SUPREME COURT OF NOVA SCOTIA
Citation: *Dietrich v. Woodworth*, 2021 NSSC 222

Date: 20210707
Docket: *Bridgewater*, No. 497179
Registry: Halifax

Between:

Veronika Dietrich

Applicant

v.

Darlene Woodworth and Donna Henry

Respondent

Judge:	The Honourable Justice Diane Rowe
Heard:	January 20, 2021, in Bridgewater, Nova Scotia
Counsel:	Anna Marie Manley, for the Applicant Mark A. Taylor, for the Defendants

By the Court:

[1] The Applicant Ms. Veronika Dietrich seeks an Order, pursuant to s. 35(1) of the *Land Registration Act*, SNS 2001, c. 6, correcting the registration of PID 60698644 ("Woodworth PID"). Ms. Dietrich maintains that the right-of-way noted in the Woodworth PID has a width of 66 feet, to the benefit of her property. She seeks that the Court order a correction to the register. She is not seeking compensation, though she is seeking costs.

[2] The Respondents are the current registered owner Ms. Darlene Woodworth, and the prior registered owner to the lands registered in the Woodworth PID, Ms. Donna Henry. Ms. Woodworth seeks the Court's confirmation that the right-of-way registered as a burden on the Woodworth PID has a width of 49.5 feet. She also seeks costs, and such further relief as the Court determines is "just and equitable". The request for confirmation, pursuant to s. 35(4)(c) of the *Land Registration Act*, was referenced within the brief submitted, though not within the Notice of Contest, which sought dismissal of the application only.

Issue:

[3] What is the nature and extent of the asserted grant of easement? Should a PID registration be corrected to indicate a wider right-of-way, pursuant to an unregistered interest, or be confirmed in the narrower width for a subsequent *bona fide* purchaser without notice?

A Right-of-way

[4] In 1993, Ms. Dietrich purchased her land from Private Dream Estate Limited ("Private Dream"). The year before this transaction, Private Dream had purchased the lands from Herbert Eagle.

[5] There was no reference in the conveyance of Eagle's lands to Private Dream that it was the dominant tenement to a right-of-way. However, Herbert Eagle did file a Statutory Declaration, just prior to his grant to Private Dream. The Statutory Declaration indicated that a long driveway to his lands existed over adjacent property and was regularly used. The driveway ran until it met Public Highway No. 210.

[6] This road or driveway was referenced in the 1993 Deed from Private Dream to Ms. Dietrich, with the description containing the following paragraph:

> "…together with such right as Private Dream Estates Limited has in that existing road leading from Public Highway No. 210 in a Southerly direction to and from the lands hereinbefore described."

[7] Ms. Dietrich's land, as it was subdivided from the Eagle parcel, is also subject to a 66 foot wide right-of-way in favour of Private Dreams and lots on the northwest, and bordering a road constructed in December 1992. Private Dreams' sales of these lots created upon subdividing the former Eagle lands also reserved rights of way in keeping with a 66 foot wide clearance.

[8] By 1994, a dispute had arisen between Ms Dietrich and her neighbours Edwin and Rita Shaw on the use and existence of the driveway as a right-of-way over their land. Litigation was commenced by Ms. Dietrich and Private Dream against Mr. Edwin Shaw. Mr. Shaw had erected a barricade on the asserted right-of-way, impeding its use.

[9] The Court received background information concerning the chain of title of the former Shaw property, now the subject of the Woodworth PID.

[10] The historical public record of ownership for these lands began in 1837 with a conveyance to George Wile.

[11] In 1878, George Wile's lands were conveyed to a subsequent owner, and were made subject to a reservation for a road "3 rods wide", to what was then known as the Waterloo Road.

[12] A measure of "3 rods wide" is equivalent to 49.5 feet.

[13] This reservation continued in the record in two Deeds, one recorded in 1879 at Book 33, page 433 and in one recorded in 1880 at Book 33, page 432. However, reference to the reservation was not repeated afterward in the chain of title to the land. Then, in 2015, when Ms. Henry migrated the lands in accordance with the *Land Registration Act* reference was made to a 49.5 foot strip of land as a right-of-way.

