SUPREME COURT OF NOVA SCOTIA
Citation: Robichaud v. Ellis, 2011 NSSC 86

Date: 20110301
Docket: Amh No. 311661
Registry: Amherst

Between:

Anthony O.J. Robichaud and Leisa Dorothy Robichaud

Applicants

v.

Allison Frederick Ellis and Helen Elizabeth Ellis

Respondents

v.

Michael L. Mills and Terry Elaine Mills

Respondents

Judge:	The Honourable Justice Glen G. McDougall
Heard:	August 23, 24 and 25, 2010, in Amherst, Nova Scotia
Counsel:	Leisa Robichaud, for herself and the co-applicant Donald Pressé, Ll.B., for the respondents

By the Court:

INTRODUCTION

[1] This application deals with a dispute over a boundary line involving three properties. The applicants and the respondents own properties in Linden, Cumberland County, originating from a single parcel that was once owned by Lester and Violet Black. The original parcel was broken into three lots and sold starting in 1970.

[2] This application is concerned with the location of the boundary line between the lots now owned by the applicants (the Robichaud lot) and the Ellis respondents (the Ellis lot). The property of the Mills respondents (the Mills lot) borders both the Ellis and Robichaud lots. The applicants seek a declaration that the boundary lines are as described in a plan of subdivision prepared by a surveyor, Grant MacDonald, in July 1978. The respondents seek a declaration that the boundaries are as described in a Deed recorded from Lester and Violet Black to Tom and Lois C. Chmiel on November 24, 1970.

[3] The parties filed affidavits in support of their respective positions. Some of the affiants were cross-examined during the hearing of the application. The court also visited the area to take a view of the three adjoining properties.

EVIDENCE

[4] The first lot created out of the original parcel owned by Lester and Violet Black (what is now the Ellis lot) was sold to Tom and Lois C. Chmiel in 1970. The legal description of the Ellis lot commenced on the north side of Highway 366 at a point twenty-four feet easterly from the southeast corner of lands owned by Douglas and Ernest Patterson. The Ellises bought the lot from Deron Fresia in September 1997. According to Mr. Ellis, Deron Fresia showed him the location of the corner of the property line between his lot and the neighbouring property (now the Robichaud lot) which was then owned by Angela Graves. Mr. Ellis further stated that he showed the same location to the Robichauds when they were considering the purchase of Ms. Graves's lot. A survey marker was found in the ground at that location. It had been slightly covered over.

[5] What is now the Robichaud lot was first sold to Gerald Casey by Mrs. Violet Black in 1978. Mr. Casey retained a surveyor, Grant MacDonald, to prepare a plan

of subdivision in July 1978 prior to purchasing the property from Mrs. Black. According to Grant MacDonald's affidavit, at the time of his 1978 survey there was a trailer and shed on the property close to a tree line which were being used by Mr. Casey. Mr. Casey sold his lot to Angela Graves in June 1987.

[6] Ms. Graves stated in her supplementary affidavit that when she bought the property there was a shed and a trailer on it next to the tree line. Her father looked after the property for her. She stated that she and her father "found an iron pipe at the corner of my property, which lined up with a stake on the opposite corner." She further stated that while she owned the property her family used it "on the understanding that the boundary line was the line of trees. Neither Mrs. Black nor any other individual ever asserted that our use of the property up to the line of trees was inappropriate." She said she never discussed the location of the boundary with the Ellises after they bought their property.

[7] In 1990 or 1991 Ms. Graves had a well drilled. Her father looked after this. She deposed that she did not "recall him ever advising me of any discussions with Mrs. Black about the location of the well. I presumed that this well was on my property." She said she never discussed the location of the boundary lines with the Ellises after they bought the property from Mr. Fresia in 1997. She said she and her family used the well "openly, undisputed and unchallenged for 16+ years."

[8] According to Allison Ellis, the well installed by Ms. Graves was located on part of the property the Ellises bought from Mr. Fresia. He also states in his affidavit that Mr. Fresia told him before he and his wife bought the property that he (Mr. Fresia) had considered selling the part of the lot containing the well to Ms. Graves. Mr. Ellis said he opposed this idea and Mr. Fresia did not go through with it. Ms. Graves agreed on cross-examination, however, that Mr. Fresia might have said that no one would contest the location of the well if she bought a small piece of his property.

