SUPREME COURT OF NOVA SCOTIA
Citation: Longard v. Keel , 2011 NSSC 75

Date: 20110218
Docket: Hfx No. 224020
Registry: Halifax

Between:

Roy E. Longard

Plaintiff

v.

Ronald Harold Keel and Petra Simone Keel

Defendants

Judge: The Honourable Chief Justice Joseph P. Kennedy

Heard: July 7 to 15, 2010, in Halifax, Nova Scotia

Counsel: Allen C. Fownes for the Plaintiff
D. Mark Gardiner, for the Defendants

By the Court:

[1] This is a dispute about the use of property.

[2] Eldred and Borden Longard were brothers and had a close relationship. They had joint ownership of a family property at Tantallon on public Highway No. 3 and in August of 1942 they exchanged deeds dividing the property into two abutting parcels, both of which were fronted on that highway.

[3] Borden's property was adjacent to the Nine Mile River, while Eldred's property was to the east of Borden's.

[4] After the division, Eldred continued to maintain a garden on Borden's property and he and those accessing his property used a driveway that ran from Highway No. 3 across Borden's parcel to Eldred's land. This access road ran adjacent to Borden's house ("the Borden driveway").

[5] That garden and that driveway are central to this action.

[6] The Plaintiff, Roy Longard, is Eldred's son and in 1986 he obtained a portion of his father's parcel next to Borden's land. For years after his father's death he continued to use "the Borden driveway" to access his property from the highway and continued to maintain the garden on Borden's property that had been his father's.

[7] Borden's driveway is not the only access to Roy Longard's property from Highway No. 3. There is another driveway that lies wholly on Roy Longard's land to the east of the disputed access ("the other driveway").

[8] "The other driveway", although not as convenient, has also been used and is used to access the lots that once were Eldred's parcel.

[9] "The other driveway" is shown on a plan of survey that was created August 11, 1980 and entitled "Plan of Survey showing the lands of Eldrid [sic] and Borden Longard" (Exhibit No. D24).

[10] On this plan, "the other driveway" is shown running from public Highway No. 3 onto Eldred Longard's "Lot B" - it is referred to as the "existing driveway".

[11] Borden Longard transferred his property to the Seventh Day Adventist Church by deed dated June 14, 1995. The Church sold the property to Laurie and Linda Mills by deed dated October 22, 1995. The Mills, in turn, conveyed the property to the Defendants, Ronald and Petra Keel, by deed dated November 22, 1999.

[12] The Defendants have shut off "the Borden driveway" to Roy Longard and do not consent to his continued use of the garden on their property.

[13] The Plaintiff, Roy Longard, wants to continue to garden on the Keel property and use "the Borden driveway". By this action he claims that he has the right to do both.

AS TO THE DRIVEWAY

[14] There is clear evidence that after the Longard brothers divided the land and each occupied their respective lots, Eldred and those accessing his property commonly would travel over "the Borden driveway".

[15] This use continued uninterrupted after Roy Longard received the portion of Eldred's property and as long as Borden remained on his property and continued when the property was transferred to the church and then to the Mills family.

[16] This use of "the Borden driveway" by Eldred and then Roy is testified to by Roy Longard and confirmed by numerous creditable witnesses: this usage is not in dispute.

[17] Roy Longard's submits that his use of this driveway as of right is based on two grounds: 1) expressed reservation, and 2) prescription.

Reservation

[18] Whether there is an expressed reservation is a question of fact.

[19] The Plaintiff, Roy Longard, submits that in the deed from Eldred Longard to Borden Longard, created when the brothers divided the family property in 1942, Eldred reserved to himself a right-of-way over Borden's land which he claims is "the Borden driveway".

[20] The description for the land conveyed from Eldred to Borden, aforesaid, reads as follows:

> Beginning on the eastern line of the Nine Mile River at its intersection with the southern side line of Public Highway leading from Halifax to Margaret's Bay thence easterly along the said southern line of the Public Highway for a distance of 222 feet to a post thence south 31 degrees 22 minutes west for a distance of 611 feet to a Juniper Post; thence south 48 degrees 30 minutes west for a distance of 288 feet to Juniper Post; thence north 41 degrees 30 minutes west for a distance of 19 feet to the middle of the road leading from the Public Highway to the Nine Mile River; thence southerly along the middle of said road for a distance of 1134 feet or to the edge of said Nine Mile River, thence up stream following the said Nine Mile River to the place of beginning - saving and reserving the free and uninterrupted Right-of-Way of the said road for the said Vendors, their Heirs and Assigns but granting the said Purchaser the free and uninterrupted use of the said Road.

[21] Roy Longard says the "right-of-way of the said road" is "the Borden driveway" in question.

[22] I do not find this to be so. The "said road" in the description clearly refers to the "road leading from the public highway to the Nine Mile River ... ".