[14] A plan of survey was made by Mr. Lester Berrigan, NSLS, dated May 13, 1996 ("1996 Berrigan Survey"). The 1996 Berrigan Survey is of the lands of Mr. Edwin Shaw and Mrs. Rita Shaw, and bears the notation that it is a "Centreline of a Right-of-way (3 Rods, 49.5 ') in width as granted in Deed recorded in Book 33, page 433 and book 33, page 432."

[15] The 1996 Berrigan Survey shows the right-of-way proceeding from the property of Veronika Dietrich, and continuing over the Shaw lands, moving toward Highway No. 210. It also shows the location of a barricade from entry onto the Shaw lands from the Dietrich parcel. The 1996 Berrigan Survey was prepared at the request of Mr. Shaw.

[16] The 1996 Berrigan Survey shows the location of the barricade upon the plan. There is also a driveway wide enough for vehicles, and overhead electrical

transmission lines to one side of the centreline of the right-of-way. This utility easement would also require clearance space.

[17] On October 8, 1996, the parties held a settlement conference. Minutes of Settlement were executed by all of the parties. These Minutes were provided for review to the Court. The pleadings in the matter were not in evidence, so it is unknown with certainty whether the extent of the right-of-way was at issue then, but surrounding circumstances indicate this is highly probable.

[18] The Minutes of Settlement provided at paragraph 1:

> That Private Dream Estates Limited and Veronika Dietrich, the Plaintiffs and Defendants by Counter-Claim (hereinafter called the "Plaintiffs") and Edwin Leroy Shaw, the Defendant and Plaintiff by Counter-Claim (hereinafter called the "Defendant") hereby agree that the Plaintiffs, their heirs, successors and assigns, the owners form [sic] time to time of the land formerly of Charles Emineau, at Waterloo, in the County of Lunenburg, Province of Nova Scotia, **shall be entitled to a right- of-way 66 feet in width for use at all times and for all purposes, in common with the Defendant and Rita Kathleen Elizabeth Shaw, their heirs, executors, successors and assigns, the owners from time to time of the lands of Edwin Leroy Shaw and Rita Kathleen Elizabeth Shaw**, over the lands of Edwin Leroy Shaw and Rita Kathleen Elizabeth Shaw, as set forth on a Plan of Survey by Lester W. Berrigan, NSLS, #409, dated 13 May 1996, and entitled "Plan of Survey showing the centreline of a right-of-way road crossing property of Edwin Leroy Shaw and Rita Shaw at Waterloo, Lunenburg County, Nova Scotia, a copy of which is attached hereto. **For greater certainty the right-of-way shall be located 33 feet on either side of the centreline of the right-of-way as shown on the said Plan of Survey** when measured perpendicular to the centreline of said right-of-way as shown on the said Plan of Survey. [Emphasis added]

[19] The Plaintiffs were to execute a Quit Claim Deed releasing any claim to other rights of way or easements. The Defendants were to execute a Grant of

Easement in the terms put forward in paragraph 1 of the Minutes of Settlement, and to pay $1650 to the Plaintiffs. This payment was a portion of the cost of constructing a road on the right-of-way. An Order of the Supreme Court was to be sought, that would incorporate the terms of the Minutes of Settlement.

[20] However, there is neither a Quit Claim Deed nor a Grant of Easement in evidence. There is no evidence the contribution toward the road costs was ever made. An Order of the Court was not obtained. However, no further steps were taken in the case by either party.

[21] Decades later, Ms. Dietrich states she was made aware the terms of the Minutes of Settlement were not fully performed. She had continued with use of the driveway throughout this entire time, unimpeded. The adjacent lot owners who relied upon the driveway for access continued to use it as well.

[22] In 2010, Donna Henry acquired title to the land from her parents Edwin and Rita Shaw.

[23] Then, in 2015, the property was migrated into the Land Registry by Ms. Henry, with a new Survey plan prepared by Peter Berrigan, dated March 19, 2015. This was registered as Plan 107299407.

[24] The 2015 Berrigan Survey contained a drawing of the right-of-way, in the same area as was on the 1996 Berrigan Survey, and repeating the notation it was 49.5 feet wide.

[25] Two years later, in 2017, Ms. Henry conveyed her title to the land to Ms. Woodworth, indicating in Schedule "A" to the Deed that the property was subject to a right-of-way, as described in the 2015 Berrigan Survey.

