

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Steffen v. Rhodenizer, 2005 NSSC 42

Date: 20050221

Docket: SBW 5631

Registry: Bridgewater

Between:

Jonas P. Steffen, Johanna Steffen, Joachim Steffen
& Olof Arnheim

Plaintiffs

(Defendants by Counterclaim)

v.

Wilfred Freeman Rhodenizer

Defendant

(Plaintiff by Counterclaim)

DECISION

Judge: The Honourable Justice Margaret J. Stewart

Heard: January 19, 21 & 22, 2004; March 23, 2004;
September 7, 8, & 27, 2004 in Bridgewater, Nova Scotia

Written Decision: February 21, 2005

Counsel: Kenneth O. Thomas, for the Plaintiffs &
Defendants by Counterclaim
Rubin Dexter, for the Defendant &
Plaintiff by Counterclaim

- [1] At issue is the actual location of the Starratt hauling road depicted on the 1915 Starratt Plan of Division of Mosher Island (attached), as it relates to that portion which is the boundary line between the lands of the Plaintiffs and Defendant by Counterclaim, Olof Arnheim (Arnheim) and Jonas, Johanna, Joachim Steffen (the Steffens) and the Defendant and Plaintiff by Counterclaim, Wilfred Freeman Rhodenizer (Rhodenizer), and meets the sand beach at the south most corner of Rhodenizer's lot at what is shown on the Starratt Plan, as the "sand flat" and known later as Lot K, formerly owned by Detlev and Gisela Steffen (D. Steffen) and Jonas Steffen and now owned by Edward and Anne Marguerite Wedler. The road shown on the Starratt plan runs in a generally south west to north east direction from the sand beach at Mosher Island to the property of the Steffens to the north east thereof and runs along the southern common boundary between the lands of Rhodenizer and Arnheim and the southern common boundary between the lands of the Steffens and Arnheim. This road in common provides access to the beach. Secondary to the location issue of the Starratt road are issues of trespass and obstruction of the road.
- [2] The parties submitted an Agreed Statement of Facts which reads as follows:

1. The Plaintiff Arnheim is the owner of lands at Mosher's Island which were conveyed to him by a series of four deeds in 1985 (Exhibit Book, Tabs 3, 4, 5 and 6). These lands about the road in question to the eastward of the road;
2. The Plaintiffs Jonas P. Steffen, Johanna Steffen and Joachim Steffen are the owners of land at Mosher's Island which were conveyed to them by their parents Detlev and Gisela Steffen in 1996 (Exhibit Book, Tab 1);
3. Detlev Steffen and Gisela Steffen acquired the lands later conveyed to their children by deed in 1968 (Exhibit Book, Tab 7);
4. The Defendant Rhodenizer is the owner of lands at Mosher's Island acquired by him by a series of deeds in 1984 (Exhibit Book, Tabs 9, 10, 11 and 12);
5. The lands owned by the parties are shown on a Plan of Division by C. H. Starratt dated November 1915 (Exhibit Book, Tab 8). The Plaintiff Arnheim's lands are shown on this plan as "lands set off to Lemuel Mosher to the east of the road in question. The Defendant's lands are also shown on the Starratt Plan as lands of Lemuel Mosher, to the north of the road in question. The Plaintiffs Steffen's lands are shown, inter alia, as lands of Daniel Mosher, to the north and west of the road;
6. The road in question is shown as a "hauling road" on the 1915 Starratt plan. The Plan of Division included an agreement which provided that "all the roads and ways in use on the lands hereby divided shall be used in common in the manner at present used and such roads and ways shall be appurtenant to such lands forever..."
7. The Plaintiff Jonas P. Steffen conveyed Lot "K" as the "Sand Flat" on the Starratt Plan by Warranty Deed to Edward and Anne Marguerite Wedler in 1998 (Exhibit Book, Tab 27).

CHRONOLOGY OF EVENTS

1941/42 - 1949

- [3] William Stanley Shaw, now 78 years of age, was born on August 11th, 1926. As a teenager commencing in 1941 or 42, he picnicked on the back beach of Mosher Island which necessitated the use of a road to the beach. In 1944 and 1945, he attended Acadia University, then went to sea in 1946 and attended Mount Allison University for a year and a half, commencing in September of 1947. During his college years, he was to the island once or twice and by 1949 had stopped going. For the first time in 50 plus years, he visited the island in 2001, at Rhodenizer's request.
- [4] He recalled where the road came out after travelling from Mosher's gate but did not remember all of the twists and turns. The road he and his friends used in early 1940's "came out at the shore next to the cliff right on the shore" and they "picnicked up on the flat part of the beach". To get there, he recalled "walking across a couple of hundred feet of the beach" with their weighty supplies. On his first visit in 2001, after traversing Rhodenizer's property, he and Rhodenizer came out at a spot where a barricade located to the east of the sand dunes was erected on a road. Basically, he recalled telling Rhodenizer that the present road "is not where the road is" and "that is not the road that I remember" and returned a few weeks later to determine

where the road that existed in the 1940's was located on the ground by starting from where he remembered its exit point onto the beach. Given his experiences, Shaw was "positive there was no second road" and "in 1941 there was one road to that beach" with discernable carriage tracks. He recalled one came out to the beach area "pretty well parallel to the tide line - that area of the land between high and low water and out to my left there was an out cropping of cliffs and out of the corner of my eye, you could see the Thumb Cap Island just far from the distance". It was necessary to walk up the beach in a northerly direction about 200 feet to get to the sand dunes, being a sheltered area, and a place where they often picnicked. In locating the 1940's travelled way, Shaw was a little further south along the beach than where Rhodenizer eventually showed him. As Roger Mosher, Rhodenizer's uncle and former owner of the property purchased by D. Steffen in 1968, lived on the island in the 1940's, he acknowledged Mosher would be familiar with and know his land and the road shared in common.

1956-1967

[5] Sixty-year-old Rhodenizer testified he was born on Mosher Island on December 20th, 1943. He left as a toddler only to return as a teenager to visit and stay with his aunt and uncle, Lilly and Roger Mosher. Over a period of

eleven years, until his uncle Roger sold his property to Detlev Steffen (D. Steffen) in 1968, he visited. He stayed for one or two weeks at a time during the summer as a teenager and anytime he could get a chance. Commencing in the 1960's, 17-year-old Rhodenizer and his father also stayed at his uncle's home from the last week in November until December 23rd lobster fishing. During his stays he walked the travelled way to the back beach on the south shore of the island travelling from Mosher's home and arriving at the beach area near the cliffs. He never used a vehicle or a horse on the travelled way to the beach.