[9] Mr. Ellis states that he told Ms. Graves in the Spring of 1998 that her well was on his property. He also told her that he did not object to her using it and suggested that it be put in writing. He says he and Mrs. Ellis spoke to Ms. Graves again after she sold her property to the Robichauds. According to Mr. Ellis, at that time she "stated that she never knew exactly where the boundary lines of her property were and that she had advised the Robichauds of this before they purchased it." He goes on to state that she "also told me that she had questioned her father's decision to put the well where it is now located because she was concerned that it was not on her property. She

indicated her father and the contractor decided to put it there. When asked to put this information in writing she reluctantly agreed but later indicated that she would not get involved. She never provided this information in writing to me." Ms. Graves agreed on cross-examination that after the Ellises bought the property, Mr. Ellis might have told her that she could continue to use the well even if it was on his property. She had heard rumours that he believed the well was on his property.

[10] Ms. Graves indicates that after she sold her property to the applicants, Mr. Ellis asked her to sign a letter stating that the well was not on the property she had owned. She says she refused to sign the letter, "as it was my understanding that the well was on my property." She denies Mr. Ellis's claim that she offered to buy a piece of Mr. Fresia's land that contained her well stating that the "only piece of property I offered to buy from Mr. Fresia was the top of PID 25372897, now Mike Mills' property, on my side of the right [of way] to make my land large enough to build on." Mr. Ellis responds that this piece of land was never part of Mr. Fresia's property.

[11] The Robichauds bought their property from Ms. Graves in August 2007. They retained Grant MacDonald to replace one of the survey markers he had placed in 1978. He stated in his affidavit that the shed was in the same location that it had been in 1978. Ms. Graves also indicated that when she sold the property to the Robichauds, "the same shed and trailer were in the same location as when I purchased the property in June of 1987." The Robichauds retained a surveyor, Michael E. Greene, to prepare a location certificate. Mr. Greene found the plan of subdivision prepared by Grant MacDonald and a sketch prepared by Ivan MacDonald.

The Surveys

[12] In a report dated March 24, 2009, Grant MacDonald described the subdivision of the Black property in 1978. He stated that he had been retained by Mr. Casey although the land was still owned by Mrs. Black. In his report, Grant MacDonald wrote:

> The lot I was required to create was to be bounded on the west by lands of Duane [sic] C. Fresia ... (now owned by Allison Ellis and Helen Ellis ...), on the north by lands being retained by Violet Black, on the east by a Right-of-Way across lands of Violet Black and on the south by another Right-of-Way across lands of Violet Black.

> Upon initial inspection of this proposed lot I met with Mrs. Black on site. At that time Mrs. Black indicated that the boundary between her lands and the Fresia lands to the west started at an iron pipe located at the southeast corner of the Fresia lands and followed a row of small spruce trees northerly to pass between a wood shed/barn attached to the Fresia residence and a small shed on her property which she was using as a chicken coop. It was believed that the iron pipe had been placed by Lester Black when he sold his residence to Thomas M. Chmiel and Lois C. Chmiel ... during November of 1970. The Chmiel lot was subsequently conveyed to Duane [sic] Fresia as noted above. This iron pipe is still in existence at its original location. The row of spruce trees is also still in existence and have grown to be quite large.
>
> The location of the two Rights-of-Way was readily evident on the ground. These Rights-of-Way were deemed to be twenty four (24) feet in width based on the deed descriptions involved.
>
> I inquired of Mrs. Black where she wished to establish the line between the newly created lot and lands being retained by her. She indicated that the line should be just to the south of the chicken coop as she intended to continue to use this shed.
>
> The new lot was then posted on the ground with steel bars at the three new corners and the found iron pipe at the southwest corner being held as an existing corner since it was being accepted as original monumentation. The line between the Black lands and the Fresia lands was held as a conventional line as [it] was not being disputed at that time by either party.

