

SUPREME COURT OF NOVA SCOTIA

Citation: *Marchbank v. Rutherford*, 2016 NSSC 251

Date: 20160923

Docket: Tru No. 449117

Registry: Truro

Between:

Penelope Marchbank

Appellant

v.

Elizabeth Rutherford

Respondent

Judge: The Honourable Justice Jamie Campbell

Heard: September 12, 2016, in Truro, Nova Scotia

Counsel: Penelope Marchbank, self-represented appellant
Jeffrey W. Lattie, Articled Clerk for the respondent

Introduction

[1] This case is about whether a dispute regarding the nature and extent of the rights conveyed by an easement is within the jurisdiction of the Small Claims Court.

Summary

[2] Section 10(a) of the *Small Claims Court Act* R.S.N.S. 1989, c. 430 says that claims for the “recovery of land or an estate or interest therein” are not within the jurisdiction of the court. The existence of a right of way and the ownership of the two properties are not in question. The respective rights of the parties to use and maintain the right of way are. To determine the case a court will be required to make a finding about the nature, scope and attributes of an easement granted in 1921. The dispute is about the actions of the owners, Penelope Marchbank and Elizabeth Rutherford, but the claim as set out in the Notice of Claim makes it clear that it is also about the relationship of the easement to the land over which it runs. “The nature and extent of the rights conveyed are at issue.”

[3] The claim is about the recovery of an interest in land because Ms. Rutherford is seeking to recover her interest in her land from Ms. Marchbank who she claims has abused the easement which is in favour of the land that she owns. It is a dispute between two people but also between two interests in land.

[4] The dispute is not within the jurisdiction of the Small Claims Court.

The Appeal

[5] The case is an appeal from the decision of Adjudicator Peter Lederman, Q.C. issued on February 14, 2016. In that decision the adjudicator responded only to the preliminary issue of whether the Small Claims Court had jurisdiction to hear the matter. He concluded that the court did have jurisdiction and would hear the matter on its merits. He ordered that the hearing be set down after the appeal period to give Ms. Marchbank an opportunity to appeal the preliminary decision on jurisdiction.

[6] Rather than hearing the matter and putting the parties through that inconvenience and expense the adjudicator issued a concise decision on the jurisdictional issue. It is significant that the decision makes no findings of fact that

would establish a factual record for the appeal. The decision indicates that the defendant, Ms. Marchbank, argued that because the dispute involved the nature and attributes of a right of way it was not within the jurisdiction of the Small Claims Court. The adjudicator agreed with Ms. Marchbank that the decision of Adjudicator Patrick L. Casey, Q.C. in *Swaine v. Hackney* 2010 NSSM 83 supported her position. He did not agree with Adjudicator Casey's reasoning in that case. Adjudicator Lederman said that "To expand the meaning of 'recovery' to include every dispute about real property rights is, in my view, unreasonable."

[7] The adjudicator provides further insight into his reasoning in the Summary Report, dated March 31, 2016. He says that in the case of an existing right of way, issues of ownership and possession do not arise and the court here is simply being asked to determine the respective rights of the parties to use and maintain the right of way. He noted that he would restrict the concept of recovery in this context to questions of ownership and possession of land. Where, as here, the right of way is existing and not in dispute, issues of ownership and possession do not arise. The court is simply being asked "to determine the respective rights of the parties to use and maintain the right of way."

[8] As with most preliminary jurisdictional issues the "facts" have to be gleaned from the pleadings. What the case is really about can only be decided based on what the parties have each claimed.

The Claim

[9] The claimant is Elizabeth Rutherford. She says that there is a right of way over her land in favour the land now owned by Penelope Marchbank. The right of way was established by a deed in 1921 and reserves a "right of way to Edmund M. Johnson and his heirs and assigns from the gate of the main road in a Southerly direction to a gate leading to the meadow." Ms. Marchbank now has the legal right to use that right of way. Ms. Rutherford claims that Ms. Marchbank has abused and misused the easement. She says that Ms. Marchbank has "overextended" her use of the easement causing damage to her property by filling ditches with debris, damaging the road bed and unnecessarily removing established trees and hundreds of saplings. The claim says that Ms. Marchbank was given notice that she was in breach of the easement and was responsible for damages as a result of her unlawful use of it. Ms. Rutherford claims damages of \$18,279.25.