[23] This is the only "road" previously referred to in the description. This is not "the Borden driveway". It is more likely that this reservation refers to an existing road that leads from public Highway No. 3 to the river, then along the river's edge across the

Borden Longard property. This road is shown as "the Old Mill Road" on the survey plan which was created August 11, 1980, and entitled "Plan of Survey showing lands of Eldrid [sic] and Borden Longard". This plan is Exhibit No. D24. There is evidence that this road was in use in 1942.

[24] It is telling that this reservation does not say that the road in question provides access to Eldred Longard's parcel.

[25] That 1980 survey was accomplished when Eldred was alive and it shows a subdivision of his property. Subsequently, Eldred sold a portion of his property to his son David, Roy's brother, and his wife Dorothy by deed dated December 1, 1980. In that deed there is no reference to any access right-of-way across Borden's land.

[26] When Eldred conveyed the portion of his land to Roy in August of 1986, the deed makes no mention of a right-of-way across Borden's property.

[27] There is no reference to the Borden right-of-way in any subsequent conveyances by Eldred or Borden. It would seem that if it were a right-of-way as

significant as a roadway running proximate to Borden's house and accessing Eldred's land, it would have been referenced in these subsequent deeds.

[28] I find that the Plaintiff has not shown that the reservation contained in the 1942 Eldred deed to Borden is or incorporates "the Borden driveway".

[29] There is no expressed reservation shown by the Plaintiff herein.

Prescription or "Lost Modern Grant"

[30] Roy Longard submits that reservation or no reservation, his father Eldred and he have used "the Borden driveway" to an extent and in a manner that has created a right.

[31] The Nova Scotia Court of Appeal visited the law of prescription in *Mason v. Partridge*, 2005 CarswellNS 479. Oland, JA states at paras. 17-22:

> 17 Mr. Mason's appeal is based on the doctrine of modern lost grant. Charles MacIntosh, *Nova Scotia Real Property Practice Manual*, at 7-21 described that doctrine as follows:

> . . . The [doctrine of lost modern grant] is a judge-created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant has been made when the enjoyment began, but the deed granting the easement has since been lost. However, the presumption may be rebutted.

18 In *Henderson*, supra the Ontario Court of Appeal set out the requirements for establishing an easement pursuant to either a limitations statute or the doctrine of modern lost grant in the following passage:

> 14. It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the *Limitations Act*. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.

19 The trial judge relied upon two decisions for the proposition that the claimant must also establish that the enjoyment of an easement was without permission: *Gilfoy v. Westhaver*, 92 N.S.R. (2d) 425, [1989] N.S.J. No. 268 (N.S. T.D.) and *Publicover v. Publicover* (1991), 101 N.S.R. (2d) 75 (N.S. T.D.). *The Nova Scotia Real Property Practice Manual*, supra referred to these decisions and then stated at 7-23:

> . . . The claimant must show such use was made without force, secrecy, or evasion and <u>without consent of the servient owner</u>. [Emphasis in original]

20 The case law does not unambiguously support the conclusion concerning the burden of proof, but in my view, it is not necessary to resolve that issue to decide this case.

21 The enjoyment required to acquire an easement must demonstrate certain characteristics. *Gale on Easements*, 17th ed. (London: Sweet & Maxwell 2002) at p. 208 states:

> The civil law expressed the essential qualities of the user, by the clear and concise rule that it should be *"nec vi, nec clam, nec precario*".

None of the evidence in the proceeding on appeal indicates that the enjoyment was by violence. Nor was it secret — the trial judge was satisfied that there was at least a 20 year period of "open use". Thus the question becomes whether the user meets the third requirement that it be "*nec precario*."

22 In that regard, Gale on Easements at p. 214-215 states:

> 3. *Nec precario*
>
> The enjoyment must not be precarious.
>
> What is precarious? "That which depends not on right, but on the will of another person." . . .
>
> Enjoyment had under a licence or permission from the owner of the servient tenement confers no right to the easement. . . .

[32] There is, as stated, considerable and convincing evidence that Eldred and Roy Longard in combination used "the Borden driveway" in a continuous, uninterrupted, open, and peaceful manner for many years (well in excess of 20 years) prior to it being blocked off by the Defendants. Roy Longard claims that such use has resulted in a right to continue to use this driveway.

[33] The Defendants claim that this usage was with the permission of Borden Longard, that he did not ever intend for Eldred Longard or his successors to acquire a right to the use of "the Borden driveway".