- [6] Between August 1957 and October 1957, Rhodenizer recalled the woods road or hauling road, as he knew it, as a teenager being extended by logger, Blake Taylor, in a south westerly direction over the lot he himself would purchase in 1984 and into the so called sand flat or Lot K on D. Steffen's surveyor, Errol Hebb's earlier 1988 Survey Plan (Exhibit 5) and adjacent lot or Lot 2 on Errol Hebb's Survey Plan from a point where the road, as he knew it, merged more or less south westerly towards the beach, thus creating a fork in and a new extension or branch of the road that the Steffens now claim to be part of the old hauling road or Starratt Road. That portion of the Blake Taylor extension from the fork and extending just until, according to

the Steffens, it turns or bends at the sand dune in a southerly direction to the beach and where Rhodenizer in 2001 placed a barricade, never existed prior to August of 1957. Neither did that portion turning or bending in a southerly direction to the beach from the Blake Taylor extension now reflected on Errol Hebb's survey plan. Basically, Rhodenizer's position is that any extension to the west of the fork created by Blake Taylor off of the original Starratt Road did not exist prior to August of 1957, and the original road always continued on from that newly created fork southerly down to the beach at the tree line approximately 40 to 50 feet from the high water mark where a cliff exists to the left. He placed the sand dune some 200 feet to the north, from the terminus of the road, as he knew it and ties it into his former surveyor Neiff Joseph's survey marker. Without commenting upon when, Rhodenizer acknowledged this portion, as he knew it, and which he later in 2002 had surveyed by Robert C. Becker (the Becker road or travelled way) from the fork to the beach went into disuse. After 1968, when his uncle sold to D. Steffen, he never went to the beach during the few occasions he was on the island, until he purchased his lot between D. Steffen's lot 1 and lot K in 1984. After that brief period of logging by Blake Taylor to the best of his

knowledge, for the next 10 years, no further logging occurred on Lot 2 or Lot K, the sand flat.

1965

- [7] When a 1965 Provincial Government aerial photograph was topographically mapped and a digital orthophoto produced from it by photogrammetrist, Paul Lumsden, President of Atlantic Air Survey Ltd., it revealed the uncontentious portion of the Starratt hauling road running in a generally south westerly direction with a travelled way portion forking off of it in a southerly direction and another travelled way portion continuing on in a south westerly direction, with both sections ending or fading into white sand, at the green line, in the aerial photo base map (Exhibit 19c). Lumsden noted the area below the white sand, to be the beach area, being the most evident part of the beach having no vegetation and being subject to the tides. I am satisfied the portion forking off in a southerly direction to the sand beach is what Rhodenizer's surveyor, Robert C. Becker, in his July 2002 survey plan notes to the east of the existing road and Rhodenizer claims to be the Starratt Road (the Becker road) and while acknowledging that the travelled way fades into the white sand, Becker's survey ties it into the

survey marker set earlier by Rhodenizer's surveyor, Neiff Joseph, with no road being discernable in the sand. I am also satisfied that the other travelled way portion continuing in a south westerly direction, which Rhodenizer testified to as being the Blake Taylor extension is what the Plaintiff's surveyor, Lester Berrigan shows on his January 2003 survey and opines as the Starratt Road opening up into or fading into the white sands south west of where Rhodenizer erected his barricade in 2001, at the beginning of the sand dune, with no extension to the south or tying into the survey marker set by Errol Hebb, even though noted on his survey plan as existing on the ground. This is also the portion of the road D. Steffen testified to walking over with the then owner of his lands, Roger Mosher in August of 1968. Lumsden's map reveals a "track" extension heading south westerly over lot K and lot 2 from this point. I am also satisfied Lumsden's 1965 documentation does not reveal the portion of the road designated on Errol Hebb's 1988 survey plan and Berrigan's plan extending south from the sand dune to Hebb's survey marker set some 45 feet above Neiff Joseph's survey marker, at what Hebb deemed to be the limit or top of the sand beach between the dune and continuing on some 40 feet below Neiff Joseph's marker in the sand, the high water mark.

- 1968
- [8] Roger Mosher sold his Mosher Island property, being lots 1 and 2 and interest in lot K, the sand flat on the 1988 Hebb Plan, to D. Steffen in late 1968. Steffen recalls Mosher and he walking the land and road in August of 1968. Using the road, they approached the beach at the sand dune, where the sand flats started and they stopped at the foot of the dune before he walked down to the beach. No path to the beach was visible and he had to walk through thick high grass. Where they stopped Mosher pointed to the right as D. Steffen's land but did not point out the boundary line. As a result of his discussion with Mosher, he referred Hebb to blazed trees on the western line of lot 2 for his survey purposes. At the time of purchase, Steffen relied on the 1915 Starratt Plan of Division and had no survey conducted.
- [9] Residing during the week in Halifax, the house on the island was his and his wife and then first child's first home. Consistently over the years, without miss the Steffens and their three children spent weekends, holidays and entire school vacations from June through to Labour Day on the island. Visits to the beach were regular and always by way of the road that opened up at the clearing and the dunes. Over the years all visitors experienced a visit to the beach via this route. Sand from Lot K was hauled over the road in

order to aid in the construction of the foundation for their home. Prior to a barricade being erected by Rhodenizer in 2001 at the entrance to the dunes, Steffen used a tractor for a number of years to haul fire wood and rock weed to his home.

1984

[10] Some 16 years after D. Steffen purchased his property, Rhodenizer, in 1984 purchased the property to the west of D. Steffen's lot 1, with the hauling road, as noted on the Starratt Plan of 1915, as the southern boundary between himself and Arnheim and with his western and southwestern boundary line separating lot K, the so-called sand flats owned by the Steffens until purchase by Edward and Anne Wedler in 1998. From the time of purchase in 1984, Rhodenizer testified to not using that portion of the road from the fork to the beach, (the Becker road), he knew and used as a teenager. He walked the existing road but never used that portion to go down to the beach. He stated by then "it was grown shut on both ends and I never seen it". He placed the big sand dune approximately 200 feet to the north of the terminus of the hauling road, as he knew it.