[10] Ms. Marchbank contests the claim. She says first that the Small Claims Court has no jurisdiction with land disputes. She also says that any work that was done on the road was “within reasonable guidelines according to right of way laws”. She adds that Ms. Rutherford has also used heavy equipment on the right of way and has damaged it through her own use.

[11] Those claims and the defences to those claims are the only evidence that can be considered in this matter. The facts are the nature of claims and defences. There have been no other findings of fact and nothing put forward by the parties in the appeal establishes further facts.

[12] The parties cannot tailor the claims and responses now to fit their arguments. This is a claim about whether Ms. Marchbank has abused, misused, or overextended her use of the easement. The pleadings do not put the width of the easement in issue. But the claim as filed clearly sets out that “The nature and extent of the rights conveyed are at issue.” It says that “The plaintiff brings a claim for damages from an abuse and misuse of the easement, drawing a distinction between the right of ways [sic] purpose, and the mode in which this purpose was accomplished.”

[13] The claim is about whether Ms. Marchbank used the easement in a way that was beyond the proper scope of the right granted by the easement in 1921. That will require a determination of the nature and extent of the rights granted by easements in general and specifically the 1921 right of way.

The Issue

[14] The legal issue in the appeal is then whether the adjudicator erred in law or exceeded his jurisdiction when he held that the Small Claims Court has jurisdiction over the subject matter of this dispute.

The *Small Claims Court Act*

[15] The *Small Claims Court Act* sets out and limits the jurisdiction of the Small Claims Court. It includes adjudicating on claims in contract or tort for an amount up to \$25,000. The court does not have jurisdiction to deal with a number of subject areas such as wills and estates, defamation and malicious prosecution, or landlord and tenant matters. Section 10(a) exempts from the court’s jurisdiction claims “for the recovery of land or an estate or interest therein”. Adjudicator

Lederman has noted in his decision that the language is “arcane and ambiguous.” It would be hard to disagree with that.

[16] The *Small Claims Court Act* has as its purpose the establishment of a court to informally and inexpensively adjudicate claims in accordance with established principles of law and natural justice. Ms. Rutherford argues that the purpose of the legislation would mean that it should be given an interpretation that would make the court more available to people seeking to have disputes resolved rather than making it less available. In a claim of this magnitude it would be very helpful to be able to seek a resolution through the Small Claims Court.

[17] Boundary disputes are not within the jurisdiction of the court. But the Small Claims Court has dealt with contractual disputes arising from Agreements of Purchase and Sale and claims of trespass to land. In each situation real estate was involved. The problem is where the line is drawn between disputes that are about where a line is drawn and disputes that otherwise involve land.

Swaine v. Hackney

[18] This issue was addressed by the Small Claims Court in *Swaine v. Hackney* a decision of Adjudicator Patrick L. Casey, Q.C. in 2010. Adjudicator Casey said that the court did not have jurisdiction to deal with the interpretation of an easement. Adjudicator Lederman disagrees with his analysis.

[19] In *Swaine* Ms. Hackney had a right of way over the Swaines’ property. The Swaines said that Ms. Hackney cut down a number of trees without their permission and those trees were on their property. Ms. Hackney agreed that she had cut down trees and removed other debris from the right of way. She claimed that she had the right to clear off the right of way as necessary to exercise ownership of it and have use of it.

