SUPREME COURT OF NOVA SCOTIA
Citation: *Dickson v. Publicover*, 2023 NSSC 221

Date: 20230706
Docket: *Bridgewater*, No. 508987
Registry: Halifax

Between:

Lisa Marie Dickson

Applicant

v.

Andrew Paul Publicover, Kimber Paul Publicover, and Judith Shirley Publicover

Respondents

Judge:	The Honourable Justice Diane Rowe
Heard:	October 26 and 27, 2022, in Bridgewater, Nova Scotia
Additional Written Submissions:	May 18, 2023
Counsel:	Rebecca Hiltz LeBlanc, KC, for the Applicant Jonathan Hooper, for the Respondents

By the Court:

[1] Kimber and Judith Publicover own lakefront property on Sherbrooke Lake in Lunenburg County. They enjoyed their summers there with their family over many years. Lisa Dickson and Andrew Publicover are two of their adult children. With respect, as three of the parties share the same last name, the Court will use parties' first names for identification in this decision for ease of reference.

[2] In the spring of 2019, Kimber and Judith were in Florida, in the United States of America. Kimber had been diagnosed with a serious illness, with an uncertain prognosis, but one which it was feared would result in his death in the near term.

[3] Kimber and Judith Publicover had title to 150 feet of the foreshore, as the total of two adjoined parcels with the lakefront as a boundary. Kimber drew a rough map of the configuration of two abutting PIDs, with one PID having a lakeshore access of 100 feet ("North Lot") and the second parcel having a lakeshore boundary of 50 feet ("South Lot"). He then also drew a "new configuration" map with a line added, indicating an equal split of 75 feet for the North Lot and 75 feet for the South Lot on the foreshore strip of land.

[4] Together, Kimber contacted their children, Lisa and Andrew, by email on April 8, 2019, to tell them he and Judith intended to grant each of them their own lots at the lake, and each parcel would have a strip of foreshore on its boundary. The first email sent had a drawing of the properties with its current PID boundaries. The second email had the same drawing but with the proposed adjustment to the boundaries as the "new configuration". This new configuration indicated a strip of 25 feet of the North Lot foreshore to be for the benefit of the South Lot.

[5] On April 19, 2019, during an in person family meeting with their two children, Kimber expressed to them that equal splitting of use of the foreshore as between them was the goal in drawing the "new configuration" map, although the PIDs "current" map may be different.

[6] On April 26, 2019, at another family meeting, Lisa Dickson chose the parcel she wanted of the two offered, after a coin flip indicated she could have first choice between the two Lots. After some time passed, Lisa chose the North Lot. This left the South Lot to her brother Andrew.

[7] In June, 2019, Kimber was advised by the municipality that the North Lot's PID boundaries were to remain unaltered, or the "grandfathering" approval for

building on the lot would not continue. If the 25 foot strip of foreshore was removed from the current 100 foot strip as set out in that PID, this would result in Lisa being unable to build on the North Lot.

[8] On July 15, 2019, Kimber and Judith prepared an agreement between themselves, Lisa, and Andrew ("Agreement"). The Agreement identified one parcel as "Lisa's Lot" (the North Lot) and another as "Andrew's Lot" (the South Lot). Each lot was to abut the other, sharing a common foreshore. The Agreement provided that "…sole use of Andrew Publicover" to a 25 foot section of the foreshore was part of "Lisa's lot". It provided that the Agreement was not to be recorded and have no effect on "…property taxes or other costs" which would be incurred by the respective owners of each lot. It also provided that the Agreement was to be in effect for as long as "Andrew Publicover lives, or until he disposes of his lot." The parties all agree that persons can cross the others property for the purposes of building their cottages. Further, it provides that there will be a minimum setback of 5 feet for any buildings on the lots or for parking on either side of the property line as described in the PIDs for each lot, and the boundary of the 25 foot section.

[9] At the final portion of the Agreement it is written:

> "Note: This agreement is being prepared by Kim and Judy Publicover, with the sincere hope and intention that both our children Lisa and Andrew and their children, present and future will be able to own and enjoy a place on Sherbrooke Lake for their lifetimes in harmony and without conflict."

[10] Kimber, Judith, Lisa, and Andrew all signed the Agreement, dated the same day.

[11] Lisa obtained an interest as a joint tenant to the North Lot and Andrew as a joint tenant in the South Lot, by Warranty Deeds both made with their parents on August 5, 2019. Neither Warranty Deed referenced the Agreement, or made reference to any easement or right of way. Kimber and Judith, as grantors, continued to retain interests in the lands as they remained joint tenants of both the North and South Lots, with their children respectively.