1986-1988

- [11] Rhodenizer raised boundary concerns with D. Steffen in 1986 which resulted in D. Steffen retaining Errol Hebb. Errol Hebb, a Nova Scotia Land Surveyor since July of 1947, by plan dated November 3rd, 1988, surveyed D. Steffen's property, to the east of Rhodenizer's property, being lot 1, and to the west and south west of Rhodenizer's property, being the so-called 8 acre sand flat or lot K between October 21, 1986 and August 11, 1988 and on June 28, 1989. In the process, he designated a road inclusive of a portion extending south west beyond the fork and reflected in purple on the 1965 aerial photo base map, being the portion Rhodenizer referenced as the Blake Taylor extension and also a portion, not noted on the aerial base map which continued thereafter, at an approximate 90 degree angle and extended south to a survey marker, he set some 45 feet to the north of a survey marker set earlier in the sand by Rhodenizer's surveyor Neiff Joseph.
- [12] Steffen like Rhodenizer contends the road, as he knew it, did not swing 90 degrees south, as Hebb's 1988 survey denotes but, rather it continued straight out, opening without bending, into and onto the actual sand flat with the foot path through the meter high grass, sometimes going one way and sometimes going another, and that it was Rhodenizer who subsequently in 1989 placed a fence designating the path between the fence and the woods

extending south after the turn. When he walked the road with Roger Mosher in the summer of 1968, there was no evidence of any road or foot path bending south to the beach. When they left the woods and approached the sand flat there was dune grass. The summer of 1988 when Hebb placed his marker, the grass on the beach was a yard high and “that year there was no foot path, nothing whatsoever.” Since first having been shown the hauling road by Mosher in 1968, D. Steffen stated it has not changed. All the foot paths extending into the sand flat however have changed, rather than going in any direction you wanted when you arrived at the sand flat, the fence established a path that was more or less accepted by anyone who used the path way to the beach. The sand flats were no longer open. Although it never should have been fenced off, D. Steffen contends it was accepted to avoid further dispute between neighbours. In 1986, while in the presence of his son and Mr. Hebb, Rhodenzier, without warning spoken disparagingly at him about his nationality by collective name calling and later in 1988 someone removed Hebb’s survey marker set at the limit of the sand beach and restored same upon the R.C.M.P. becoming involved. For D. Steffen, the true quarrel commenced when Rhodenizer blocked his access to the beach by constructing a barricade across the road in 2001.

[13] Steffen contends the road that he has walked since 1968 is the road shown to him by Mosher and that he still walks today and that he would walk right through to the sand flats were it not for the barricade that he has respected. Prior to the barricade being erected in 2001 and after the fence was erected in late 1989 or so, he and his family for that 10 to 13 year time span accessed the beach by staying in the area abutting the tree line and the now rotting fence post line to avoid any problems. D. Steffen contends that since he acquired the property in 1968 no one has ever shown him another road in the vicinity of the beach that was identified to him as a boundary road. Besides no one ever showing him anything, neither did anyone, inclusive of Rhodenizer, talk to him about another road forming the boundary and being the original hauling road on the Starratt plan.

1985 - 1989 & 2001

[14] Arnheim who, in 1968, purchased property on the other end of Mosher Island has visited the island every summer. In the early years, his use of the hauling road was very infrequent. In 1985, he purchased the lot bound in part by the sand flat and by the hauling road which separates his property

from the adjacent lots owned by Rhodenizer and the Steffens (lot 1). Thus, a large portion of his land abuts the hauling road in question “to the eastward of the road”.

- [15] Purchasing the 1985 lot by bidding on an estate sale, he did not walk the boundaries, or understand where they were or receive a copy of the Starratt Plan or have a survey conducted before he purchased.
- [16] Rhodenizer testified to granting permission to Arnheim and his family in 1989 to travel over his land, specifically by way of the Blake Taylor extension and continuing south from the sand dunes in order for them to access the beach, while referencing and emphasizing the fact that the hauling road that was the boundary between their properties was over grown and as he did not know just where it now was, there was a need for them to get together at some point to have it surveyed. In 1988 when the Hebb Plan was drawn, he contends there was no travelled way on lands he considered to be his to the beach beyond the Blake Taylor extension. Thus, when Hebb did his survey work between 1986 and November of 1988, no travelled way existed extending south off of the Blake Taylor extension. Where it opened into the clearing at the sand dune is the approximate point where Rhodenizer placed his barricade in 2001. In essence, for Rhodenizer and for D. Steffen,

the 15 year old Hebb Plan showing the travelled way south off of the extension did not reflect the reality of 1988. He contends he told Hebb there was “no road coming down there” when he was putting the survey marker in and that Hebb ignored his reference to the road being somewhere in the woods and that Hebb had it wrong. He contends, commencing in 1989 and over the next 12 years, Arnheim and his family’s travel over and use of this section of his land created the travelled way to the beach. During this time, he states he had no idea where the Steffens were travelling to get to the beach. After the Hebb survey was completed, he erected a fence creating a west perimeter for a travelled way heading south to the beach from the extension to prevent travelers encroaching any further onto his property. In 2001, he testified to erecting a barrier near the end of the Blake Taylor extension, having indicated his intentions to do so in 2000, after receiving a negative response to hiring a surveyor and cutting out the overgrown hauling road and after experiencing an issue with some sand being removed from the sand dunes by Arnheim in 1989 and tree limbs and trees being cut on the path to the beach.

[17] Arnheim experienced a road heading to the beach that came down to a point where, on the right, it was a sand dune and on the left, were brambles and

“absolutely” there was no sign of a road beyond that. There was no evidence of a road extending down through the dune grass to the water. For the first three years, the road was used by Arnheim simply to go down and enjoy the area. Then with the use of a diesel tractor, he started bringing seaweed up for his garden. However, prior to the fence being erected, he testified to never walking over it straight out. He always hung close to the left.

[18] Unsure of the date but not disagreeing with the fence being erected in 1989 and the barricade in 2001, he recalled two conversations with Rhodenizer concerning access to the beach area. As a result of the first conversation, quite a few years after he acquired the property, he understood Rhodenizer felt that there was a need to clear out the tree branches on the left side of the travelled way heading south as they were growing out and their presence was causing users to move over to the right. Arnheim took steps to clear out branches and remove saplings. Without any notice, he recalled a fence just showing up. This occurred years before the barricade was erected. Arnheim contends at this point, there was no indication from Rhodenizer that the travelled way was not the proper boundary. The fence showed up after Arnheim addressed the issue of the branches and he continued to believe that

Rhodenizer did not want him to go on the other side of the fence. Nor was there any indication to him from Rhodenzier that the survey marker set by Hebb was an incorrect location. Just before the barricade was erected, Arnheim recalls having had what turned out to be a heated second conversation with Rhodenzier near the opening, onto the sand dune. In the second discussion, Rhodenzier indicated it was his land, they were trespassing and that the location of the road was elsewhere, “over there” which caused Arnheim to vent his disbelief and reference pursuing the resolve in court if need be. He contends his good intentions were shown by clearing out the branches, not going near the sand dunes and then only years later during the next conversation, was there any reference about the road belonging elsewhere, “over there”. As to whether Rhodenizer gave him permission originally to use the extension and travelled way and then withdrew it with a years grace before erecting the barricade, Arnheim stated his negative response in absolutes.