[20] Adjudicator Casey noted that there are many cases in which adjudicators have been asked to interpret contractual provisions which may touch on matters relating to the ownership of real estate, including rights of way. Those are essentially contractual issues and are within the jurisdiction of the court. If the claim involves the determination of an issue concerning the recovery of land or an interest in land then it is beyond the jurisdiction of the court even if it is framed in contract or tort. In other words, as Adjudicator Casey said, “if in order to resolve the contract or tort issue the Court is asked to determine an issue involving the

recovery of land or an interest in land then the claim is beyond the jurisdiction of this Court.” para. 25 of *Swaine*.

[21] An owner of a right of way is an owner of an interest in land. The grant of an easement includes a grant of ancillary rights as are reasonably necessary for the exercise and enjoyment of that easement. The interpretation of those rights is an interpretation of common law property rights as they pertain to both the easement and the property over which the easement runs.

[22] The court in that case was not being asked to determine whether there was an easement or whether the trees and debris were on that right of way. It was whether Ms. Hackney had the right to remove the trees as part of the rights incidental to the easement. Adjudicator Casey concluded that the court would be required to interpret the document granting the right of way to Ms. Hackney and also to consider the rights that pertain to that right of way under common law or otherwise. The adjudicator observed that the court had jurisdiction to resolve issues between the parties but lacked jurisdiction to resolve property issues, which may affect not only the current owners but future owners of the property interested in the question.

[23] Because the court was asked to determine the extent of a property right the matter was beyond its jurisdiction.

[24] Adjudicator Lederman agreed that the *Swaine* case supported the position put forward by Ms. Marchbank. He did not agree with the analysis in that case. Instead he said that the expansion of the term “recovery” to include every dispute about real property rights was unreasonable. He determined that “recovery” in this context is limited to questions of ownership and possession of land. Where there is an existing right of way issues of ownership do not arise and the court is simply asked to determine the respective rights of the parties to use and maintain the right of way.

“Recovery of land or an estate or interest therein”

[25] Ms. Rutherford argues that this case is not about a recovery of an interest in land. It is about damages done to her land by Ms. Marchbank. But Ms. Marchbank says that she was properly exercising her rights under the 1921 easement.

[26] This case is not the same as claim for damages for trespass made against a stranger. It is a dispute about the interaction between two interests in land; a deed and a right of way. The case could not be resolved without making a finding about the nature and extent of those competing interests. In that sense it is like a case in which a boundary is decided based on the interpretation of an old deed.

[27] In *Swaine* Adjudicator Casey addressed the interpretation of the word ‘recovery’ and held that it was not limited to recovery of a debt but included obtaining a right of property. Recovery is something of value received as a result of a judgment of the court. In this context recovery of land or an interest in land is an order respecting land or an interest in land. That order might confirm the right asserted by one party or the other.

[28] The parties are bound by the pleadings. What this case is about is defined by the pleadings. The claim clearly says that the nature and extent of the rights conveyed in the 1921 easement are at issue. The claim is for an abuse and misuse of that easement. To determine the issue the court would have to make a determination of what the 1921 easement conveyed.

[29] Ms. Rutherford in making her claim would have to show that Ms. Marchbank’s easement did not include the right to remove the trees that were alleged to have been removed. Ms. Marchbank in her defence would be trying to establish that the law as it relates to easements and in particular the easement in favour of her land over Ms. Rutherford’s land includes the ability to remove the trees in question. The claim as it is set out in the pleadings is about the extent and interpretation of the rights that flow from that easement. The judgement would not simply be with respect to actions of one or the other of the parties but would be with respect to the rights that flow from the 1921 easement. The decision would purport to define the scope of the interest in land and the relationship between the two property interests.

[30] That is a claim for the recovery of a right or interest in land.

Conclusion

[31] Jurisdiction has to be determined on the face of the pleadings. The pleadings here put before the court the issue of the nature and extent of the rights conveyed in the 1921 easement in favour of the land owned by Ms. Marchbank. The case is about the relationship between the right of way that pertains to Ms. Marchbank’s land and the rights of ownership that pertain to Ms. Rutherford’s land. The effect

of the decision would be to determine the nature and extent of the competing interests that flow with the title to the two pieces of property involved.

[32] The appeal is granted.

Campbell, J.