**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Armour Developments Ltd. v. Manga Hotels (Halifax) Inc.*, 2016 NSSC 274

**Date:** 20161026
**Docket:** Hfx No. 430020
**Registry:** Halifax

**Between:**

Armour Developments Limited,
a body corporate

Applicant

v.

Manga Hotels (Halifax) Inc.,
a body corporate

Respondent

**Judge:** The Honourable Justice Mona M. Lynch

**Heard:** July 5, 2016, in Halifax, Nova Scotia

**Counsel:** John Shanks, for the Applicant
Barry Mason, for the Defendant

**By the Court:**

**Background:**

[1] The Applicant and Respondent own neighbouring properties on Hollis Street in Halifax, NS. The property owned by the Applicant, Armour, is known as Founders Square. The property owned by the Respondent, Manga, contains the Hollis Hotel.

[2] Founders Square was constructed between 1984 and 1985. Occupancy of Founders Square commenced in the summer of 1986. Armour, through a wholly owned subsidiary, Founders Square Limited, had a leasehold interest in the Founders Square property from 1984 until Armour purchased the property from the province of Nova Scotia in 2003. The province of Nova Scotia acquired title to the properties that make up Founders Square between 1972 and 1975.

[3] The property owned by Manga includes a small vacant lot located behind the Hollis Hotel which connects to Bedford Row. It is used by Hollis Hotel for employee parking and garbage storage.

[4] The lease from the province of Nova Scotia to Founders Square Limited in July 1984 identified an easement from the rear door of the former Lenoir Building to Bedford Row across the vacant lot currently owned by Manga.

[5] The Warranty Deed dated September 19, 2003, from the province of Nova Scotia to Armour identified the same easement -- an easement or right of ingress and egress to the rear of the Lenoir Building, 1659-1663 Hollis Street, from Bedford Row over the adjacent vacant property, currently the Manga vacant lot.

[6] The Lease provided an assignment of the easement or right of ingress and egress to Founders Square Limited and the deed conveyed all of the Grantor's right, title and interest in the easement or right of ingress and egress to Armour Developments Limited.

[7] Armour has been unable to locate the original grant of easement across the vacant lot after a detailed search of the Land Registration records for the Founders Square Property and the Manga property.

[8] The Manga property was migrated on July 6, 2006, and the registration does not record any burden on the property related to the easement in question or otherwise.

[9] The Founders Square property was migrated on April 26, 2007, and the registration shows the benefit of an easement/right-of-way over the Manga property.

[10] Manga purchased the property by way of Warranty Deed on June 30, 2011, unaware of the easement claimed by Armour. Manga plans to build stacked parking on the vacant lot.

[11] Armour, by an Application in Court, asks the court for an order declaring that Armour enjoys the benefit of an easement across the Manga vacant lot under the doctrine of lost modern grant, or a prescriptive easement pursuant to s. 32 of the former *Limitations of Actions Act,* R.S.N.S., 1989, c. 258.

[12] Manga disputes the claim and asserts that the use of the property by Armour would not support the claim of open and continuous use for more than 20 years, the use was sporadic and Manga permitted the use as a neighbourly gesture. Manga pleads the *Land Registration Act*, SNS 2001, c. 6 and the *Limitations of Actions Act.* Manga also asserts that the claim by Armour is not adverse as they thought they had a deeded right-of-way. As well, Manga points to ss. 74 and 75 of the *Land Registration Act*, SNS 2001, and c. 6.

[13] After hearing of the matter, at the request and agreement of both parties, the court took a view pursuant to *Civil Procedure Rule* 51.12. The view involved proceeding down stairways, exiting through both fire exits from Founders Square and looking at the vacant lot.

**Issue:**

[14] Has Armour established that it has a prescriptive easement under the former *Limitations of Actions Act* or by the common law doctrine of lost modern grant?