[13] As a result, Grant MacDonald prepared a plan of subdivision showing the proposed lot as parcel "A." He measured from the centre of the Linden Road, along the southern boundary of the Ellis lot (then belonging to Mr. Fresia), to a post. This gave a distance of 248 feet. The legal description of the Fresia lot gave the southern boundary as 215 feet. Mr. MacDonald assumed that the highway was 66 feet wide. Measuring from the centre line of the road, his legal description indicated that the lot occupied by Mr. Casey began at an iron pipe 248 feet east of the centre line of the road. The road was in fact 100 feet wide. It had been widened in 1958 well before Mr. and Mrs. Black sold the Ellis lot to Mr. and Mrs. Chmiel.

[14] On cross-examination, Grant MacDonald recounted a discussion with Mr. Casey who instructed him to set out lines for the lot he was occupying. He recalled Mrs. Black telling him where she wanted the northern line (running east-west) so that she could retain a shed she was using as a chicken coop. He recalled locating the iron pipe but did not recall anyone pointing it out to him. He did not speak to the adjoining landowners, the Fresias. His survey notes make no reference to conversations with Mr.

Casey or Mrs. Black. He was referred to the paragraph in his 2009 report describing a meeting on the site with Mrs. Black and suggesting an origin for the iron pipe. He stated that he has no recollection of this conversation other than Mrs. Black's direction respecting the chicken coop. He said no one told him that Lester Black had placed the iron pipe where he found it. He did maintain, however, that he believed this to be the case.

[15] Grant MacDonald's survey results are supported by a report of survey prepared on behalf of the applicants by Michael E. Greene on December 7, 2009.

[16] Another surveyor, Ivan MacDonald, sketched the boundaries of the lands remaining in the possession of Violet Black – now the lands of the respondents Michael L. Mills and Terry Elaine Mills – in 1983-84. He was retained by Violet Black to "ascertain the boundary line between her remaining lands, the Chmiel lot and the Casey lot (what is now the Robichaud lot)." He deposed:

> ... I was able to locate the starting point used by the Black's [sic] in describing the lot conveyed to Chmeil [sic] from a review of the description. The point was located 50' from the center of Hwy. 366 (which is a 100' wide highway) and 24' easterly from the Southeast corner of lands now owned by Doug and Ernest Patterson (as stated in the original deed to Chmeil [sic]). This forms a lane 24' wide along the boundary between Patterson and Black lands running from Highway 366 to the Northumberland Strait, together with a right-of-way to Chmeil [sic] over the said lane. Although the legal description uses the direction (north) which is incorrect, it describes the line as running along the 24' wide right-of-way parallel to the Patterson lot. This accurately describes what is in fact, the north side of the Chmeil [sic] lot. With that starting point and direction ascertained I was easily able to follow the words of the legal description and accurately plot the lines of the Chmeil [sic] lot....

[17] Ivan MacDonald reviewed the plan of survey prepared by Grant MacDonald in 1978. He concluded that there were errors on the plan. He stated in his affidavit:

> ... I note that Mr. Grant MacDonald refers to Highway 366 as the "Linden Road" and mistakenly states it is 66' wide. This results in a difference in the location of boundaries on the two surveys.
>
> ... I reviewed a report prepared by Mr. Grant MacDonald in which he indicates he found a galvanized post that he suggests marked a corner of the then Casey (now Robichaud) lot. I dealt with Mrs. Violet Black in 1983 and 1984 when I prepared my sketch and she never stated to me that her husband placed this post to mark the

> corner of the Chmeil [sic] lot. In fact, there were no monuments placed at any of the corners of the Chmeil [sic] lot until I placed posts in 1983/1984.

[18] Ivan MacDonald disagreed with the suggestion by Grant MacDonald that Lester and Violet Black had believed the road was 66 feet wide, rather than 100 feet, and that therefore Grant MacDonald's survey accurately reflected their intentions as to the location of boundary lines when they subdivided the original property. He states that he believes that the Blacks knew Highway 366 was 100' wide, for the following reasons:

> a. The Province of Nova Scotia obtained the property in 1958; the Black's [sic] were paid for the property taken from them by the Province to widen the highway. In fact, the Black's [sic] would have been aware that the barn had been located on the edge of the highway would now be on provincial highway land....
>
> b. The "Linden Road" or "main Road" was designated Route 366 in 1970....
>
> c. Although the highway is referred to as the "Main Road" in the 1970 Chmeil [sic] Deed, the Black's [sic] sold property on the other side of Hwy. 366 to the Chmeil [sic] s in 1971 and in that Deed they refer to it as Hwy. 366. The Black's [sic] were aware of the proper name of this highway in 1971 and would not have referred to it as the "Linden Road" as is done in the Grant MacDonald plan.
>
> d. The Black's [sic] have sold a number of lots of land bordering on Hwy 366. In all cases, that I have reviewed it is clear that they had used a 50' from center for the border of the highway.
>
> e. I was hired by Violet Black in September of 1978 (a little more than a month after Grant MacDonald prepared his plan of survey) to prepare a Plan of Survey of Lot LB Lands of Violet J. Black [in] East Linden, Cumberland County, this is simply a lot south of the current Ellis property. It borders on Hwy. 366 and Violet Black was aware at that time that the highway was 100' wide....
>
> f. I walked the Patterson lot and determined that the corner across the 24' wide right of way was based on the assumption that HWY. 365 was 100' wide.... This is significant as the starting point for the Chmeil [sic] deed in 1970 was opposite this corner (across the 24' wide lane).

[19] Grant MacDonald stated in his affidavit that if he had been aware that the road was 100 feet wide at the time of the 1978 survey, his survey "would not have changed due to the physical evidence on the ground and the fact that I used the center of the

road as my starting point. The center of the road remains in the same place regardless of the width of the road."

[20] The applicants take the position that the line between the properties is that identified by Grant MacDonald. They submit that the legal description in the deed to the Ellis lot did not reflect the intention of the original grantors, Mr. and Mrs. Black, and that they in fact intended the line to be where Grant MacDonald located it. They point to aerial photographs obtained from the Nova Scotia Geomatics Center, taken in 1985, 1995 and 2005, which they say show the presence of a trailer and a shed on the property along the tree line.

ISSUES

[21] The issues are:

(i) Whether the applicants have established that the boundary is that set out by Grant MacDonald as a result of the doctrine of conventional lines; and,

(ii) Whether the applicants have established title to the disputed area by adverse possession.

HEARSAY

[22] None of the landowners involved in the original transactions connected with the subdivision of the Black property were available to provide evidence either because they are no longer alive or else could not be tracked down. The respondents state that any reference to discussions with original owners (such as Mrs. Black or Mr. Casey) is inadmissible hearsay. Such discussions are referenced in various affidavits by Angela Graves, Michael Greene and Grant MacDonald, as well as the applicants' own affidavits. They submit that such evidence must fall within an exception to the hearsay rule in order to be admissible. Specifically, they appear to take the position that such evidence could only be admitted as a sworn declaration against interest from a predecessor in title, relying on **Ford** v. **Kennie** (2002), 210 N.S.R. (2d) 50, 2002 NSCA 140 (C.A.). In that case, an issue arose as to the admissibility of a statutory declaration sworn by the appellant's predecessor in title, who was deceased. Chipman, J.A. said:

29 The Declaration was part of an exhibit book that was prepared by counsel prior to the trial and it was introduced by counsel for the respondents without any attempt to prove the signature of Wilbert Ward and without objection on this basis by counsel for the appellant. Later in argument before MacAdam, J. counsel for the appellant stated that he was not taking the position that the statutory declaration should or ought not to be entered into evidence, rather that it should be. In these circumstances I am prepared to accept that formal execution of the Declaration, as it purports to have been done, can be taken as established.

30 There was objection to the Declaration on the ground that it was hearsay. MacAdam, J. in rejecting this argument referred to the following passage from the decision of Hallett, J. (as he then was) in *Lynch v. Nova Scotia (Attorney General)*, [1985] N.S.J. No. 456 (N.S. T.D.) at ¶29:

> I ruled against the admission of the declaration because (1) there is no provision in the Evidence Act to admit the declarations and (2) the rules of evidence do not permit the admission of such documents as the deponent is not available for cross-examination and (3) the declaration did not fit into any of the standard exceptions to the hearsay rule such as being declarations of a deceased person against interest.

31 And at ¶31:

> It would only be cases in which the Court was very satisfied as to the reliability of the declarations that such declarations should be accepted if the deponent was dead and therefore not available for cross-examination.