[26] Ms. Woodworth, and Ms. Henry, maintain that they were each, in their turn, *bona fide* purchasers without notice of a 66 foot wide encumbrance.

[27] The Respondents acknowledge there may be a right-of-way over the Woodworth lands, and rely upon the measure of 49.5 feet, first referenced in the 1879 and 1880 Deeds, as noted in the 1996 Berrigan Survey, and again in the 2015 Berrigan Survey. They deny any knowledge of the Minutes of Settlement. They submit that it was incumbent on Ms. Dietrich to ensure the terms of the Minutes were met for there to be an effective grant of easement and to have registered her interest accordingly.

[28] The Respondents rely upon the ratio in decisions of the British Columbia Court of Appeal, specifically *Roop v. Hofmeyr* 2016 BCCA 310, and the earlier decision of *Babine Investments Ltd. V. Prince George Shopping Centre Ltd.* 2002

BCCA 289. In short, the appellate Court in those decisions held that when an implied grant of easement arises, that the easement would continue in force even upon migration of the servient parcel into a Torrens land registration system, even if that easement was unregistered. However, if there is then a subsequent transfer to a *bona fide* purchaser without notice of the implied easement, then the lands would be acquired free of the implied grant. This would be the case absent equitable or actual fraud, as was noted by the Court.

[29] *Roop, supra* referenced with approval the NSCA decision in *3021386 Nova Scotia Ltd. v. Barrington (Municipality)*, 2015 NSCA 30 concerning the test for an implied grant of easement. At paragraph 34 of *3021386 Nova Scotia Ltd., supra* Hamilton, JA, stated the following, with approval:

> [34] The judge properly sets out the test for determining an implied grant of easement:
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> > [17] *Anger & Honsberger*, "Law of Real Property, Third Edition" (Toronto: Thompson Reuters Canada Limited, 2012), at pages 17-9 and 17-10 states:
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> > > "When land owned by one person is divided and part of the land conveyed to another, even if there are no words in the instrument expressly creating an easement, a court will imply that the new owner was granted easements of necessity and any continuous and apparent easements which existed as quasi-easements during unity of ownership. Thus, the implied grant will render the retained lands servient and the newly acquired portion dominant.
> >
> > > ….
> >
> > > In order for a quasi-easement which was exercised during unity of ownership to become an easement by implication of law, the right claimed must meet certain criteria:

> (a) it must be necessary to the reasonable enjoyment of the part granted;
>
> (b) it must have been used by the owner of the entirety for the benefit of the part granted up to and at the time of the grant; and
>
> (c) it must have been apparent at the time the land for which the easement is claimed was acquired.
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> **For an easement to be apparent, its previous use must have been indicated by some visible, audible or other apparent evidence on either the quasi-dominant or the quasi-servient tenement which could be seen, heard or smelled by a reasonable inspection.**" [Emphasis added]

[30] Ms. Woodworth and Ms. Henry contend that as the 66 foot wide measure of the right-of-way was not registered, that a later *bona fide* purchaser of the lands had no effective notice of a more extensive burden. Therefore, the wider right-of-way set out in the Minutes of Settlement should not be enforced, in keeping with the principles of a Torrens style registry.

[31] A significant element is the extent of Ms Henry's knowledge concerning the right-of-way.

[32] Ms. Henry's evidence was that her parents resided in their home until 2011. She was a regular visitor, trying to see them every other weekend, and that this was the pattern in 1994 through to 1996.

[33] Ms. Henry was aware of "some dispute" having to do with the right-of-way. She didn't witness the blocking of the right-of-way during her parents' dispute with Ms. Dietrich, though, and her parents did not "speak much" of that. She

confirmed on cross-examination that she was aware of her parents being involved in litigation with Ms. Dietrich. She remembers this, but did not know what the settlement was between the parties.

[34] She also indicated that both in 2010, when she acquired the lands, and then in 2015, when the lands were migrated, she did not ask her parents about the right-of-way.