Surveyors & Photogramatrist

- [19] Neiff Joseph, a Nova Scotia Land Surveyor, was retained by Rhodenizer prior to 1988 and in the process of surveying Rhodenizer’s property, set survey markers at the north shoreline of Rhodenizer’s western boundary and

at the south western corner, both of which Errol Hebb, D. Steffen's surveyor, noted as found set by Neiff Joseph in his final 1988 survey plan and did not question.

[20] At issue as between Hebb and Joseph, as noted on Hebb's survey plan, is the proper location of the survey marker denoting where Rhodenizer's south western boundary line intersects with the hauling road, as referenced on the Starratt Plan being the most southern corner of the Rhodenizer lot. Central to that issue, besides determining the distance and the angle of the south western boundary line from the Starratt Plan is whether the survey marker found set by Neiff Joseph at the south west corner of Rhodenizer's lot is the original Starratt corner and what, if anything, is on the ground of Rhodenizer's western line. This was raised by the Steffens' and Arnheim's land surveyor, Lester Berrigan, who offers the opinion that in retracing the south western boundary line and having regard for proper methods, the south western line is not where either Joseph or Hebb established it; but, rather is some 150 feet to the north and ties into the most southern corner of Rhodenizer's lot at the end of the existing road, where it opens to the sand dunes close to the barricade, as noted by Berrigans' pink line on the Hebb plan. He notes however, that he was not retrained to establish the boundary

between Rhodenizer and the now owners of lot K. In the result, his plan shows what he found on the ground, inclusive of Hebb's, Joseph's and Becker's markers and angles and is not his opinion, as to the south western boundary line.

[21] Indeed Becker like Berrigan, given the scenario of absence of physical evidence on the ground, such as found survey markers and blazes and absence of anything in deed descriptions as to course and distance confirmed normal procedure would be to retrace the Starratt plan by scaling it. Scaling out the western line of Rhodenizer's lot revealed to Becker, as it did to Berrigan, the potential in these circumstances for quite a discrepancy in the length of the western line between Starratt's plan digitized overlay and the Hebb plan. Problematic for Becker with Berrigan's analysis is that Rhodenizer's deed description calls for Rhodenizer's south eastern boundary to be the hauling road and the south western to be sand and by moving the south western boundary northerly from the found survey marker set by Neiff Joseph to account for that discrepancy in distance places that line in heavy wooded area before it extends to the sand. There is no telling where the sand ends and the woods starts on the Starratt plan, given how Starratt depicts the whole area. The nature and quality of the ground where the trees are located

may be a consideration. Like Berrigan, the south western line was not his mandate.

[22] Lester Berrigan, a land surveyor with thirty years experience, was retained by the Steffens and Arnheim to carry out a preliminary survey of the common boundary line between the Rhodenizer and Arnheim properties. Ultimately after three visits to the island in July of 2001, June of 2002 and December of 2002, he prepared his final survey plan dated January 20, 2003, having reviewed the 1915 Starratt plan, Errol Hebb's survey plan November 3, 1989 with June 28, 1989 revision and the Robert Becker survey plan dated July 12th, 2002. Commenting on Hebb's retracement survey of the four lots on the Starratt plan, inclusive of Steffen's lots 1 and 2, the sand flat or lot K and Rhodenizer's lot, he noted a review of Hebb's field notes revealed the location of Hebb's road, as plotted on Hebb's plan to be incorrect. He concluded the road as shown on Hebb's plan is actually plotted to the south east of where the existing road is actually located. There was a mistake on the plotting of the field notes by the draftsman, not in the field notes themselves. The field notes reveal a road in the same physical location, as the road Berrigan shows on his plan. This is not disputed.

[23] Rhodenizer contends the travelled way (the Becker road) south east of the existing road by 90 to 100 feet on his surveyor, Robert Becker's plan, signifies the road shown on the 1915 Starratt plan. Berrigan has no disagreement with what Becker's plan depicts on the ground. Berrigan's evidence and survey plan reveals the Becker road as an old hauling road, some 100 feet north eastwardly from the barricade, diverting from the main hauling road some 69 feet before leading into a footpath at the location of a three foot rise or rock out crop in the road and proceeding southwardly towards the beach, as the traces of the footpath fade in the flat sand dunes, a distance of some 111 feet from the survey marker set by Neiff Joseph in the sand. The area between the Berrigan road and the Becker road is wood land, heavily treed with spruce and toward the south, consists of a water filled low area on either side of the Becker road before opening into the sand.

[24] Berrigan testified, in reference to Rhodenizer's western boundary line that he would only accept a corner some 100' away from the distance measured on a plan he was retracing, if he actually found the physical evidence on the ground. On the two occasions he attended at the south west corner of Rhodenizer's property, he stated there was just a survey marker "out in what was the former sand dune" and which now had some small spruce trees

growing up around it. In his experience in retracing Charles Starratt's plans of survey over the years, Berrigan found Starratt, who died in 1939, to use either wooden posts with rocks or just a pile of rocks as markers. This is similar to Becker's experience. Where Rhodenizer's first surveyor, Neiff Joseph placed his bolt, Berringer contends neither was there any evidence of any old blazed line out near the survey marker, marking the south west corner of the lot. Basically, he contends there was no evidence on the ground. Berringer opines if there was no evidence on the ground, then Neiff Joseph placed the survey marker in the incorrect place. In the absence of anything on the ground, the correct place would be approximately 150' on the diagonal north of Neiff Joseph's marker, along the western boundary of Rhodenizer's property. The western boundary line measured on the Starratt plan reflects 627' from the shore to the south west corner in contrast to Hebb's western line measuring 763.42' to the corner survey marker found and set by Neiff Joseph. Also, Berringer noted if he was retracing the Starratt plan and could not find any original corner where the point is marked "survey marker found" on the Hebb plan, he would have to use measurements or scales from the plan and not his own measurements. As noted the Starratt plan western line scaled at 627' and the south western line

at 181' to Rhodenizer's most southern corner where it meets the hauling road. Joseph noted the later distance to be 194.25'.