[34] They have produced a Statutory Declaration that was executed by Borden Longard on 5 September 1996 (Exhibit 1A, Tab 10). Paras. 3, 4 and 5 of that Statutory Declaration reads as follows:

> 3. **THAT** on August 5, 1942, Eldred Longard and his wife conveyed the lower portion of "family lands" bordering on Nine Mile River (LRIS #40026783) to me. This Deed is recorded at the Registry of Deeds at Halifax in Book 845 at Page 813. The property referred to in that Deed is presently owned by Laurie and Linda Mills who acquired the property on October 27, 1995 (Book 5800, Page 1067).
>
> 4. **THAT** some time after acquiring the property referred to above my brother, Eldred, asked if he could use the circular driveway on my property. He also asked if he could use a small area (30' x 40') of my property for a garden (the driveway and garden as it exists today are shown on the plan attached hereto as Schedule "B"). Given that the entrance to my property was safer to use than the driveway on Eldred's property and the fact that I had a garden there myself, I gave him my permission to use the driveway and make a garden on my property. While both the driveway and the garden were used by him (and later by his son, Roy) regularly over the following years they both knew that they were using the driveway and the garden with my consent and that the property belonged to me. I never said, or implied, that either of them owned the property or could have the property. I always exercised all other elements of control and ownership over LRIS # 40026783 including the driveway and the area the garden was located on.
>
> 5. **THAT**, furthermore, had I wished that Roy Longard have the garden in question I would have deeded it to him prior to selling the property to the Maritime

> Conference of the Seventh-Day Adventist Church in 1995. I deliberately chose not to convey the garden property to him when I sold this property to the Church.

[35] I am satisfied that "the circular driveway" referred to in paragraph 4, is "the Borden driveway".

[36] Borden's averral in that document is significant to the prescription issue.

[37] This is the only evidence as to the communication between Borden and his brother, Eldred. The only evidence as to the nature of the arrangement which led to the use of "the Borden driveway" (and the garden) by Eldred Longard.

[38] The Plaintiff, however, claims that Borden was not competent when he executed this document, so as a result the circumstances surrounding the execution are highly relevant.

[39] This Statutory Declaration was accomplished at the initiative of Linda Mills, a predecessor in title to the Defendants. She is a retired teacher. She testified. I found her to be an impressive and creditable witness.

[40] She and her husband, Laurie, purchased the Borden Longard property from the church in October of 1995, intending to build a house in the area where their successors, the Keels, eventually built.

[41] Linda Mills testified to a difficult relationship with Roy Longard. She said he was upset that "outsiders" were purchasing the Borden Longard property. Roy continued to use the garden area that was on the Mills land, and trees that they planted along the border that separated the properties were "torn out".

[42] Roy Longard's claim to the use of both the garden and "the Borden driveway" on the Mills property was formalized by a letter dated August 20, 1996, sent to Linda and Laurie Mills by his then lawyer, Kelly Patrick Shannon (Exhibit 1B, Tab D11). This letter reads in part:

> . . . You are no doubt aware by now that Mr. Longard has claimed that he has a possessory interest in this land operated by virtue of this Limitations of Actions Act. We have reviewed the various facts and circumstances surrounding this matter and it would appear to us that Mr. Roy Longard has in fact been in actual, open, notorious, exclusive and continuous possession of this garden property as well as road access for a period of time well in access [sic] of 20 years. In fact, his father before him had owned Roy Longard's property and had utilized this property continuously dating back to the 1930's. Mr. Longard informed us when you purchased this property you had undertaken a survey of the line between the property you subsequently purchased and that of Mr. Longard's which, presumably, would have disclosed the existence of this encroachment. It is our view that Mr. Longard

> has established his prescriptive right to the garden property and a portion of the roadway of this property and his intention is to continue to the use of this property in the same manner in which he has used this property for several years and to which he has acquired an entitlement to do.

[43] Linda Mills testified that as a result of the receipt of this letter and the actions of Roy Longard she decided to go and speak to Borden Longard at the nursing home medical facility where he then resided.

[44] She said that she saw Borden twice before the Statutory Declaration was drawn up. "We shared with him the trouble with Roy. " As a result of these conversations the Mills engaged counsel to prepare the Statutory Declaration.

[45] Linda Mills said that she believed that Borden was of sound mind during these discussions and that he "articulated well". As a result of the conversations with Borden Longard, Mills engaged Les Doll, the counsel who had acted for the Mills when they had purchased the property, to prepare the Statutory Declaration.

[46] Les Doll testified. He has been a member of the Nova Scotia Bar since 1986 and a property law specialist. With respect to the preparation and execution of the

Statutory Declaration, he said "you have to make sure that the signing party knows what he or she is doing - that's crucial - especially with older people".

[47] Les Doll attended at the nursing home with Linda Mills and Glenna Doubleday (a niece of Borden Longard). He said he asked Borden questions to determine his situation, "Borden was bright and lucid, he knew what he wanted to do. He was amazed at Roy Longard's assertions. Borden made the point 'if I had wanted to give it to him I would have'."

[48] Les Doll said that he read the document to Borden paragraph by paragraph before the signing.