[35] I find it difficult to accept that Ms. Henry had no knowledge of the barricade incident, or that she made no enquiries about the settlement between her parents with Ms. Dietrich and Private Dream concerning litigation. I do not find it credible that, as an adult migrating her property into the land registry with the assistance of counsel for the purposes of financing, Ms. Henry did not make any enquiries of her parents as to the content of the right-of-way, or ask for better particulars concerning the litigation or its disposition. Presumably this information would be relevant when she engaged Peter Berrigan to survey the land for this purpose, and retained counsel. The 2015 survey repeated the placement and width of the 1996 Survey, that was made in the midst of the litigation.

[36] The migration demonstrated that Ms. Henry knew there was an operative grant of easement, at least to the width to encompass the physical driveway and

utility lines over the land, as referenced in the migrated title. The driveway across the Shaw lands is well documented, and known to each of the subsequent owners. It is maintained and used regularly.

[37] Ms. Woodworth's evidence was that when she purchased the property from Ms. Henry, she was familiar with the fact that there was a lane in existence crossing the property used for access to the Dietrich residence. She indicated she had some knowledge of the plan of subdivision showing the property, and that she recalled the Plan showing it as a 49.5 foot right-of-way to the Dietrich property toward the Public Highway Trunk No 10 roadway.

[38] Ms. Woodworth submits that the widening of the right-of-way to 66 feet will cause disruption to her use and enjoyment of her own property, as it would be bisected more widely, with one half a fenced pasture, and the other half with her residence. It was speculated that Ms. Dietrich's intention in asserting the wider right-of-way was to assist in greater residential development of her own, and adjacent lands, in the area.

[39] I find that Ms. Woodworth had no knowledge of the prior legal dispute between Ms. Henry's parents and Ms. Dietrich, but was fully aware that the lane

was subject to a driveway for vehicles and utility poles to the benefit of Ms. Dietrich and others to gain access to their lands.

[40] If there was a former implied grant of easement before the title was migrated under the *Land Registration Act*, then it found legal expression when Ms. Henry migrated the lands in 2015. This right-of-way continued its legal expression in the 2017 Deed from Ms. Henry to Ms. Woodworth, that also referenced the 2015 Berrigan Survey. Whether I find that there is a right-of-way with a width of 49.5 feet or of 66 feet, I am satisfied there is a registered and enforceable right-of-way over the Woodworth lands, to the benefit of the Dietrich property.

[41] The legal distinction that the Respondents seek to make is in regard to the extent of the right-of-way. They submit they understood it to be 49.5 feet. Ms. Woodworth and Ms. Henry's position is that the wider right-of-way claimed by the Applicant must be unenforceable by operation of law upon the migration of the parcel pursuant to the *Land Registration Act*, as the 66 foot width was unknown to Ms. Henry, and then subsequently to Ms. Woodworth.

[42] As noted before, I do not accept Ms. Henry's evidence that she had no knowledge of either the dispute or its resolution concerning the right-of-way at the time of the lands' migration.

The Minutes of Settlement

[43] The Applicant submitted that the registry reference to the burden of a right-of-way on the Woodworth PID is correct, but that the width is in error, as it omits the effect of the Minutes of Settlement concluded in 1996. She submits that the Respondents would have had some constructive knowledge of the 1996 litigation and its resolution by way of agreement between the parties.

[44] Ms. Dietrich requests that the PID be corrected pursuant to section 35(4) of the *Land Registration Act*.

[45] Section 35(4) of the Act provides, under the heading "Proceeding to correct registration" that:

> 35 (4) The court shall determine the rights of the parties according to law, subject to the following principles:
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> (a) the person aggrieved may have the registration corrected;
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> (b) any correction of the registration shall preserve the right to compensation of a person who obtained a registered interest from a registered owner who registered the interest objected to; and
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> (c) the court may, where it is just and equitable to do so, confirm the registration.

[46] Ms. Dietrich directs the Court to consider the principles in *Penney v Langille*, 2018 NSCA 43, in which the Court ordered a correction of a PID that omitted reference to an unregistered right-of-way across property to include the subsequently proven right-of-way. In that matter, the Court had to consider

evidence of language within related deeds and the ongoing use of the asserted right-of-way. The *bona fide* purchaser without notice of the unregistered interest appealed the decision. The Nova Scotia Court of Appeal upheld the order correcting the PID registration.