[25] Berrigan was not retained to establish and define the boundaries between Rhodenizer and now, Wedler's lot K. The Starratt plan has no coordinates or measurements, only compass bearings N 15° E on the eastern boundary lines of Arnheim and Rhodenizer lots and Steffen's lot 2. For Berrigan, the best available information was a scale off the Starratt plan being one inch equals 20 rods or 330 feet. His pink lines marked on the Hebb plan reflect his use of the scale off the Starratt plan for depicting Rhodenizer's western (627') and southwestern (181') lines in common with the sand flat, lot K. In so doing, he tied his southwestern line to where the existing road meets the sand dune "located south west of" and commencing "very close to the barricade", where he opines to be the end of the Starratt Road. He had no issue with Hebb's lines, as they extended from the road that was there at the time to the shore that was there. As for the north shore line, as shown on the Starratt plan, having to be an accurate depiction of the north shore of the island, in order to measure Rhodenizer's western line, he offered the opinion that some compass work was carried out on the shore line by Starratt and

commented on the quality of the results that flow from circumstances that demand retracement by scaling from the original plan.

[26] After measuring the western and south western boundary lines relating to Rhodenizer's lot on the Starratt plan and determining Starratt's south west corner angle for the lot to be 130 degrees and after noting it was not a perfect fit when applying digitized overlay of the Starratt plan at a scale to match the Hebb plan, over the Hebb plan that had Berrigan's pink line measurements on it, Berrigan referenced the fact that certainly the eastern boundary line with its blazing, previously noted was correct and that the southern boundary line coincided with a land monument, being the bend in the hauling road and the south west corner on the western boundary reflected probably a thirty foot diversion which translated into a 20' diversion when a scaled digitized Starratt plan was over layed on his own survey plan.

[27] As to whether this process revealed lot K's western boundary line to also be diverted, the fact that line on the Hebb plan was calculated, not surveyed and no survey markers were set on either water side was raised in response to what was acknowledged to be the case. Other than the actual shore line shown on the Hebb plan and the right angle bend on the hauling road to the south east of Rhodenizer's south east corner being physical indications of

boundaries, there were only two lines shown on the Hebb plan, as having been derived from all blazes on the ground. They were Rhodenizer's eastern line and the western line of the Steffen's lot 2. Berrigan noted Neiff Joseph's south western line with its 130 degree angle at the south west corner is only correct if the survey maker found by Hebb and placed by Joseph is at the original corner as set by Starratt and is found in the field to be the original corner; but, if there is no evidence of that corner on the ground, then there is no choice Berrigan contends but to go back to the Starratt plan to find the angle and distance. It is the best available method in lieu of finding the original evidence on the ground and acceptance of his version, places the road where it is the same as the Starratt road. The Becker road does not correspond to the Starratt road. It is a full 30 degree angle from the Starratt plan on his analysis.

[28] As to the proper placement of the road shown on the 1915 Starratt plan, Berrigan opined that as stated many times throughout the trial, the road only went to the west as outlined on the Starratt plan overlay and did not extend out on the sand flats and ended at the most southern corner of the Rhodenizer lot. Where the road now turns to the south, that road is in fact over the undivided sand beach not Rhodenizer property. He opined what is

on the ground corresponds very closely to what is shown on the Starratt plan.

[29] As for the Becker road, Berrigan opined that the beginning of the Becker travelled way is an actual old hauling road but beyond that point, it is a pathway two to four feet wide which extended to the beach. It never could have been used as a hauling road with anything with wheels, whether it be a wagon or a tractor or even used by sleigh, as the terrain is too rough. He specifically referenced three foot rock out crops, three foot rises and sixty to eighty year old trees within an eight foot width of the travel way discounting the travelled way being a hauling road.

[30] With respect to the “iron bolt found” noted by Becker on his plan where the traces of the old travelled way fade into the sand, Berrigan testified to placing no significance on it other than it being an old nail some six to seven inches long often used in wharf construction.

[31] Robert Beckker, Nova Scotia Land Surveyor, with some twenty-seven years experience, attended the Rhodenizer property in March of 2001 at Rhodenizer’s request to conduct a survey of his property and provide an opinion as to which road constituted the south eastern boundary of Rhodenizer’s property. His mandate was to determine the location of the

hauling road, as shown on the 1915 Starratt plan, in the south eastern area.

The road on his survey plan dated July 12, 2003 (the Becker Road) reflects his opinion of the south eastern boundary of Rhodenizer's property.

[32] Becker, like Berrigan stated the lack of evidence on the ground causes one to rely on the survey plan. Noting Starratt to be a major surveyor of his day, Becker's experience with Starratt's plans, given the drafting technology of the day, varied from hard to follow in some cases and in other cases, as being fairly close. He noted this one could be one of the good ones. He had not investigated enough but what he saw was "reliable in that vicinity". Certainly, he confirmed Rhodenizer's eastern line on Hebb's plan matched quite accurately in distance and compared favourably in direction/course with the Starratt plan, being "closer than one would usually expect". There was not much difference. Becker like Berrigan, felt this line to be very close in direction to the bearings Starratt assigned it and ran according to the physical evidence on the ground. He walked but did not survey the south western Rhodenizer line, noting it on his plan with a thin line between Rhodenizer's south west corner at a found survey marker and what would be the southern most corner of Rhodenizer's property at Neiff Joseph's set survey marker. He showed this line for illustration purposes only and did

not make a comment on his agreement or lack thereof with it. He stated that was not his mandate and he did not form an opinion as to where the boundary line between the Rhodenizer property and the now Wedler property lay and was affirmative in his response to the south western line running anywhere along Rhodenizer's western line to the road. In the same vein, he did not make any determination, whatsoever, as to whether or not Neiff Joseph's survey marker set below Errol Hebb's indicates the most southerly corner of Rhodenizer's property. Where Hebb's survey tied into that portion of the road, after the 90 degree angle heading south to the beach, both Berrigan and Becker commented on the lack of Hebb's survey notes showing the ties to any road and that they were only able to infer from the notes and a sketch where he placed that portion of the road. Berrigan concluded it to be free drawn in some fashion he was not aware of. Hebb testified to what he showed on his survey plan to be an actual traverse of the existing road, at the time, in that area and not a hand-drawn thing.

- [33] The road on the Starratt plan acts as a boundary of Rhodenizer's property and the Starratt plan and the 1965 aerial map as well as Berrigan and Becker agree it ends at the sand flat.

[34] The portion of the road diverging easterly, according to Becker, and southerly, according to Berrigan, that Becker found and presented (Becker Road), as the road shown on the Starratt plan commences for Becker as an “old beaten down path or road way” for some fifty feet before presenting as traces of an old travelled way for some 113', passing between two low water areas and then fading out into a sandy area some 25' before connecting with the limits of the beach area and creating a distance of 100' plus in the sand before tying into Neiff Joseph's south corner survey marker with no road evident in that distance. Becker felt the sand beach would have alleviated some of the road over the years. However, as previously noted, he makes no determination “whatsoever” as to whether or not Neiff Joseph's survey marker set indicates the most southern corner of Rhodenizer's property, being the point on the Starratt plan where the road is to meet Rhodenizer's south western line at the sand flat. The Becker road varies in width between four feet and six feet, with six feet reflecting the beginning portion and with no strong issue being taken by Becker with Berrigan's characterization of the last 60 feet or so of the traces of a foot path/travelled way while fading into the sand and before the limits of the beach, being two to three feet wide.