32 In my opinion, the Declaration fits into one of the standard exceptions to the hearsay rule as being a declaration of a deceased person against interest. As will appear later in these reasons, I am satisfied that the Declaration is very much against the interest of Wilbert Ward. He was deceased, and he was a predecessor in title of the appellant Kennie. The Declaration on its face was sworn to before a barrister.

33 Moreover, I am satisfied that the Declaration is admissible on the principle established by the Supreme Court of Canada in **R.** v. **Khan** (1990), 79 C.R. (3d) 1 (S.C.C.). Admissibility results from the necessity of the evidence and its reliability. Necessity arises from the fact that Mr. Ward is deceased, and reliability is determined by looking at the circumstances under which the statement was made. It was purportedly made by way of a solemn declaration sworn before a member of the bar. Having regard to the presumption of regularity, there is a high degree of reliability in the circumstances under which this out-of-court declaration was made.

> 34 The weight and meaning to be ascribed to the Declaration depends upon an examination of its contents which I will make later.

[23] The respondents argue that none of the alleged hearsay statements offered by the applicants are "sworn declarations from a deceased person made against interest," and that the statements should therefore not be admitted. They do not directly address the principled approach to the admissibility of hearsay on the basis of necessity and reliability.

[24] After discussion counsel for the respondents and Mrs. Robichaud agreed that any comments attributed to Mr. or Mrs. Black in conversation with the two surveyors, Mr. Ivan MacDonald and Mr. Grant MacDonald, would not be objected to and could be admitted for the Court's consideration. Any remaining hearsay evidence would be the subject of argument as to necessity and reliability and left to the Court to decide its admissibility and weight.

ARGUMENTS

[25] The applicants rest their claim that the boundary should be located in accordance with Grant MacDonald's survey on the argument that this boundary has been established by the doctrine of conventional line or by adverse possession. Professor Bruce Ziff makes the following remarks about determining boundary lines in Principles of Property Law, 5th edn. (Toronto: Carswell, 2010), at pp. 105-106:

> Even when the transfer document is unambiguous, the physical location of the boundary may have become uncertain because some crucial piece of evidence has been removed or destroyed. To re-establish the boundary as it was originally laid out on the ground, the normal hierarchy of evidential guides is as follows: (i) natural boundaries; (ii) original monuments; (iii) fences or possession that appears to relate back to the original survey; and (iv) measurements stated in a plan or a metes and bounds description.
>
> When the parties are unsure of the boundary, it may be settled by agreement under a principle known as the conventional line doctrine. Such an agreement is capable of running with the land, and so is binding on successors. Moreover, even absent an agreement, when the parties have assumed, wrongly, that a fence marks the boundary between two plots, the law of adverse possession may alter title.... [I]f a party has occupied land belonging to another for a requisite period of time (10 years in some

> places; 12 or 20 years in others), the adverse possessor will be entitled to retain the land.

[26] I will deal first with the arguments respecting the alleged conventional lines and then move on to adverse possession.

Conventional Lines

[27] The doctrine of conventional lines is described in the following terms by Norman Siebrasse in "The Doctrine of Conventional Lines," 44 U.N.B.L.J. 229, at 229:

> The doctrine of conventional lines may be concisely stated as follows: if neighbouring parties intend to settle the boundary between them, then any boundary line agreed to by them is binding on the parties and their successors in title notwithstanding that it is not the true line according to the deeds or Crown grant.

[28] The applicants say that Mrs. Black's intention could not have been for the western boundary of what is now the Robichaud lot to run through a trailer, shed and chicken coop. In other words, it is submitted, Mr. and Mrs. Black did not intend to transfer the disputed area as part of the Ellis lot when it was first conveyed to the Chmiels in 1970. The applicants argue that Ivan MacDonald's survey ignored physical evidence on the ground as well as evidence of use and simply followed the measurements in the legal description. By contrast, they submit that Grant MacDonald took the physical evidence into account along with the legal description and the use and occupation of the land. The applicants also say that Ivan MacDonald's sketch is not a registered survey and that "reportedly he never tied in adjacent properties, nor considered historical usage, but rather depicted only the metes and bounds as described in the Deed."