[49] Glenna Doubleday is the niece of Borden and the cousin of Roy Longard who was present at the signing of the Statutory Declaration. She visited her Uncle Borden frequently until his death. She estimated she was at the nursing home at least once a week. She assisted with his banking once a month, "I never thought his mind was failing". "His mind was good to the very end". She made notes in her diary on the day that the Statutory Declaration was signed. She wrote that the document was signed "so Roy can't claim the garden or the driveway".

[50] Glenna Doubleday was a creditable witness. She showed no bias as between these parties and was in an excellent position to have assessed Borden's cognitive ability at time proximate to the signing of this document.

[51] Roy Longard claims that Borden was not capable at the time of the execution of the Statutory Declaration. Roy testified that he had contact with Borden in 1996 and believed he was suffering from dementia, "He knew who I was but didn't know what day it was".

[52] I do not find that Roy Longard had contact with Borden that allowed him the advantage that Glenna Doubleday had when assessing Borden's competence.

[53] I am satisfied that Borden Longard was competent on the 5th day of September 1996 when he executed the Statutory Declaration. We have the testimony of the three witnesses who were present when he signed, one being his niece who had regular contact with him at times proximate to this signing.

[54] I am satisfied that counsel, Les Doll, made the effort to satisfy himself as to Borden's competency prior to the execution of that document. I am further satisfied that Borden Longard knew what he was declaring. Although there is some legal terminology in the document, its overall content strikes me as being information that Borden Longard would have possessed and conveyed.

[55] I conclude that it is a viable declaration that accurately communicates Borden Longard's position at that time.

[56] There is another document that I consider significant to the determination of the matter.

[57] David Longard, as indicated, is Roy Longard's brother. The Eldred Longard property was subdivided as shown on the Plan of Survey dated 19th day of June 1986 (Exhibit No. 1B5). David Longard owned the land shown as Lot X, Lot 10, on that survey plan. That lot was behind Roy Longard's Lot No. 2, vis-a-vis the public Highway No. 3.

[58] In April of 1987, David and Roy Longard entered into a right-of-way agreement that is Exhibit 1, Tab B5. In that agreement, David is the party of the first part; Roy is the party of the second part. The agreement reads in part:

> NOW THIS AGREEMENT WITNESSES THAT, in consideration of the premises,
>
> (a) the Party of the First Part grants to the Party of the Second Part a right-of-way for the use of the owners and occupants from time to time over the northern part of Lot X where the Existing Driveway shown on the Plan runs from Highway No. 3 to Lot 2;
>
> (b) the Party of the Second Part grants to the Party of the First Part a right-of-way for the use of the owners and occupants from time to time over the Existing Driveway shown on the Plan which runs from Highway No. 3, over the northern part of Lot X and then over part of the western half of Lot 2 as shown on the said Plan to the southern part of Lot X; . . .

[59] The "existing driveway" described is that access to Highway No. 3 that was shown as "existing driveway" onto Eldred's land in the Plan of Survey of August 11, 1980 (Exhibit No. D24). It is "the other driveway".

[60] By this agreement, created 23 years ago, Eldred's sons are negotiating the rights to the access right-of-way that runs across Roy's land. There is no mention in this document of "the Borden driveway".

[61] David Longard, a user of "the Borden driveway", is securing access to No. 3 Highway over "the other driveway" access to Roy's land.

[62] David Longard testified as to why he entered into this agreement. He said he did so because "he didn't have a legal right-of-way across Borden's property although he had always used it".

[63] I believe that David Longard's understanding is insightful - he had used this entrance but he knew he didn't have a right-of-way over it and so made arrangements with his brother, Roy, to obtain a right-of-way over Roy's property.

[64] Roy Longard testified, "David and his wife brought the agreement out to me and asked me to sign. I shouldn't have signed because I knew this was not the existing driveway".

[65] I am satisfied on the basis of the Statutory Declaration and on the totality of the evidence that Eldred Longard, his sons Roy and David, and others accessing their properties from Highway No. 3 by use of "the Borden driveway", did so with the permission of Borden.

[66] This permission extended by Borden to Eldred and then to Roy precludes the creation of any right to cross "the Borden driveway" created by prescription or lost modern grant.

[67] I find further that the use of the garden on Borden's property by Eldred and then Roy was with the permission of Borden Longard, as Borden sets out in his Statutory Declaration.

[68] Similarly, as a result, no right has vested in the Plaintiff, Roy Longard, as to the use of this garden.

[69] Having found the Statutory Declaration of Borden Longard to accurately set out the circumstances of the use of "the Borden driveway" and the garden by Eldred and then Roy Longard, I find that Roy Longard has no right to the use of either and that the Defendants are able to legally terminate his use of their property.

[70] If necessary, I will receive written submissions as to costs.

Kennedy, C.J.