IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacLean v. Williams, 2008 NSSC 293

Date: 20081006
Docket: SPHa 257339
Registry: Port Hawkesbury

Between:

Joan MacLean of R.R. #1, Orangedale, in the County of Inverness, Province of Nova Scotia, B0E 2K0

Plaintiff

v.

Hector Williams, Laurie Williams and James Williams of R.R. #1, Orangedale, in the County of Inverness, Province of Nova Scotia, B0E 2K0

Defendants

Judge:	The Honourable Justice Frank Edwards
Heard:	October 2 and 3, 2008, in Port Hawkesbury, Nova Scotia
Written Decision:	October 6, 2008
Counsel:	Nash T. Brogan, for the plaintiff Joel Sellers, for the defendants

By the Court:

[1] This is a right-of-way dispute.

[2] In the summer of 1994, the Defendants, Laurie Williams and James Williams, began to build an access road to their property. The only access from the public highway to the Williams' property is over the Plaintiff's property (the MacLean property). The parties are cousins and had enjoyed a cordial relationship in the past.

[3] Joan MacLean became aware of the attempt to build the road shortly after the bulldozer began "scrubbing" the access route. The Williams brothers had not consulted her. She was upset by the location of the attempted construction. Joan MacLean met that day with the Williams brothers. She told them that she would prefer that they build their access road along her northern property line. Joan MacLean, the Williams brothers, and the bulldozer operator went to the preferred location.

[4] It was immediately clear to all that construction of the access road in MacLean's preferred location was not practicable. The route from the public

highway to the Williams' property line is slightly upgrade but otherwise uncomplicated. It is 265 feet in length (see Tab 10 of Exhibit 2). The problem is that the Williams' land is traversed by a large ravine in that area. An access road to the habitable portion of the Williams' property would have to circumvent the ravine by turning north and running parallel to the western ridge of the ravine for at least several hundred feet. (The exact distance is not in evidence.) The road would then cross the ravine at its most shallow point and then turn south and run several hundred feet back along the eastern ridge of the ravine. (I viewed the property and walked along the ravine. It is obvious that road construction there would be a physical and financial challenge.)

[5] According to the Williams brothers, Joan MacLean readily agreed with them that the road could not be built in her preferred location. I believe them. For her part, Joan MacLean acknowledges that, when she actually viewed the area, she agreed that the road construction there would be difficult. She therefore relented and agreed that the access road could be built where the Williams had initially started construction.

[6] The parties differ on their recollection of the nature of the permission given. Joan MacLean insists that she made it clear to the Williams that their access road was temporary. She says she told them that they would eventually have to construct a permanent road in her preferred location. I do not believe her. She testified that she recalled telling the Williams that their road was temporary on several occasions. She was confronted in cross-examination with her discovery evidence given two years ago. At discovery, she could only vaguely recall one occasion when she had told the Williams brothers that their access road was not permanent.

[7] Both Williams brothers deny that Ms. MacLean ever advised them that the road was temporary. I believe them. James Williams testified that, shortly after road construction began, he asked Joan MacLean to put it on paper. He says that she refused to do so and said that she did not want to "split the farm". He says she told him to "just use it". I believe that James Williams did ask Ms. MacLean for written confirmation of the access. He likely would not have requested such formality if he had been told that the access was temporary. Both brothers testified that they would not have spent approximately $8,000.00 to construct the road if they had had any inkling that it was only temporary.

[8] On March 5, 1998, Joan MacLean executed an easement agreement with Nova Scotia Power Inc. giving the company the right to install and maintain power lines along the access road. Joan MacLean could give no satisfactory explanation for this act which is obviously inconsistent with the access being temporary. One would have expected her to resist giving a permanent easement to anyone in this area. One would also have expected her to reaffirm her insistence to the Williams that the road was temporary. "Build your permanent road and run the power in there" is what one would have expected her to say. Instead, she testified that she felt she had no choice but to sign because she believed the power company could do what they wanted. Ms. MacLean is an educated person, a retired school teacher. She is obviously intelligent and no pushover. Her evidence regarding the Nova Scotia Power Company easement is simply not credible.

[9] I am satisfied that Joan MacLean never gave the Williams any indication that their access road was temporary until she wrote James Williams a letter dated July 3, 2003. At that time, she gave notice that she would "close off" the road in sixty days. Between August 1994 and July 2003, the Williams had relied upon

what I am satisfied was a licence Joan MacLean had given them to travel over her property.

[10] The law related to licenses is set out in the Plaintiff's brief.

> "23 A licence is a permission given by the owner of land which allows the licensee to do some act which would otherwise be a trespass. A licence is generally a personal right and is revocable. As a personal right it is not binding on an assignee of the licensor and is not assignable by the licensee. However, ***where financial expenditures are made in reliance on the licence, it may become a proprietary right and irrevocable***.
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> 24 For example, in Stiles, supra, the plaintiff had purchased a lot in a proposed subdivision and improved it with the developer's encouragement. The subdivision did not receive approval and the defendant purchased the land with notice of the plaintiff's interest. The defendant left the plaintiff in quiet possession for approximately nine years and told him that it would make him an offer when it needed his lot for development. The defendant later took the position that the plaintiff had no interest in the land and the plaintiff sued. Huddart J. (as she was then) held, at 374, that the plaintiff had obtained a personal right, arising out of the agreement with the developer by reason of the application of the doctrine of estoppel and that in this case the estoppel was a proprietary estoppel because the developer had encouraged the plaintiff to make expenditures improving the property.
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> 25 Huddart J. applied ***Inwards v. Baker***, [1965] 1 All E.R. 446 at 448 (C.A.), where Lord Denning found that even though there was no contract:
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> > ... if the owner of land requests another, or indeed allows another, to expend money on the land under an

> expectation created or encouraged by the landlord that [the other party] will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity.

In ***Inwards***, the equity was an irrevocable licence to occupy which was found to be binding on the successors of the original owner of the land who took with notice. The court explained that the underlying rationale in such circumstances is that it would be unconscionable in the circumstances for a legal owner fully to exercise his legal rights. Huddart J. then went on to set the out the principles to be applied, at 375:

> 'Thus, ***where a party expends money on the land of another under an expectation created or encouraged by the owner, or even where the landowner merely stands silent, the authorities establish that proprietary estoppel may found a cause of action, a revocable licence may be rendered irrevocable, or the party's interest may be found in a licence coupled with an equity, the circumstances may establish a contract between the parties or equity*** may require that the fee simple be transferred. The equity is enforceable against a successor in title who takes with notice.'

Huddart J. inferred that a contractual licence had been granted by the developer to the plaintiff when the plaintiff paid for the lot and that the licence had become irrevocable when the developer encouraged the plaintiff to build. The rationale was that the transactions were sufficient to create in the plaintiff's mind a reasonable expectation that his occupation would not be disturbed and that the transactions and the subsequent dealings between the parties could not be explained by any other supposition." (Emphasis added)

[11] ***Conclusion:*** The Plaintiff's action is dismissed. The Defendants shall have a declaration that they have an irrevocable and unlimited right-of-way over the access road (20 feet in width). The Plaintiff is enjoined from interfering with that right-of-way.

[12] The Defendants may make a written submission regarding costs within seven days of receipt of this decision. The Plaintiff will have a further seven days to respond.

Order accordingly.

J.