[12] After the Deeds were registered, and as the cottages were constructed, differences arose between the siblings. In June, 2020, Lisa requested that Andrew sign a "License Agreement" regarding the strip of land and its use. Andrew also engaged counsel, with the two engaged in negotiations continuing through August, 2020. A licence or a lease agreement was never executed by the parties and difficulties continued.

[13] On February 2, 2021, at the request of Lisa, Kimber and Judith issued a Quit Claim Deed to her of their interests in the North Lot ("Quit Claim"). There was no reference in this to the Agreement.

[14] After the Quit Claim Deed was issued there continued to be disagreement between them all on the use of the foreshore, the septic system, and construction. Lisa then proceeded to stop Andrew, and others, from continuing use of the 25 foot strip of foreshore.

[15] Lisa applied to the Court requesting it issue a declaration that the Quit Claim Deed conveyed clear title in fee simple to the North Lot, without restrictions. Further, she now requests that the Court declare that the Agreement is of no force and effect. She also filed a request for damages in trespass and for loss of enjoyment to property. Ms. Dickson also sought an order enjoining Andrew, Kimber, and Judith from entering upon the North Lot without her invitation and from interference with her enjoyment of the property.

[16] Lisa pleads that she was coerced into signing the Agreement, and maintains that it is not legally binding or enforceable in law as either a licence or an easement. She submits that, as the Agreement is not valid, that the initial transfer by Warranty Deed of title to the North Lot conveyed 100 feet of foreshore, free of

any encumbrances. Further, the later Quit Claim of her parents' joint interest to her sole interest would also have cleared any asserted claims or potential encumbrances on the North Lot.

[17] Andrew, Kimber, and Judith, in response, plead that Lisa did sign a valid and binding Agreement and that it created an easement over the North Lot that is continuing. They acknowledge that the easement is unregistered, as the Agreement has not been filed with the Registry of Deeds.

[18] They submit that the Easement is clearly defined and binding on Lisa. As the use of the Easement was lawful, they plead that they can not be found to be trespassing. Also, they submit that the use of the Easement was reasonable and consistent with their proprietary rights granted under the Easement. Further, they plead that Lisa is estopped from interfering with their use of the Easement.

[19] The Respondents submit that both parties used the Easement for the construction of their properties, which adjoin each other, in keeping with the Agreement, and that Lisa constructed her cottage in accordance with the provided set back as referenced in the Agreement.

[20] The Respondents are not seeking to set aside the transfer of the North Lot to Lisa Dickson but respond that Andrew, Kimber, or Judith should not be enjoined from using the 25 foot strip of foreshore.

[21] At the outset of the hearing, Lisa stated that her requested relief for the movement of trucks over the property, and related septic issues, had been resolved as between the parties.

Issues:

[22] Can the Court grant a declaration that the Quit Claim Deed transferred title to the North Lot to Lisa Dickson free of any encumbrances?

[23] Relatedly, can the Court grant a declaration that the Agreement is of no force and effect?

Evidence

Lisa Dickson

[24] Lisa's evidence was that she reviewed the initial emails sent by her parents concerning the Lots and confirmed she saw the "new configuration of the lots" drawing made by her father Kimber. Lisa saw that the South Lot was enlarged and the North Lot was decreased.

[25] She acknowledged that there was a note on the drawings indicating what was “current- with 100 feet and 50 feet” spacing and a “new of 75 ft to 75 feet” division of the foreshore area.

[26] Lisa confirmed that she knew at the time of the initial phone call in April, 2019 with Kimber and Judith that her parents’ “hope” was that she and her brother could share the 150 feet of lake frontage equally. She could not recall if she spoke with anyone else about the arrangement except for her husband, parents, and brother at the April 8, 2019 call.

[27] Lisa chose the North Lot and stated that she understood it to be her parents’ “wish” that she share part of the property with the adjacent “new Owner” but that the PID boundary would not change.

[28] Her evidence was that the creation of the Warranty Deed to the North Lot including her as a joint tenant with her parents was done to create an unconditional gift of the North Lot to her from her parents. There was no condition precedent for her to sign the Agreement in July, 2019 prior to her accepting the gift of an interest in the North Lot land by Warranty Deed in August, 2019.

[29] Lisa's evidence was that she accepted this gift, but did not know the potential effect of the later Agreement on her interest until after she began building her own cottage on the North Lot.