[35] Berrigan's concerns over a three foot rock crop, three feet rises and 75 to 80 year-old trees located in the road preventing traffic and the use of the road were addressed by Beckker commenting upon the rock crop not being vertical or extensive, the grade and distance over which the rise inclines and extends being gradual and his interpretation of the edge of the travelled way accommodating these trees so that there was no impediment. He disagrees with Berrigan's conclusion that it was not an appropriate terrain for a road, as a hauling road.

[36] Becker testified on digitizing to having no success in trying to relate what was on the Starratt plan in certain places to what was on the ground, leading him to wonder what road actually was the correct Starratt road. The information he derived from the digitized Starratt plan on his plan, did not agree with what was on the Hebb plan. He found it resulted in the hauling road on the digitized Starratt plan overlay being somewhere in between the two proposed roads. It started to diverge between the roads where the Becker road started to diverge from the Berrigan or Blake Taylor extension portion. It caused him to be suspicious of this area.

[37] On cross examination, he confirmed that the Starratt plan and the Hebb plan were generally a pretty good match insofar as location from the gate at the

north end of the road down to where the Becker road diverged south. There was a clear match especially in the vicinity of Rhodenizer's south eastern corner and at the sharp bend in the hauling road on the Starratt plan. He confirmed on cross that the general flow of the Starratt road shown on the digitized Starratt plan overlay, over his plan, more closely approximated the road shown by Berrigan rather than his road, as the Starratt road, ran through the low wet area on the ground between the two roads. The bearing of the Starratt road was somewhat similar to the Berrigan road or was a closer bearing than the Becker road. The course of the Rhodenizer's western line was different but "not terribly" so. The true difference arose in the area where Rhodenizer's south western boundary heads south easterly to the road.

[38] There was no disagreement between surveyors that a good way to relate a plan and information to each other is by using the same scale and transfers of the same scale and by overlaying them differences and similarities can be noted. By digitization you have the ability to rework the Starratt plan to the same scale, as an existing plan but as stressed by counsel it does not correct any inaccuracies with the Starratt plan rather, it provides the same information, at a different scale, so that it can be compared more easily.

- [39] Photogramatrist, Paul Lumsden interprets and creates topographical maps from aerial photographs using a stereoplatter machine and his own extensive tracing skills. At Rhodenizer's request he conducted an aerial photogramatrical analysis of Mosher Island, looking for indications of road ways, path ways, trails, and tracks from a 1965 Provincial Government aerial photograph, he chose over 1945, 1955, 1965 and 1975 photos for its clarity, resolution and angles.
- [40] Employing double red lines denoting some unmeasured width because he could see "the pathway at all", rather than a single red line, the road, trail, pathway, Lumsden denoted runs generally in a south westerly direction from the top of the map (noted in yellow over the double red lines) branching out into two, so that one extended in the same direction (noted in purple over the red lines) and the other referred to by him as track or trail because it was not very definable in the heavily treed area headed in a 90 degree southerly direction, with both branches ending or hitting close to what Lumsden designated as the green tree line and commencement of an extensive white sand area, which itself lies to the north of a very definable and most evident part of what he references, as the main beach area, with the latter being subject to tides and lacking vegetation outlined in blue. He testified to the

whole sand beach running along the top part of the beach area but that the whole thing is sanded and stops at the green tree line. He described the area below the green tree line as sand flats. He depicted a single red line track extending out from the purple extension to and part way through an over cut green area located to the south of water on Steffen's lot 2.

[41] Independent of each other, Becker and Lumsden found the uncoloured double red lines extension, (the Becker road), heading south in the same location, thereby, verifying each other's work. Becker's coordinates coincided with Lumsden's aerial analysis. Unlike the other branch of the road, Becker's portion did not show evidence of recent use in 1965.

Lumsden did not discount the possibility of either of these road extensions being present in 1955, when the 1955 aerial photo was taken. Given the quality of the photo, he was just not able to determine any road in that photograph.

[42] Accepting Lumsden's findings, given his experience as a photogramatrist and correction capability of his equipment over the Steffens' and Arnheim's expert, I am satisfied the uncoloured double red line trail heading south in the 1965 photo existed. I am also satisfied what Lumsden saw in the 1965 aerial photo and interpreted, as being an extension of the yellow road in

purple is what is shown on Berrigan's plan, as a portion of Berrigan's road hitting or ending around the sand dune to the right and the other extension left uncoloured is what is shown on the Becker plan as the Becker road hitting or ending at the white sand area, where there is the sand dune to the left.

[43] Placing the overlay of Berrigan's digitized Starratt plan at a 1:2000 scale on his base map and matching the bend in the yellow portion of the road, Lumsden noted the yellow road to be a fairly close match to the digitized outline of the Starratt road and the location of the first fork in the road to be a "pretty good match" as well as the purple section of the road, the Berrigan road portion, much more accurately corresponding with the Starratt road outlined on the overlay than the Becker road and that it terminated pretty close to where the tree line ended at the sand on the 1965 map. Neither the map nor the overlay revealed a portion of road heading sharply south through the sand to the water at the end of the purple extension as depicted by Hebb in 1988. As noted, the map reflected a trail in 1965 continuing in a south westerly direction from the end of the purple extension over to lot 2.

[44] Lumsden expressed no opinion on the main issue of which road on the ground as between the Berrigan and Becker road is the road shown on the 1915 Starratt plan.

CONCLUSION

[45] After having considered all of the evidence the following is my conclusion as to which of the two roads, the Berrigan Road or the Becker Road, is the same road as shown on the 1915 Starratt plan; i.e. the Starratt hauling road and my reasons for same.

