[27] The 1927 Deed excepted both the "right of way or road" and "the land on which the 'HALL' is situated". The "HALL" refers to the land on which the Community Hall sat, and which Alexander Baillie conveyed to the Community of Earltown in 1897.

[28] The 1877 and 1885 Deeds conveyed the "HALL" property. So those deeds "reserved" only the "right of way or road" from the grants. Apparently, the 1877 and 1885 grantors each wished to reserve a right of way.

[29] In the 1897 Deed, Alexander Baillie conveyed the "HALL" property to the Community of Earltown. This meant that Ms. Packard's acquisition of the lands in 1925 did not include the "HALL" property.

[30] Ms. Packard's 1927 Deed "excepted" the "HALL" property because she didn't own it. Her 1927 Deed could not have "reserved" title to property which was not hers in the first place. This explains the change of wording from "reserving" in the 1877 and 1885 Deeds to "excepting" in the 1927 Deed.

[31] The 1927 Deed dealt with the "right of way or road" and the "HALL" property in the same phrase. It appears that Ms. Packard was excepting only the right of way already reserved by the 1877 and 1885 Deeds, but not reserving yet another right of way for herself. So "excepting" was appropriate for both the "HALL" property and the existing right of way. In an ideal etymological world, had Ms. Packard wished to reserve a right of way for herself, the 1927 Deed would have split the phraseology to "except" the "HALL" Property and the existing right of way, and "reserve" the right of way for Ms. Packard.

[32] The point is a "right of way" isn't a fee simple. The 1927 Deed excepted the former, meaning not the latter. I am satisfied that the meaning of the 1927 Deed, according to the established principles of construction, is clear. I agree with the judge's conclusion that the 1927 Deed passed the fee simple in the Sutherland Road to Ms. Bailey's predecessor in title.

Conclusion

[33] I would dismiss the appeal with appeal costs of $2,000, all inclusive, payable by Mr. Stonehouse to Ms. Bailey.

Fichaud, J.A.

Concurred: Beveridge, J.A.

Bryson, J.A,