[30] Lisa says she had not seen the Agreement before signing and asked to seek advice of her husband before signing it.

[31] On cross examination she stated her parents did not threaten her in order to get her to sign the agreement nor was she forced to sign. Lisa admitted she could have stopped and gotten a lawyer but she "felt coerced" by the circumstance of her father's illness.

[32] Lisa's evidence was that she understood that the Agreement was a form of "informal licence" between Andrew, Kimber, and Judith only, as she was not yet holding any property interest in the Lot, and she did not know it was to be an "easement". As an informal document she believed that it was not to be recorded and was primarily her parents' "hope, wish and a dream" on the lakeshore use being captured.

[33] She was unable to give evidence on what parts of Agreement she was uncomfortable with at the time of signing. She also could not recall asking her

parents if she wanted more time to discuss the Agreement with anyone before signing it.

[34] After Lisa signed the Agreement her parents put her on title to the North Lot as a joint tenant with them on a new Warranty Deed, with the grant from Kimber and Judith to the grantees Lisa, Kimber, and Judith.

[35] Lisa confirmed that the placement of her cottage was more than 30 feet from the boundary of the North Lot on the PID. This reflects the Agreement's term that no building was to be placed less than 5 feet from the edge of the area intended for the use of the South Lot holder, as defined in the Agreement, including the 25 feet reserved to the South Lot on the lakeshore.

[36] In May, 2020, Lisa retained counsel to draft a form of Licence Agreement as between herself, her brother and her parents in order to create a "legally binding agreement" on the use of the 25 foot foreshore strip. Despite efforts to conclude a Licence Agreement, the terms put forward by Andrew were not to her satisfaction.

[37] Lisa's evidence was that she thereafter asked her parents to Quit Claim their interest to her in February 2021. She indicated that due to the ongoing disagreement and conflict the family had counselling, which I accept. However, the Court can't accept or rely upon her hearsay evidence concerning whether the

counsellor had recommended that her parents execute the Quit Claim as a solution. Her evidence was that she was concerned about her own property interests in the South Lot and was unsure what her co-owner parents might do to protect Andrew's interests, as another motivation that prompted her to ask them for a Quit Claim deed, but what that would possibly entail was not made out.

[38] Lisa stated she was informed by one of her former counsel that the effect of a Quit Claim deed meant that there were no conditions on the title and so it was a "clean deed". Her intent in asking for one from her parents was to "remove any other encumbrances".

[39] Andrew did not prevent Lisa from using the 25 foot strip of land physically, but she submitted it was implicit as if he was using it then she would not be.

[40] Lisa was evasive on her motivation in obtaining legal advice to conclude a Licence Agreement with Andrew in May, 2020 to formalize Andrew's use and access of the foreshore strip in a manner she approved and controlled. She did not agree then that Andrew had acquired any legal rights because of the Agreement, and was seeking a different formal document that would capture her view that he had no legal rights to that portion of the North Lot.

[41] Lisa did allude to Andrew acting in a manner she did not approve while he was at the lakeshore during past summers but, as this appeared to be an attempt to submit bad character evidence which is not admissible in a civil proceeding, it was not included in my consideration.

Kimber Publicover

[42] Kimber was obviously saddened that his intention to have an equal division between his children of the foreshore of the family cottage was instead the subject of protracted conflict. While ill, he was stoic as he gave his evidence at the hearing, in a straightforward and credible manner.

[43] Kimber drafted the Agreement, with no legal training or advice. It was not perfect and informal in tone. Further, he recognizes that his hand drawing of the lots was also not perfect. However, his intentions were clear and obvious. Neither Lisa or Andrew had input on its contents and were not shown the Agreement before it was read and signed by all the parties.

[44] Kimber confirmed that it was not a condition precedent that the two children sign the Agreement before he and Judith put them on title jointly for the Lots. He did indicate that he had legal advice to grant each Lot as a joint tenancy with

himself, Judith and a child as grantees, in order to lessen the likelihood the lands would be “broken up” and transferred out of the family.

[45] He confirmed that he had received information from the local municipality that if the North Lot boundaries were to be adjusted, then the new grantees would be unable to build a structure on it. This was his motivation in creating the Agreement, to effect an equal split of use of the foreshore without adjusting the metes and bounds of the North Lot in the PID.

[46] Kimber and Judith were parties to the Agreement and expressed their intent regarding the foreshore strip’s use in that document. The Agreement was intended to informally change the boundary with the kids and his wife, to even up the water front.