[46] I am satisfied the portion of the Starratt Road in issue, as shown on the 1915 Starratt Plan of Division extends from the fork and flows into the sand in the area at the foot of the sand dune, very close to the barricade, being that portion Lumsden referenced in purple on his base map (Exhibit 19C) and what Rhodenizer wrongly referenced as the Blake Taylor extension and that specific portion on Berrigan's plan referenced during the proceedings, as Berrigan's road before turning south to the beach. The deed description reads and the Starratt plan depicts the hauling road boundary ending at the sand flats, not the water's edge or in the middle of the sand. The Starratt road does not extend south to the water at a 90 degree angle upon hitting the

sand around the sand dune area. This area is the undivided sand beach area. Although not part of the original Starratt hauling road that section south of the sand dune, along the tree line heading to the beach, started to experience something more than hit or miss use, as a choice of location, after 1985 and became the regular choice of location when the fence was erected in 1989, after the completion of the Joseph and Hebb surveys, right up to the time of barricade preventing access in 2001. Arnheim for the few years preceding July of 1988, at least, had always hugged that section along the tree or bush line when accessing the beach. Before the fence was suddenly erected, he actually trimmed back some limbs and cut out the saplings at Rhodenizer's request. Around the time of Hebb's survey, D. Steffen recalled that to be a year when the sand dune grass was high. Hebb, in approaching the survey of that area, was aware of Neiff Joseph's survey marker set in the sand marking what would be the southern most corner of Rhodenzier's lot where the road meets the sand, at a time when the Becker road was not evident and the only known road was the Berrigan road some 200' or so to the north of Joseph's marker. Hebb testified to traversing the ground in order to designate that section and not to having coordinates. It may well have been a case of what was expected, given Neiff Joseph's survey marker; but, I am

not convinced, given Hebb's years of experience, there was nothing on the ground, at least hinting at some use of the area, at the specific time that he conducted his survey. However, as noted, it was not the Starratt road.

[47] I accept Berrigan's opinion and description of the Starratt plan being more than a hand drawn pictorial representation of a portion of Mosher's Island in that, although no measurements were provided, compass work was carried out on the road way and shore line as well as on three of four north/south boundary lines, with Rhodenizer's western line and Lot K's eastern line not noting the constant N 15° E direction and visually looking different. The features are not uniform. They reflect various bends on the shore line and clearly show the right angle bend on the hauling road which remains in the same place today just to the south east of the south east corner of Rhodenizer's lot. Becker noted the Starratt Plan could be one of Starratt's "good ones".

[48] Becker's and Berrigan's survey plans finalized in 2002 and 2003 respectively reflect accurately what is on the ground with respect to the two roads. The location of the road is in error on the Hebb plan because of the failure of draftsmen to transfer field notes to the Hebb plan properly; but, the

road is in the same location and is reflected on Berrigan's plan with the portion previously referenced reflecting the Starratt road.

- [49] The basis of Berrigan's opinion that the end of the portion of his road designated in purple on Lumsden's map and by a purple "X end" on the Hebb plan is the most southern corner of Rhodenizer's lot, as denoted by the terminus of the Starratt road meeting Rhodenizer's south western line on the Starratt plan is couched in appropriate survey methodology of retracement, in circumstances when no evidence is found on the ground and in the accuracy of the Starratt plan. Berrigan's pink retracement lines and angle on the Hebb plan, using the scaled off distances and angle from the Starratt plan, specifically 672' and 181' and $130^{\circ} \pm$ placed it almost exactly there, when the one inch equals 100 feet scaled digitized Starratt Plan overlay is applied by matching the known and agreed fixed eastern Rhodenizer boundary and the fixed angle bend on the ground east of Rhodenizer's south east corner. The angle Berrigan drew between his two pink retracement lines on the Hebb plan, is $130^{\circ} \pm$, despite any possible interpretation of his evidence. Rhodenizer's eastern line, shore to road is fixed on all plans, given the blazing that was found on the ground and corresponds to the foot with the scaled 1":100' overlay version of the

Starratt plan, while that lines N 15° E compass bearing is exact except for 46" 54'. This line provides an appropriate starting point in the analysis of the overlay and its relation to the Hebb plan with Berrigan's pink retracement lines. Both southern boundary lines coincide with the physical evidence on the ground of the angle bend on the hauling road. The south west corner on Rhodenizer's western line reflects probably a 30' diversion when compared and is on the very line that the Starratt plan reflects no compass bearings for and does not visually appear to run parallel with lot K's N 15° E, western line or Rhodenizer's eastern line. There are only two blazed lines on Hebb's survey, specifically, Rhodenzier's eastern line and lot 2's western line. Lot K, the sand flats western line from shore to shore is certainly effected in the comparison, as is the north shore line. It is to be noted the latter line on Hebb's plan with compass bearings one degree out was calculated, not surveyed, and no survey markers were set on either shore line.

[50] Although Berrigan's retracement and scaled overlay of the Starratt plan analysis in the right circumstances may prove that the Starratt road as shown on the Starratt plan ends where Berrigan's proposes, I simply note without determination of these circumstances so as to address the process of

replacement or that of evidence found on the ground, inclusive of what if any evidence exists on the ground, evidence of the shore, sand and tree line edges, etc. no such finding as to the location of the road end is possible.

Similarly, on the evidence, specifically Becker's and Berrigan's, there can be no fixing of either Joseph's survey marker set below Hebb's or Hebb's survey marker, as the most southern corner of Rhodenizer's lot. To accept the analysis or either of these markers fixing this point is to accept their south western boundary line. In light of the court's mandate and the issues raised as to circumstances, this is not an option.

[51] However, Lumsden's base plan is a map of what he saw on the June 1965 aerial photo and represents what was on the ground in 1965. The application of a 1:2000 scaled Starratt plan over lay (Exhibit 16), as read and weighed in the context of its accuracy, to Lumsden's map (Exhibit 19c) by matching the fixed angle bend results in the Starratt road on the plan lining up just about exactly with the purple portion of the Berrigan road, while the uncoloured red lined Becker road goes south from the main road. Lumsden acknowledged same to be "a very good fit". The course of the purple portion of the Berrigan road on the Lumsden map resembles the more gradual turn directly towards the beach reflected on the Starratt plan and

referenced by Becker, as a description of the road on the Starratt plan, than does the Becker travelled way which turns at a southerly angle at the fork.

[52] The Starratt plan shows the hauling road ending at the commencement of the sand to form the south most corner. From where the fading Becker footpath fades into the sand as shown on Becker's plan, the distance to any point on Rhodenizer's western line, as proposed by Hebb and Joseph well exceeds the 181' scaled from the Starratt plan, as the distance of the south western line. Other than speculation by Becker as to the sand covering over some 111' plus of the foot path lined up with Joseph's survey marker, there is no evidence as to any variation in the edge of the white sand beach.