**Law:**

[15] Section 32 of the former *Limitations of Actions Act*, now called the *Real Property Limitations Act*, provides:

> 32 No claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of twenty-five years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by deed or writing. *R.S., c. 258, s. 32; 2001, c. 6, s. 115*.

[16] In ***Mason v. Partridge***, 2005 NSCA 144 at paras. 17 and 18 the law is set out as:

> [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:
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> > . . . 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:
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> > 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

[17] In **Balser v. Wiles,** 2013 NSSC 278, Justice Murphy sets out law on easements and lost modern grant in paras. 9 – 15:

> [9] Charles Macintosh's *The Nova Scotia Real Property Practice Manual*, loose-leaf, (Markham: LexisNexis Canada Inc., 1988-2013) defines an easement as follows at p.13-51:
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> > An easement is a right one landowner has to utilize land belonging to another and imposes a burden on that land for the benefit of the owner of the land to which the easement is attached.
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> [10] The four essential characteristics of an easement are set out in Anne Warner La Forest, *Anger and Honsberger: The Law of Real Property***,** loose-leaf, 3rd Edition (Toronto: Canada Law Book Ontario, 2012) at p.17-3:
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> (a) There must be a dominant and a servient tenement;
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> (b) An easement must accommodate the dominant tenement;
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> (c) The dominant and servient owners must be different persons; and
>
> (d) A right over land cannot amount to an easement unless it capable of forming the subject-matter of a grant.
>
> [11] An easement can be established through long-time use and enjoyment by one of two means. The first is by the operation of s.32 of the *Limitation of Actions Act*, R.S.N.S. (1989) c.258: …
>
> [12] The other method for establishing an easement based on use and enjoyment is by application of the doctrine of lost modern grant. The *Nova Scotia Real Property Practice Manual*, *supra*, describes the doctrine of lost modern grant at p.13-95:
>
> > The doctrine of modern lost 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.
> >
> > The doctrine predates and is an alternative to a finding that a right has arisen by prescription. The doctrine is based upon usage, not a real grant.
> >
> > ...
>
> [14] The claimant must also establish that the use was made without violence, secrecy or evasion, and without consent or permission of the servient owner: **Mason v. Partridge**, *supra*, at paras.19-22.

> [15] In view of the serious consequences for the servient property owner, a prescriptive easement will be found only where there is clear evidence of both continuous use and acquiescence in such use by the owner of the servient property: **Henderson v. Volk**, *supra*, at para.21.

**Analysis:**

[18] In the present case, Armour asserts that they have used the exit into the vacant lot as a fire escape from Founders Square and then across the vacant lot to Bedford Row. The onus is on Armour to show that they meet the requirements for a declaration of an easement across the vacant lot.

[19] Armour provided evidence from former employees who worked on the construction of the Founders Square project. The evidence showed that the exit to the vacant lot was a requirement of the *National Building Code.* Two exits were necessary in order to obtain an occupancy permit for the office building. However, the need or necessity for a second fire exit does not, in my view, provide an entitlement in easement or lost modern grant over the vacant lot.

[20] Other former employees provided evidence that the fire exit door contained a sign indicating the door was a fire exit, warning not to block or obstruct and to keep clear at all times. The evidence showed that when employees of Armour working at Founders Square noticed obstruction of the fire exit by garbage containers, etc. a request to employees of the current Manga property would always result in the removal of the obstruction.

[21] The strongest evidence for Armour came from Gordon Parsons who has been employed by Armour since 1988, currently as Vice-President and formerly as Director of Property Management. His work involved Founders Square from 1992 on and his office has been in Founders Square since 1992. There are usually about 1,000 occupants in the building. His evidence was that the fire door did not provide access to Founders Square but it allowed occupants to exit Founders Square at any time. Fire drills were held, once a year, and there were false alarms from time to time. He had no records or reports of the fire drills. He assumed that the occupants used the exit to the vacant lot during all fire drills over the years, as it would be the closest exit for many of the occupants. His only personal observation of occupants using the fire exit was on one occasion at the end of June 2016. On that occasion, for a false alarm, he counted 79 people exit the fire door leading to the vacant lot.