[47] Kimber and Judith still own title to “Andrew’s lot” as joint tenants with Andrew. His evidence on cross examination at the hearing of this application was that he felt he has no remaining interest in the North Lot, and acknowledges that Lisa is the sole owner of the North Lot.

[48] On cross examination, Kimber reiterated twice that the intent was to gift an interest to each child equally. Kimber wanted each of them to have their own

cottage to spend time at the lake as they had in childhood and with their own families.

[49] Kimber also acknowledged that the intent of the gift was for the recipients to enjoy recreational time, and the gift was not for a commercial activity. He had no expectation of return for the grant of interest in the lands and no conditions or money in exchange. It was to be an equal gift.

[50] He recalled a family meeting in his house with just Lisa and Andrew, but Kimber deferred to Lisa on her evidence on attending alone without her spouse, Mike, at that meeting when the Agreement was signed.

[51] Kimber's evidence was that he explained to Lisa that he couldn't divide it the way he wanted because as a result, building on her lot would not be possible. He did believe that the Agreement would accomplish what he and Judith intended which was an equal share of use to the 150 feet of waterfront on the lake as between the two children.

[52] He acknowledged that the Agreement was not to achieve a utility or access purposes, for a power line or driveway, but just to set out what was a fair use of the lakefront upon the gift.

[53] Kimber's affidavit evidence referenced the Agreement as an easement but on cross examination he stated that at the time he wrote the Agreement he did not think of this as "an easement" but, as he remarked, he is not a lawyer. He was intending that the Agreement provide the 25 foot strip of foreshore for the sole use of Andrew, among other items.

[54] Kimber's affidavit evidence is that Judith and he had agreed to Lisa's request to make her sole title owner of the South Lot due to her "concern", and so executed the Quit Claim Deed. It was not put before the Court what "concern" it was he intended to address by doing so.

Andrew Publicover

[55] Andrew's evidence was that it was not a condition precedent that he sign the Agreement before taking title to the South Lot. He also did not see the Agreement before signing it and did not seek legal advice.

[56] Andrew's affidavit evidence stated that he "never signed a lease or a licence" concerning the property. However, he was presented with a document filed with the Oct 21, 2021 Lisa Dickson Affidavit, at Tab C, headed "License Agreement June 2020". This indicated that Andrew had signed a licence

agreement, though it was not countersigned by Lisa Dickson or the other parties. In response, he withdrew this paragraph of his affidavit.

[57] To the Court it appears he meant he had not fully executed either a licence or a lease with his sister Lisa.

[58] Andrew acknowledged that the draft Licence agreement he had signed and sent to Lisa, which was not countersigned, was an iteration of a Licence agreement draft first presented to him by Lisa, which he redrafted by his solicitor.

[59] The initial draft Licence agreement was drafted by one of Lisa's former counsel. I will note that there is no inclusion of a clause in this Licence agreement attempting to formalize the prior Agreement or any reference made to it. There was a Lease Agreement entered in Court, however as it was unsigned by any party, I will not consider it.

Law

[60] The Court must consider whether the grant of a declaration sought by the Applicant is appropriate, according to law. I may exercise my discretion and decline to make a declaration as the Court must consider the utility of the remedy sought and whether the declaration will settle the issues between the parties. The

Court must also consider any alternative remedies or statutory mechanism that may exist to resolve the dispute or protect the rights in question.

[61] As Justice Fichaud set out in *Schnare v Schnare* 2023 NSCA 30, at para 23, "a declaration is a discretionary remedy", with the Court required to consider the utility of the declaration sought. The Court may decline to exercise its discretion include the consideration that the declaration would not effectively dispose of the issue, when there is a more effective alternative remedy.

[62] Further, at para 28, of *Schnare, supra*, Justice Fichaud remarks that: "A declaration may resolve a title dispute inter se between the named parties: e.g. *Prest Bros. Ltd. v. Myers*, 2011 NSSC 175, paras. 5, 95-96 and *Thompson v. Bauld*, 2012 NSSC 72, paras. 29-30."

[63] Fichaud J, also in *Schnare, supra*, writes at para 23 that:

> ….In *Nova Scotia (Securities Commission) v. Potter*, 2012 NSCA 12, Justice Bryson (paras. 15 and 19) adopted the following tests, stated by the applications judge in that case, for exercising the discretion to entertain an application for a declaratory judgment:
>
> > A. Is there a sufficient and/or legal foundation in place to avoid giving a "declaration in the air"?
> >
> > B. Are there available effectual alternative remedies?
> >
> > C. **In all the circumstances,** do the interests of justice favour making the declaration on the question in issue? [emphasis added]

[64] Chipman, J., in *Dawgfather PHD v. Halifax (Regional Municipality)*, 2016 NSSC 104 (CanLII) at para 22 remarked that:

> [22] The Nova Scotia Court of Appeal has held that a judge may grant a declaration under Rule 38.07(5) only where there are no available effectual alternative remedies (see *Nova Scotia (Securities Commission) v. Potter,* **2012 NSCA 12** at paras. 25-26 , rev'g 2011 NSSC 239).