[47] Bryson, JA, held in *Langille*, at paragraphs 19 to 21:

> [19] The relevant interpretative principles applied by the judge are summarized by the respondents in their factum, quoting from the Court in *Purdy v. Bishop*, 2017 NSCA 84 at ¶ 15:
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> > [15] The law requires that a contract be "read . . . as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract", (*Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, ¶ 47). Surrounding circumstances assist the Court in interpreting the language used by the parties, but does not displace it, (*Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, ¶ 57).
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> [20] In resolving the case as he did, Justice Coughlan referred to the usual leading authorities with respect to interpretation of deeds and the legal character of rights-of-way, relying upon *Knock and Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, amongst others. No issue is taken with his reliance on this law.
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> [21] As previously described, the right-of-way to Caribou Lake was omitted from the description in Mr. Penney's parcel when it was migrated under the *Land Registration Act* in 2010. The omission was discovered because local residents continued to make occasional use of the right-of-way to obtain access to Caribou Lake, including the launching of boats. These users also did some basic maintenance on the right-of-way to ensure access to the lake.

[48] In this matter, similar in some respects to *Langille v Penney*, the omission of particulars concerning the right-of-way, specifically an accurate description of the nature and extent of the burden of the right-of-way in the PID, is the error to be corrected.

[49] The Respondents submit that the Woodworth PID should be confirmed, but not corrected, as the wider measure outlined in the Minutes of Settlement is an unregistered interest that should "fall away" upon registration of the title because it was not recorded.

[50] Bryson JA noted the following in *Langille*, in relation to correction versus confirmation as follows:

> [34] The intervenor argues that confirmation and correction are really corollaries; you cannot consider whether to do one without doing the other. If a registration is corrected it is not confirmed; and if not corrected it is confirmed. So the equitable criteria (s. 35(6)) are necessarily engaged. While this argument has some attraction, it is not compelling in this case for three reasons. First, if the equitable criteria were intended to apply to both confirmation or correction, it would have been an easy matter for the legislature to say "in determining whether it is just and equitable to confirm ***or correct*** the registration objected to . . ." Second, it cannot apply to overriding interests owing to the clear and unequivocal language of s. 73(1) that such interests ". . . shall be enforced with priority over all other interests", regardless of whether they have been recorded. Third, since the holder of an overriding interest need not, but is entitled to, record it (s. 47(4)), there is no discretion that could be exercised pursuant to s. 35(6).
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> [35] **Section 35 requires the Court to resolve the rights of the parties "according to law". Section 73(1)(e) tells us what that law is by giving priority to a right-of-way in use as an overriding interest. Section 47(4) allows the holder of such an interest to record it. From this, correction to the register follows, reserving only the question of compensation, if any. Confirmation—as described in s. 35(6)—has nothing to do with it.** [Emphasis added]

[51] In considering the effect of knowledge of surrounding circumstances in analogous cases in which the Court considers evidence establishing the nature and extent of a grant of right-of-way or easement, my review of *Langille*, necessarily

led me to consider Justice Arnold's decision in *Romkey v. Osborne*, 2019 NSSC 56.

[52] In *Romkey*, supra Justice Arnold refers to *Langille*, at paragraphs 88 to 90 as follows:

> [88] In *Penney v. Langille*, 2018 NSCA 43, 2018 CarswellNS 386, another right-of-way case, Bryson J.A. cited his earlier statement of the law in *Purdy*: para. 19.
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> [89] Neither party drew the court's attention to the Court of Appeal's decisions in *Duncanson, Purdy*, and *Penney*. Since these authorities were helpful to his position, Mr. Arsenault was likely unaware of them. Ms. Dumke, on the other hand, was counsel in Penney. As officers of the court, counsel have a duty to bring forward all relevant case law, including cases contrary to their position: *DeMaria v. Canada (Regional Transfer Board)*, [1988] 2 F.C. 480, [1988] F.C.J. No. 45, at para. 28; *R. v. Mitchell*, 1994 ABCA 369, [1994] A.J. No. 923, at para. 19; *R. v. C.F.*, 2016 ONCJ 302, [2016] O.J. No. 2752, at para. 21. The use that could be made of surrounding circumstances was a significant issue in this case, and the court should have been provided with any relevant authority on the point.
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> [90] As I stated earlier, I find that the decisions in *Duncanson, Purdy*, and *Penney* are consistent with the modern law of contractual interpretation, while *Laamanen* reflects the pre-*Sattva* approach to the admissibility of evidence of surrounding circumstances. For this reason, I decline to follow *Laamanen* on this issue. **Evidence of surrounding circumstances is always admissible to assist the court in interpreting the words of a grant.** [Emphasis added]

[53] The 1996 Minutes of Settlement, predating the subsequent migration of the lands' title into the Registry, are admissible evidence and are of assistance to the Court in determining the nature and extent of the registered right-of-way.