[29] The respondents argue that Ivan MacDonald's survey is supported by more research – such as speaking with various landowners – than is Grant MacDonald's. Grant MacDonald did not find markers or monuments at the other corners although he did find one in the middle of a field whose location (the respondents submit) made no apparent sense.

[30] The position of the respondents is that Ivan MacDonald was correct not to accord any significance to the iron pipe that Grant MacDonald found or to the tree line

whose origin or purpose was also not established. They say Mr. Greene's later survey essentially adopted Grant MacDonald's results and does not add anything to the applicants' position.

[31] The boundary line in Ivan MacDonald's 1984 sketch is mathematically consistent with the description in the Deed to the Ellis lot. He located and set the markers for the four corners of the Ellis lot by following the legal description in the Chmiel Deed. There being no ambiguity, the respondents argue, the words of the Deed must govern. The applicants suggest that despite Ivan MacDonald's claim that the description on the Ellis Deed is unambiguous he admits in his affidavit that the Deed's reference to the "north" side of the road leaves it unclear where the "north" side of the road begins, that is, whether it is the edge of the pavement, the edge of the gravel, the ditch or the lawn, or whether the side of the road has changed with patches or erosion. The applicants suggest that leaving the interpretation to the reader in this way creates ambiguity in the Deed description. According to the respondents, the error in compass direction did not create any ambiguity. Further, they say, there is strong evidence that the Blacks knew that the road was 100 feet wide; they had been compensated for the land expropriated for the purpose of widening. Ultimately, the respondents argue, having sold the property described in the Chmiel Deed, the Blacks no longer owned the property and hence could not re-sell a portion of the same land to Mr. Casey.

[32] As has been noted, Grant MacDonald's survey of the Robichaud lot commenced with a galvanized post or pin that he believed to be the marker for the southeast corner of the Ellis lot. He measured from the centre of the highway to this marker, and found the distance to be 248 feet. He assumed that the highway was 66 feet wide and that the southern boundary of the Ellis lot was 215 feet, as indicated by the legal description. He located a second iron pin in the direction of the northern boundary of the Ellis lot and ran a line between these two markers. The applicants note that the two pins formed a straight line along the tree line behind Mrs. Black's chicken coop. They submit that if Ivan MacDonald had discovered such a discrepancy between the legal description and the evidence on the ground in 1983-84, it is likely that he would have informed Mrs. Black and she would presumably have rectified the situation.

[33] The applicants cite **Swinemar** v. **Hatt** (1980), 41 N.S.R. (2d) 453, 1980 CarswellNS 203 (S.C.T.D.), **MacCormick** v. **Dewar**, 2010 NSSC 211, 2010 CarswellNS 383, and **Traynor** v. **Hilderley**, 1997 CarswellOnt 4510 (Ont. C.J. (Gen. Div.)), as authorities on boundary-determination. **Swinemar** and **MacCormick**

involve ambiguous descriptions. In **Traynor**, the court discussed the heirarchy of evidence to be considered by a surveyor. Stortini, J. said:

> 13 It is common ground that a surveyor shall, when redefining boundaries, rely on the following evidence in the order named: [...]
>
> 14 a) Natural boundaries;
>
> 15 b) Original monuments;
>
> 16 c) Fences or possession which can reasonably be related back to the time of the original survey;
>
> 17 d) Measurements as shown on the plan or as stated in the metes and bounds description.
>
> 18 If original monumentation is found and is undisturbed as to location, it must be accepted, erroneous as may have been the original survey....
>
> 19 If no evidence exists of either the original monuments or original line, then the surveyor must refer to the measurements as contained in the deed or on the plan. This approach may, of course, be affected by possessory title. If no other method of establishing the boundary in question is available, the court must fix the boundary with the assistance of deed measurements and the law of possessory title.