[65] The evidence established that Kimber and Judith intended to make a gift of an interest in land to Lisa and to Andrew. The gifts were not predicated on a condition precedent that the Agreement be signed by their children concerning the use of the foreshore. There is no party seeking to set aside these grants.

[66] Andrew's evidence was that he was not coerced or forced to enter into the Agreement. However, Lisa's evidence was that while she was not subject to force or duress, she felt implicitly compelled by the circumstances of Kimber's ill health to sign the Agreement.

[67] At issue is the content and scope of the interests that were conveyed in the grant of lands by Kimber and Judith to themselves and their adult children, respectively, in the Warranty Deeds to the North and South Lots, as executed on August 5, 2019. There were a number of arguments raised by the parties. These include: whether the Agreement is a binding contract that further defined the initial

grant; whether the Quit Claim Deed extinguished all other interests; whether there is or is not an easement created on the facts whether in contract or equity; and whether there is estoppel or proprietary estoppel.

[68] While considering this matter and writing the decision, the Court read the Nova Scotia Court of Appeal decision in *Muir v Day*, released March 30, 2023 (*Muir v Day* 2023 NSCA 21 CanLii) and the trial decision *Day v Muir*, 2022 NSSC 20, which was not put before the Court in prior submissions by counsel. Counsel were asked to review these decisions and make written submissions to inform the Court on the potential applicability of the legal principles canvassed within, as the matter addressed analogous issues in fact and in law.

[69] I received these written submissions on May 18, 2023.

[70] At the trial level, *Day v Muir, supra*,(trial) a parent with ownership of lakefront shoreline intended to gift portions to his adult children for recreational cabins. In 1979, Miller deeded a lot to his daughter Carol Muir, reserving a right of way for a driveway used by her father and the daughter to access their respective lands. Miller then deeded a portion of his lands, dividing it further, to his other daughter, Day. There were no plans of subdivision or drawings or surveys before

the Court that were made at time of Miller's grant to Muir in 1979, just a bare reference in the Deed to a right of way.

[71] Day sought a declaration of easement, based on the language in the 1979 Deed and supporting evidence, or, in the alternative, a prescriptive easement. Muir opposed, submitting that the language in the 1979 Deed concerning the Right of Way was ineffective legally in creating an easement.

[72] At para 23 of *Day v Muir*, *supra* (trial) Keith, J. identified that the issue before him was whether expressly or by operation of law the Grantor Miller had reserved a right to use any part of the disputed portion of lands (a driveway in that case) when signing the Deed gifting a waterfront lot to his daughter. Keith, J. found there was an implied mutual and reciprocal easement created. The Court of Appeal upheld this finding, as the only reasonable and necessary inference to be drawn from "all the facts and circumstances.." surrounding the 1979 Deed was that each of the parties to the Deed held a common intention that Miller, as grantor, had the right to continued use of the driveway (para 42, *Muir v Day*, *supra*, NSCA).

[73] The Court does note the comment at para 85 of *Muir v Day*, *supra*, NSCA:

> [85] Although I would dismiss this ground of appeal, I am of the view the judge did not need to resort to finding an implied reciprocal and mutual easement. Rather, this case appears to lend itself more aptly to an interpretation of the language of the deed, considering the factual matrix and surrounding circumstances

> of its execution (see *Duncanson v. Webster*, 2015 NSCA 29, *Purdy v. Bishop*, 2017 NSCA 84 and *Penney v. Langille*, 2018 NSCA 43). In the case at hand, the factual matrix and surrounding circumstances provide clear and sufficient evidence that the parties to the original grant (Miller and Muir) intended each would have the right to use the driveway. The judge could have relied on that evidence to find the reservation in the 1979 Miller to Muir deed itself created the easement rather than implying a mutual and reciprocal easement.

[74] In *Muir v. Day, supra* though, the "…language of the Deed" signed in 1979 was the only primary evidence of the intention of the grantor Mr. Miller, who was deceased, which Keith, J. referenced as creating an implied reciprocal and mutual easement to the grantor's benefit. There were no other documents before the Court to demonstrate this intention, but for a plan of survey.