[53] I accept Roger Mosher knew the land he owned and the access to it. The only road that Roger Mosher chose to walk and felt the need to walk in 1968 with D. Steffen when showing him the land had to be, on the balance of probabilities, the road devoted to designating his boundary and providing common usage, as noted on the Starratt plan. Some 11 years at best of disuse, being the time between the alleged construction of the Blake Taylor extension and their walk would not cause Mosher to ignore the very road essential to his property and common access, after years of use, in favour of another, in these circumstances, no matter how convenient. I accept D.

Steffen experienced and learned of only one road and had no reason after his walk and exchange with Mosher to assume, nor did he assume, there was any other road than the one he walked. Mosher felt no need to identify any other particular hauling road and/or foot path, despite it's existence in 1968, as it did not factor into the issue at hand. Other road ways and path ways were not unique to the area.

[54] Rhodenzier's conduct, actions and other party's evidence taken in totality cause me to conclude Rhodenzier was not promoting the Becker road as the Starratt road until sometime in 2001. Until then, he did not expound the Starratt road to be located any where other than that portion which approached the clearing and the sand dune. Rhodenzier considered and treated what he now refers to as the Blake Taylor extension to the clearing, as the Starratt road. As a result, I have disregarded his evidence on his experiences and opinions with and about the Becker road, being the Starratt road. I am satisfied no reference about another boundary road being located elsewhere was made by Rhodenzier to any one until some 15 years later in 2001 and no permission to use the area south of the sand dune was accepted by Arnheim. Indeed, Rhodenzier erected his fence in 1989 to denote the location of his property while D. Steffen through a solicitor's letter of

August 2, 1989 challenged his claim to ownership of the sand flat, by then deeded to D. Steffen's son, Jonas. The norm for D. Steffen and family had been to branch out in different directions, until the fence. They ended up tolerating the fence till the barricade was erected on the road they had used for some 30 years thereby preventing access to the sand flat and beach. Both the fence's presence in various stages for 12 years and the location of the barricade at the sand rather than 100' or so further north at the fork where Rhodenizer's proposed road extended south reflect this. Rhodenizer only took issue with where Hebb placed his survey marker to the north of Neiff Joseph's. Rhodenizer never charged his own surveyor with locating his old road. I do not accept he did not have Joseph in 1988 investigate his proposed over grown boundary road because it was too costly. It would have been just as an important an issue then, as 14 years later and would not have resulted in promotion of a boundary line for 14 to 15 years by way of actions and unchallenged survey plans, if he really knew there was a road he travelled throughout his childhood and that the one everyone was now using, was not the original Starratt road. Neither did he initiate any written reply elaborating on these particulars about the existence of the Becker road when faced with Steffen's immediate lawyer's letter dismissing his position and

asserting ownership. He took no steps to retain counsel or rehire his surveyor or challenge Hebb's 1988 survey plan, for some 15 years.

[55] Hebb, as a professional surveyor or Joseph, who did not testify, for that matter, if faced with the proposition of another location for the boundary would have taken steps to investigate and make appropriate notation and show in his words "anything else except the road I was surveying". Had Hebb been exposed to and observed the Becker road, a functioning main and only road in 1949 according to Shaw, during his visit in the 1950's as with a friend of a Mosher family member, at a time when he was also a professional surveyor, he would have been in a position to comment on same, if raised by Rhodenizer years later. But Hebb did not experience or observe the Becker road in the 1950's and I am satisfied that Rhodenizer did not raise it. Also, despite Rhodenizer's disclaimer, I am satisfied D. Steffen experienced his inappropriate references and that they were sufficiently derogatory for Hebb to recall the incident.

[56] I have already indicated that I do not accept the evidence of Rhodenizer and where it contradicts, the evidence of the Plaintiffs and Defendants' by counter-claim, I prefer the latter. Testifying for Rhodenizer was Shaw, who indicated in the 1940's among other things, that there was only one road and

had there been more than one road, especially one that arrived at the sand dune where they sometimes picnicked, he would not recall carrying their beer the 200 feet or so distance through the sand that was required. I also appreciate he was emphatic about the land marks cited at the end of the road in the period of his exposure to it. On the other hand, Steffen testified that when he purchased his property in 1968 from Roger Mosher, the owner throughout the 1940's, the only road shown to him by Mosher was the one advanced by him that included the purple portion of the Berrigan road as shown on the Lumsden map or marked as ending with a purple "X end" on the Hebb plan and not that identified by Shaw. At that time and subsequent to it until 2001, he was not made aware of any other boundary road effecting his property by anyone. Additionally, although somewhat vague as to when he was on the island in the 1950's, prior to conducting a survey in 1957 for another party to the east of the Steffens' lot 1, Hebb who through the 1950's was a young surveyor, testified the only road he traversed to enjoy the beach was also that road walked by D. Steffen with Mosher. Furthermore, although the surveyor, Berrigan's evidence is conditional upon certain preconditions existing, which were not established on the evidence, to the extent his retracement analysis may have any weight another day, it would

reconfirm the location advanced by the plaintiffs. Additionally, Lumsden's map, when overlaid with the scaled Starratt plan, as read and weighed in the context of the accuracy of that plan, inclusive the angle bend in the hauling road still found on the ground today and used by the surveyors as a fixed point, proves to be a very good fit from the bend continuing along to the purple coloured section of the Berrigan road to where it meets the sand and in the process, passes by where the uncoloured red lined Becker road branches off. Added to this, although there is no evidence as to the true width of the hauling road, which as it now exists is some eight feet wide, is the impossibility of the Becker road at certain locations, being wider than four feet in order to avoid its use being impeded by existing trees now 65 to 70 years old and causing it to appear to lend itself, after a certain distance, and before the sand to more of a foot path to the beach than a hauling road extending all the way to the beach. Additionally, the distance of the south western boundary line as scaled from Starratt's plan at 181' or as noted on Becker's plan at 193.43' presents as significantly further than from where the Becker road fades into the sand to any point on Rhodenizer's western line.

[57] Having regard to the evidence supporting the Steffens' and Arnheim's position, on the balance of probabilities, I find it preferable to the evidence

of Shaw in support of Rhodenizer's position. Whether Shaw is honestly mistaken or is deliberately misleading, I am unable to conclude. Fifty years plus is a long time to revisit an area. A brief reference was made to a sand dune near the end of the Becker foot path on the left side as opposed to the right. However, on the balance of probabilities, I find for the Plaintiffs and the Defendants by counterclaim, the Steffens and Arnheim and grant a declaration that the Steffens and Arnheim are entitled to make use of the Starratt Road as found, in common, free of hindrance or obstruction by Rhodenizer. I also grant a permanent injunction preventing Rhodenizer from placing obstructions on or in any way obstructing the use of the road in common by the Steffens and Arnheim. I will hear the parties as to costs if necessary, orally or by way of written submissions.

J.