[22] On his drive to work each day he would normally pass by the vacant lot and check to ensure the fire door was not obstructed. On occasion he would notice that there was an obstruction. He would ask the Operations Manager to contact the hotel property to remove the obstruction and on each occasion he would note the obstruction was removed. On two occasions, he personally made the request to remove the obstruction directly to the hotel property, both with the prior owner and with Manga. The obstruction was removed on both occasions. He was unaware of any time where Founders Square occupants were prevented from exiting the fire door. He was also unaware of any refusal to clear any obstructions when a request was made to the hotel property.

[23] The evidence for Manga showed that the hotel property was purchased without any knowledge of a right-of-way or the use of the fire door. Manga plans to build stacked parking on the vacant lot.

[24] There was also evidence from a Manga employee who has worked at the hotel property since 2003, prior to Manga's purchase. From 2003 to 2013 he worked at night and took garbage to the vacant lot every night. Since 2013 he has worked during the day and takes garbage to the vacant lot. He has parked his car in the vacant lot since 2003. He has never seen anyone crossing the vacant lot from Founders Square.

[25] There is a dominant tenement, Founders Square. There is a servient tenement, the Manga property. The easement accommodates the dominant tenement in that it provides a second fire exit from the office building. The dominant and servient owners are different persons. The right of way is capable of forming the subject-matter of a grant as it did in the 1984 lease and the 2003 deed from the province of Nova Scotia.

[26] Armour must demonstrate a use and enjoyment of the right-of way which was continuous, uninterrupted, open and peaceful for a period of 20 years.

[27] The Nova Scotia Court of Appeal discussed the acts of user in **Mason v. Partridge,** 2005 NSCA 144 at paras. 42-44. They note the difference when the use is by noisy trucks than when it is by pedestrians over a sidewalk. They note the need to proceed with caution before subjecting a property owner to a burden without compensation. Clear evidence is needed both of the continuous use and acquiescence.

[28] Manga argues that there is scant evidence of actual use of the vacant lot by anyone other than employees of Manga. I agree that there is little evidence that the fire exit was used frequently. The fire drills were once a year and false alarms on occasion. Except for one occasion, there was no actual personal knowledge of the use of the fire door during a fire drill. However, after visiting the property with the parties and using both fire exits, it would defy logic to suggest that all of the occupants of Founders Square would use one exit. This would require some of the 1000 occupants to pass by a close and more convenient exit to use a farther and less convenient exit.

[29] Use can be seasonal in nature, **Gilfoy v. Westhaver,** 1989 N.S.R. (2d) 425 (NSSC). It can be seasonal and limited to once a year, **Croft v. Cook,** 2014 NSSC 230. In **Croft v. Cook** at paras. 84 and 85 the nature of the use is discussed:

> [84] There is no question but that the use of the hauling road by the plaintiffs during this period was seasonal in nature with the harvesting of logs and firewood. However, it is well-established in law that with a right-of-way, the requirement for its uninterrupted use can be sufficient if the use was of such a nature, and took place at such intervals, as to indicate to the ordinarily diligent owner of the servient tenement that a right is being claimed.
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> [85] This principle is well summarized in the Cheshire & Burns text on *Modern Real Property*, 14th Ed. (Butterworths, 1988) at p. 516. It reads as follows:
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> > In addition to being as of right, user must also be continuous, though the continuity varies according to the nature of the right in question. For instance, a right of way from the nature of the case admits only of occasional enjoyment, and therefore if it is used as and when occasion demands, the requirement of continuity is satisfied. But so far as a discontinuous easement, such as a right of way is concerned, it is impossible to define what in every case constitutes sufficient continuity of user. Every case must depend upon the exact nature of the right claimed, and all that can be said is that the user must be such as to disclose to the servient owner the fact that a continuous right to enjoyment is being asserted and that therefore it ought to be resisted if it is not to ripen into a permanent right. The user must assert a right, and not be merely dependent for its continuance upon the tolerance and neighbourly good nature of the servient owner.