[54] Ms. Dietrich's evidence was supplied by affidavit, filed with the Court dated January 8, 2020. She was the only party to the Minutes of Settlement to present

evidence to the Court, and was not cross examined concerning her evidence on the agreement or the litigation.

[55] Within her affidavit, she acknowledges that a formal Grant of Easement was not executed by the Shaws in accordance with the Minutes of Settlement, and she was recently informed that there was no Order obtained from the Court incorporating the Minutes.

[56] Ms. Dietrich's evidence includes an affidavit of Elizabeth Branscombe, confirming that there was no Order filed in the Supreme Court of Nova Scotia Action SBW No. 2888 between Private Dream Estates Limited and Veronika Dietrich and Edwin Leroy Shaw ("Shaw Action") that incorporated the Minutes of Settlement reached in the Shaw Action. The Bridgewater Prothonotary's Office did confirm that the Shaw Action file did contain an Order pertaining to the withdrawal of Mr. Shaw's counsel.

[57] Ms. Dietrich also stated that she was not contacted at any time by Ms. Henry or her legal counsel at the time of the 2015 Berrigan Survey, or the migration of the Shaw lands into the Registry, although the notation in the Property Online file shows a burden to the benefit of Ms. Dietrich's lands.

[58] Ms. Dietrich's submission also included argument that the Minutes of Settlement contain all the elements of a grant of easement. I have earlier found that an implied grant of easement found expression in the migration of the Woodworth PID in 2010 and confirmed in the 2015 registration. I will not address the submissions concerning whether the 1996 Minutes of Settlement conferred a grant in itself pursuant to s. 7 of the *Statute of Frauds*, RSNS 1989, c. 442, although I do consider the evidence concerning agreement between Ms. Dietrich and the Shaws, as predecessors in title, concerning their mutual understanding on the nature and extent of the width of the easement to be significant. The Minutes of Settlement constitute persuasive evidence that the grantors Mr. and Mrs. Shaw were in agreement with the grantee Ms. Dietrich that the width of the right-of-way to the grantee was set at 66 feet.

[59] While the terms of the Minutes were not fully met, there is no evidence that Mr. or Mrs. Shaw ever repudiated the Minutes of Settlement. I also note that no evidence from the Respondents was put before the Court concerning the circumstances surrounding the Shaws' lapse in making a formal Grant of Easement in accordance with the Minutes.

[60] There was part performance of the Minutes as the litigation did not proceed, and Ms. Dietrich continued her use of the right-of-way over the Shaw lands

unimpeded to the present, with later owners recording the burden on title of a more limited right-of-way, omitting the effect of the prior agreement.

[61] As has been noted repeatedly by the Courts, any ambiguity created in a grant of right-of-way is interpreted in the favour of the grantee.

Conclusion

[62] Ms. Dietrich's request for the Court to direct the Registrar General of the Nova Scotia Land Registry to make a correction to the Woodworth PID for a right-of-way in the measure of 66 feet in width is granted, pursuant to section 35(4)(a) of the *Land Registration Act*.

[63] Any and all rights that Ms. Woodworth may have in relation to seeking compensation, as may be provided under the *Land Registration Act*, are preserved and not affected or precluded by this decision regarding correction of the Woodworth PID in the manner requested by Ms. Dietrich. Ms. Woodworth was a *bona fide* purchase of value for a property with a burden of 49.5 feet right-of-way. If I am wrong, and the 49.5 feet is confirmed on an appeal of this decision, then a corresponding loss of value to Ms. Dietrich can be quantified, and for which she may seek compensation.

[64] If the parties cannot agree on costs, I will receive written submissions within 30 days of the release of this decision and direct the parties accordingly.

Rowe, J.