[34] More recently, the principles of deed interpretation were set out in **MacDonald** v. **McCormick**, 2009 NSCA 12, 2009 CarswellNS 48, where Saunders, J.A., for the court, cited the following passages from **Metlin** v. **Kolstee**, 2002 NSCA 81, at paras. 71-73:

> [65] In his decision, after reviewing the evidence, the trial judge referred to the principles applicable to the interpretation of a deed... Justice Coughlan stated in 37-39 as follows:
>
> > [37] The general principles applicable to the interpretation of a deed are set out by Jones, J. (as he then was) in *Saueracker et al. v. Snow et al.* (1974), 47 D.L.R. (3d) 577 at p. 582:
> >
> > > ... The general principles applicable to the interpretation of a deed are set forth in paras. 13 and 24, 5 C.E.D. (Ont. 2d), pp. 488-90 and 497-8, as follows:

> 13. Construction. — General Rule. The Court must, if possible, construe a deed so as to give effect to the plain intent of the parties. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrarily overborne by any presumption. The intention of the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it, and effect should, if possible, be given to every word of the document. Where, judging from the language they have used the parties have left their intention undetermined, the Court cannot on any arbitrary principle determine it one way rather than another. Where an uncertainty [still remains] after the application of all methods of construction, it may sometimes be removed by the election of one of the parties. The Courts look much more to the intent to be collected from the whole deed than from the language of any particular portion of it.

.....

[38] The relative importance to be given to various items in the interpretation of a deed is well settled. In *McPherson et al. v. Donald Cameron* (1866-69), 7 N.S.R. 208, Dodd, J., in giving the judgment of the Court, stated at p. 212:

> ... The question is how he is to get there, for neither the course nor distance given in his grant will take him there, without the alteration of one or the other. The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake;

....

[66] These statements correctly set out the general principles to be applied in interpreting descriptions of land as spelled out in a deed. As a general rule the intent

> of the parties to a conveyance is to be gathered from the words of the document. If there is an ambiguity, the common sense rules as quoted by the trial judge from *McPherson et al. v. Cameron, supra,* are generally to be applied. When courses and distances clash preference to one, rather than the other, will depend on the circumstances. . . . [Underlining by Saunders J.A.]

Saunders, J.A. went on to say, at paras. 72-73:

> A clear and unambiguous deed should be given its plain meaning. As Fichaud, J.A. observed in *Knock v. Fouillard* (2007), 252 N.S.R. (2d) 298 (N.S. C.A.), commencing at ¶ 27:
>
> > [27] In the interpretation of a conveyance it is important to recall three governing principles:
> >
> > .....
> >
> > (b) ... the court should construe the document as a whole, if possible giving meaning to all its words. . . .
> >
> > This principle applies to the interpretation of a deed: Anger and Honsberger, ¶ 25:40. Gale on Easements (*Sweet v. Maxwell*, 17th ed.) ¶ 9-14 says:
> >
> > > In the case of an express grant the language of the instrument must be referred to. The court will have regard to the conveyance as a whole, including any plan that forms part of it, even though the plan is not mentioned in the parcels or is said to be for identification purposes only.
> >
> > ....
> >
> > (c) Third, the court's first task is to determine whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes, motives or recollections. The primary source is the document, not the psyche.
> >
> > .....

> In the process of interpretation, a court may not utilize the parties' subjective wishes, motives or intent to alter the unambiguous and objectively manifest intent in the deed's wording.

> When the words of a deed are not ambiguous, either in themselves or when applied to the land in question, the intention of the original grantor is to be taken from the words of the description in the deed. No further rules of interpretation are required....

[35] The respondents argue that the legal description of the Ellis lot is clear and unambiguous and that it governs the boundary lines of that lot, as well as the western boundary of the Robichaud lot. The words of the deed being clear, they say, there is no need to consider extrinsic evidence. I am satisfied that the deed description is unambiguous.

[36] Citing Prof. Siebrasse's definition of conventional lines – "if neighbouring parties intend to settle the boundary between them, then any boundary line agreed to by them is binding on the parties and their successors in title notwithstanding that it is not the true line according to the deeds" – the respondents say the doctrine requires clear proof of an agreement as to the precise location of the boundary line. They refer to **Re Munn**, 2001 NBCA 116, 2001 CarswellNB 446, where the New Brunswick Court of Appeal said, at para. 3:

> As this Court noted in *Parlee v. McFarlane* (1999), 210 N.B.R. (2d) 284 (N.B. C.A.), at para. 32, the courts of this Province "have long recognized and given effect to agreements, whether express or implied, that settle the boundary between adjoining lots, even though the agreed upon location may be inconsistent with the line dictated by the pertinent deeds or Crown grant." The Court went on to summarize as follows the principles that govern the application of the conventional boundary line doctrine, at paragraph [40]:
>
> > First, there must be satisfactory evidence that an agreement was reached between the owners of adjoining lands to settle their boundary. See The Doctrine of Conventional Lines [(1995) 44 U.N.B.L.J. 229]. The burden of proving such an agreement lies with the party asserting it. See *Murray et al. v. McNairn* (1952), 30 M.P.R. 200 (N.B.C.A.). Second, clear proof of such an agreement and the precise location of the line is required. See *Miller (Lewis) & Co. v. Clow* (1918), 52 N.S.R. 1 (C.A.). Third, such an agreement may be inferred from the conduct or declarations of the owners of the

> contiguous lots, if, and only if, such an inference is a logical consequence from proven or admitted facts. [Underlining in original]

[37] The respondents argue that the evidence does not establish a clear agreement between the parties on a precise location of the boundary line, other than that shown on the deed to the Ellis lot. I agree. There is no convincing reason to conclude that the various owners ever came to a clear agreement that the lines were other than those indicated by the deed. The line originating with the iron post found by Grant MacDonald does not establish any such agreement, and I am persuaded that Ivan MacDonald was right to be cautious as to its significance. I am satisfied that the boundary lines are correctly set out in the manner described by Ivan MacDonald.

Adverse Possession

[38] The law on adverse possession is summarized in **Spicer** v. **Bowater Mersey Paper Co.**, 2004 NSCA 39, 2004 CarswellNS 99, where Roscoe, J.A. said, at para. 20:

> ... claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession.

See also **Boudreau** v. **Pellerine**, 2010 NSSC 188, 2010 CarswellNS 297, at paras. 67-71.

[39] The applicants submit that their ownership of the land shown on Grant MacDonald's survey is made out by adverse possession. They support their possessory claim by reference to aerial photographs and family photographs that they say demonstrate that the lot has been used up to the tree line since 1978. They say Mr. Casey's trailer was in the same location from at least July 1978 until the applicants bought the lot in 2007. They say the previous landowners were never asked to move the trailer or the shed. Nor, they say, was there any objection taken when Angela Graves installed a well on the property in 1990-91. In short, they rest their adverse

possession claim primarily on the presence of the trailer and shed, and the use of the land as a summer property.

[40] The respondents say the applicants have not established open, notorious, continuous and exclusive occupation of the area in dispute. Mr. Casey, who initially owned the Robichaud lot, was aware that Ivan MacDonald was marking the boundary for Mrs. Black in 1984. They say the evidence shows that the Ellises actively used the property (to which they, of course, had paper title) from at least 1997. When the Robichauds bought the property in 2007, they were aware that there was a dispute, or at least an uncertainty, over the location of the boundary line.

[41] The evidence of Angela Graves was that she assumed that the trees marked the boundary line. It is clear, however, that she was aware of the possibility that her well was not on her own land. Mr. Ellis gave her permission to continue to use the well; this is inconsistent with adverse possession. She did not assert her ownership against this claim. She also saw Mr. Ellis place wooden stakes on the land she was occupying but took no action. This was in 1997. Even if there had been a developing situation of adverse possession, such an action by an owner with paper title would displace it. As **Spicer**, *supra*, indicates, "[e]very time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession."

[42] I am satisfied that the boundary lines are correctly set out in the manner described by Ivan MacDonald. Grant MacDonald unfortunately determined the lines without satisfactory evidence of the meaning and purpose of the metal pipe and tree line that he concluded were indicators of the location of the line. He also erred by relying on an incorrect width for the highway.

[43] The applicants have not offered sufficient evidence to establish title by adverse possession. They were aware when they bought the property that there was a dispute regarding the location of the boundary lines. They. nevertheless, proceeded with the purchase relying on an incorrect plan of survey.

CONCLUSION

[44] The correct position of the boundary lines are as depicted on the plan of survey prepared by Ivan P. MacDonald, NSLS, dated July 12, 1984. The applicants have not

established title either through the doctrine of conventional lines or through adverse possession. Therefore, their application is dismissed.

COSTS

[45] I will leave it to the parties to try to reach an agreement on costs. If they are unable to agree I will accept their written submissions within 60 days of the date of release of my decision.

McDougall, J.