[30] The question is then whether the user in the present case was such as to disclose to the owners' of the Manga property that a continuous right to enjoyment was being asserted and therefore ought to have been resisted? Was the use of such a nature, and at such intervals as to indicate to the ordinarily diligent owner that a right was being claimed?

[31] Here the nature of the use is important. It was an emergency exit and not a daily entrance or exit. The evidence of assertion of the claim was not limited to the actual use by exiting the fire door and walking on the vacant lot. The evidence is clear that Armour, and affiliated companies, believed that they had a deeded right-of-way over the vacant lot. It was contained first in the 1984 lease for Founders Square and then in the 2003 deed. They took great care to ensure that the fire exit in the new building was in the same place as the exit from the Lenoir Building, 1659-1663 Hollis Street.

[32] The evidence shows that because they thought they had a right-of-way, they acted as if they had a right-of-way. They posted a sign on the fire door, clearly asserting that the door was a fire door, that there was right to exit that door without obstruction or blockage. The sign is clearly visible to anyone in the vacant lot. If the egress from the building by the fire exit was blocked or obstructed, they requested the blockage or obstruction be removed and it was.

[33] I also accept that they used the fire exit for fire drills and false alarms. The nature of the right being claimed was a fire exit which, hopefully, means infrequent use. I am satisfied by the evidence of Mr. Parsons and from taking the view that the exit would have been used in a fire drill.

[34] While the walking on the property was infrequent, the notice of the claim of the right was not. The notice on the door was there 24 hours a day 7 days a week for all to see. The requests to remove any blockage or obstruction were made and acted upon. This use was of such a nature and at such intervals as to indicate to the ordinary diligent owner of the Manga property that a right was being claimed. An inspection of the property prior to purchase in 2011 should have brought to the attention of representatives of Manga that the Founders Square property was asserting a right.

[35] The right-of-way was registered at the Registry of Deeds in both the lease and the deed from the province of Nova Scotia to Armour or an affiliate.

[36] I understand that I have to proceed with caution to find title by prescription as it will burden the Manga property and hinder development plans. However, based on all of the evidence, I find that the usage was continuous, uninterrupted, open and peaceful. It started in 1986 and exceeds 20 years.

[37] I do not find that there was any abandonment by Armour and a lengthy period of non-use does not equate to abandonment, **Mason v. Patridge,** para.48. The use was for fire drills, false alarms and between those events there would be no need for use, **Mason v. Patridge,** para. 49. It was used as and when occasion demanded **Croft v. Cook,** para. 85.

[38] Manga asserts the use was not "as of right" as where parties are mistaken as to their respective rights, acquiescence is not proven. They say that because Armour mistakenly believed that they had a deeded right-of-way across the vacant lot there was no adverse possession. They rely on two cases from Ontario to support this view. The first case, **Choquette v. 995146 Ontario Ltd.,** [2003] O.J. No. 3693 upheld on appeal [2004] O.J. No. 3593, involved two adjacent landowners both of whom were mistaken about the boundary line. The servient tenant did not have knowledge that there was an adverse claim, that they had the power to stop the acts and a failure to exercise the power. That is different than the case at hand. Here, Manga was not under the mistaken belief that Founders Square held a deeded right-of-way over the vacant lot. They say they had no knowledge of the right-of-way in the deed or lease.

[39] The other case relied upon by Manga to show the use by Armour was not "as of right" was **1043 Bloor Inc. v. 1714104 Ontario Inc.,** 2013 ONCA 91, where a 20 year user of the lane in question was interrupted by a request to sign an agreement to use the lane. In that case it was found that the use after the request was with permission of the servient owner. The Ontario Court of Appeal indicates at para. 101 when discussing "as of right" that:

> …The dominant owner knows that the servient owner owns the property in question, but uses it anyway. "As of right" usage depends only on long, uninterrupted and unchallenged usage, which the servient owner could have prevented but did not."

