

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Totten v. Gosby, 2006 NSSC 272

Date: 20050708

Docket: S. T. 239195

Registry: Truro

Between:

Dale Totten and Dawn Totten

Plaintiffs

v.

Terry Gosby

Defendant

DECISION

Judge: The Honourable Justice J. E. Scanlan

Heard: July 8, 2005 in Truro, Nova Scotia

Written Decision: September 14, 2006

Counsel: Mr. Robert Pineo, Solicitor for the Plaintiff
Mr. Peter Lederman, Q.C., Solicitor for the Defendant

By the Court:

[1] This is an application wherein the plaintiffs, Dale Totten and Dawn Totten, have asked this Court to issue either a mandatory injunction or award damages as against Terry Gosby in relation to a property at Highway #2 Hilden, Colchester County, Nova Scotia. The parties agree, as is evidenced in a survey prepared by E.C. Keen Land Surveying dated April 5, 2004 that the Gosby dwelling house including a portion of the deck and what appears to be a portion of the front steps on the Gosby house, encroaches onto a piece of land held in the name of Dawn Elizabeth Elaine Totten and Dale Totten.

[2] The encroachment is a very minor encroachment. It is identified in the survey plan as being four feet and had existed, according to counsel's submissions, since approximately 1985 although they were not clear on that. In other words, it existed for quite a substantial period of time. There has never been a complaint about the encroachment and in fact it would appear from the materials before me that nobody was even aware of the encroachment until the Tottens attempted to sell the lands to a Mr. Wright who is not present here today nor is he a party to this action.

[3] As I noted to counsel during submission, it is not unusual that in real property conveyancing in Nova Scotia, or anywhere else, I expect to find from time to time that there are encroachments on adjoining properties. Indeed people who own property and find their neighbours are encroaching on the property are entitled in the normal course to a mandatory injunction requiring removal of the encroachment.

[4] In this case the parties, both the plaintiffs and the defendant, say there is no desire to have that encroachment removed. What they want instead would be to have some reasonable amount of damages by way of value for the land encroached upon. The plaintiffs also suggest compensation for interest lost and opportunity lost in relation to a sale to Mr. Wright. The representation by the defendant is that Mr. Wright is prepared to go through with the sale with the encroachment in place and simply wants the matter clarified. The plaintiffs are not so sure that is the position of Mr. Wright and, as I said earlier, he is not here so I really do not know what his position is. It does not make sense to me though, based on the plaintiffs' representation to me, that Mr. Wright wishes to have the matter rectified and is prepared to go through with the sale. It is simply a matter of having a conveyance of the portion upon which there is an encroachment. In other words, he wants

some clarity for down the road in terms of who owns that piece of land. It still goes to a matter of simply then determining what is an appropriate compensation for the piece of land and how do we arrange to get it into the name of Mr. Gosby.

[5] I indicated to counsel during submissions that what this case lacked for some time was common sense on the part of the parties. There were a number of possible resolutions if Mr. Totten and Mr. Wright really are not concerned about the encroachment and the fact they are prepared to leave it there. One of the rectifications or remedies would have been a simple line agreement wherein the parties recognize there would be a change in the line so as to accommodate the encroachment. An alternative would be some sort of a license agreement which said to Mr. Gosby for “x” number of years or until such time as the property is moved or replaced he can leave it there but eventually the land still remains ours in the meantime. All those things would obtain the same objective as what Mr. Totten now seeks and what Mr. Gosby seeks. Mr. Gosby simply wants to have the house remain where it is. He does not want to see the house removed by way of mandatory injunction. Really nobody wants to see that. None of those common sense solutions were employed here. At the end of the day, however, the fact of the matter is that it is still Mr. Totten’s land. This Court is really in a situation

where I cannot force Mr. Totten to simply say Mr. Gosby's house is there, you're stuck with it. He is in a situation where the Court must determine, in view of the encroachment, what relief Mr. and Mrs. Totten are entitled to.

[6] I am satisfied the relief they are entitled to is in fact compensation for the land and costs in relation to effecting a conveyance. It would be oppressive in this case to Mr. Gosby, in view of the small encroachment and the fact the parties really are not bothered by the extended encroachment to require him to move it. In other words most of the requirements in the **Sheffler v. City of London Electric Lighting Company** are met.

[7] I am satisfied, based on the submissions before me, that an appropriate compensation would be \$1,500.00 for the land. In addition there will be compensation for the survey expenses to-date, \$1,400.00. Mr. Gosby will have to pay the survey and legal fees associated with effecting a subdivision and conveyance of that portion of land to him.

[8] As regards the balance of the monies requested by the plaintiffs, as I indicated, in view of the solution they are now asking the Court to impose, I am

satisfied that any one of the simple common sense remedies that could have been employed early on would give them exactly the same as what they are getting today. In that regard I reference having the piece of land identified and subdividing out only the encroaching portion and conveying it to Mr. Wright. A simple line agreement or licensing agreement could have been used and Mr. Wright would have just as good a title then as he would now. The fact of the matter is now he actually loses that piece of land and he loses it forever. I am not prepared to give any other damages to the plaintiffs over and above the \$1,500.00, the reasonable subdivision expenses and recompense for the \$1,400.00 in survey expenses to-date.

[9] At the end of the day both sides really absorb a substantial portion of the costs here and I recognize that. There was a common sense solution that was available early on.

[10] Mr. Pineo will prepare the Order.

J.

09/07/06