[40] The Nova Scotia Court of Appeal held differently in **Gould v. Edmonds,** 2001 NSCA 184 where the parties were all mistaken as to the location of the true boundary at paras. 70 and 73:

> [70] This principle has been applied in Nova Scotia. In **Logan v. Smith, MacLeod and MacLeod** (1984), 64 N.S.R. (2d) 234 (N.S.S.C.T.D.) Burchell, J. stated at p. 237:
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> > . . . I agree with the submission for the defendants that a specific intention to exclude the true owner is not a necessary element in the acquisition of possessory title and that one may acquire such title while under a mistaken impression that one is himself or herself the actual legal owner.
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> [73] The following were cited by reference as cases that "dealt with mutual mistake and held that adverse possession is established when the parties are mistaken about the true boundary": **Beaudoin et al. v. Aubin et al.** (1981), 33 O.R. (2d) 604 (H.C.J. ); **Wood v. Gateway of Uxbridge Properties Inc.**, [1990] O.J. No. 2254 (Gen. Div.); **Campbell v. Nicholson**, [1997] O.J. No. 747 (Gen. Div.); **Fazio v. Pasquariello**, [1999] O.J. No. 703 (Gen. Div.); **Bacher v. Wang**, [2000] O.J. No. 3146 (S.C.J.); as well as **Keil v. 762098 Ontario Inc**. (1992), 91 D.L.R. (4th) 752 (Ont. C.A.).

I am satisfied that Armour used the right-of-way out of the fire exit and across the vacant lot to Bedford Row "as of right". The assertion of the right by Armour by the sign, requests to remove blockage and use during fire drills was acquiesced in by the owners of the Manga property.

[41] Once there is proof of acquiescence, the claimant has established that the acts were "as of right" unless the owner points to some "positive acts" on his or her part which either expressly or impliedly grant permission, **Mason v. Partridge,** para. 45.

[42] There is no evidence that the owners of the Manga property expressly or impliedly granted permission to Armour to use the exit and right-of-way. No permission was sought or granted. The owners of the Manga property or their employees removed obstructions when requested by Armour to do so. They were not simply acting as a good neighbour.

[43] Manga has also pointed to ss. 74**(**1**)** and 75**(**1**)** of *Land Registration Act, SNS 2001, c.6* which state:

> 74 (1) Except as provided by Section 75, no person may obtain an interest in any parcel registered pursuant to this Act by adverse possession or prescription unless the required period of adverse possession or prescription was completed before the parcel was first registered.

> 75 (1) The owner of an adjacent parcel may acquire an interest in part of a parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act, if that part does not exceed twenty per cent of the area of the parcel in which the interest is acquired.

While I do not have exact calculations of the dimensions of the right-of-way claimed by Armour, I do have the plan that was Exhibit number 1 to the affidavit of Marion Bryson. The area calculations from that plan and my view of the vacant lot would satisfy me that the whole vacant lot is less than 20% of the Manga property. Much of the vacant lot is taken up by parking spaces and garbage containers. I am satisfied that the right-of-way being claimed is less than 20% of the Manga property. The right-of-way is simply an unobstructed path to get from the fire exit to Bedford Row.

**Conclusion:**

[44] I find that Armour Developments enjoy the benefit of an easement or right of egress to the rear of the Lenoir Building, 1659-1663 Hollis Street, Halifax, Nova Scotia over the Manga Hotels (Halifax) Inc. vacant lot at the rear of 1649 Hollis Street, Halifax, Nova Scotia to Bedford Row, Halifax, Nova Scotia under the doctrine of lost modern grant, or a prescriptive easement pursuant to s. 32 of the former *Limitations of Actions Act,* R.S.N.S., 1989, c. 258.

Lynch, J