[75] That is not the case here. In this matter, the original grantor Kimber gave his oral evidence concerning the common intention in the Agreement, there is the text of the Agreement, evidence of the parties, the related emails, and the grantor's drawings of the Lots, all before the Court, albeit in lieu of granting language in the Warranty Deed. As this matter engages contract, a claim of easement and equitable interests in land, the principles of law considered in the *Muir v Day, supra* decisions are germane.

[76] As Justice Keith wrote at para 24 of *Day v Muir, supra* (trial):

> [24] The parties each refer to a number of general principles of contractual interpretation which may be distilled as follows:

1. "The overriding concern is to determine 'the intent of the parties and the scope of their understanding …. To do so, a decision-maker must read the contract 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 formation of the contract.'" (*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 ("***Sattva***") at paragraph 47). The relevant "surrounding circumstances" were also described as the "factual matrix" in *Sattva* (see, for example, paragraph 50). In *Sattva*, the Supreme Court of Canada explained that taking into account the "factual matrix" or "surrounding circumstances" at the time of contract formation represented a "practical, common-sense approach not dominated by technical rules of construction" (paragraph 47 of *Sattva*). Moreover, "The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement" (paragraph 48 of *Sattva*).

2. In determining the scope of the "factual matrix" or those "surrounding circumstances" which are relevant to interpreting a contract, three limiting principles are important:

a. The "surrounding circumstances" or "factual matrix" at the time of contract formation "must never be allowed to overwhelm the words of that agreement" (paragraph 57 of *Sattva*). The express words chosen by the contracting parties and recorded in their written agreement predominate. "The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract …. While the surrounding circumstances are relied upon in the interpretative process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement" (paragraph 57 of *Sattva*). In *Purdy v Bishop*, 2017 NSCA 84 ("Purdy"), the Nova Scotia Court of Appeal added: "Surrounding circumstances assist the Court in interpreting the language used by the parties, but does not displace it." (at paragraph 15); and

b. The relevant "surrounding circumstances" should "…consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paragraphs 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (paragraph 58 of *Sattva*). Similarly, and reminiscent of the Supreme Court of Canada's caution in *Sattva*, the Nova Scotia Court of Appeal said in *Purdy*: "The Court must interpret the intention of the parties objectively by the words they used in the deed, not by subjective wishes, motivations or recollections" (at paragraph 16).

c. In *Romkey v Osborne*, 2019 NSSC 56, Arnold, J. undertook a comprehensive review of the law as to the role of "surrounding circumstances" when interpreting contracts and, more specifically for that decision, in interpreting the scope of an express right contained in a deed. He concluded, among other things, that: "Surrounding circumstances could include the historic use of the easement, the physical conditions which existed at the time of the grant, and any

other background facts that were or reasonably ought to have been within the knowledge of the parties at or before the date of grant" (at paragraph 91).

d. The Court should approach the parties' subsequent conduct (i.e., their actions after contract formation) with caution. In *Shewchuk v Blackmont Capital Inc*., 2016 ONCA 912, the Ontario Court of Appeal warned of the dangers which arise when the issue of contractual intent becomes tainted by subsequent conduct (at paragraphs 41 – 44). It concluded: "Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix" (at paragraph 46).

[77] At para 62 of the appeal decision in *Muir v Day, supra*, the Court noted that:

[62] The judge set out the more specific principles at paras. 26-55 of his decision. In summary, he identified:

- Primary among the more specific principles is the rule that a grantor may not derogate from a grant.
- Grantors have a duty to clearly express their intentions in the deed itself and may not derogate from (or deny) any such easements without clearly communicating that intention.
- The law recognizes a distinction between a grantor who, after conveying land, seeks to reserve an implied easement versus a grantee who seeks a grant of an implied easement to fully achieve the interests being conveyed. The legal and evidentiary challenges which face a grantor will be more formidable that those facing a grantee.
- Patent ambiguities should normally be interpreted against the grantor. Correspondingly, and without limiting the court's ability to determine the parties' intention based on the deed as a whole, reservations or exceptions should be interpreted in favour of the person from whose title it detracts.
- The non-derogation rule is important but it is not a fixed edict of paramount importance for which equity admits no exceptions. That is, the non-derogation rule does not serve as a bar, prohibiting grantors from claiming an equitable, implied easement under any circumstances. The rule in Wheeldon does not dictate a particular result and it may bend in appropriate circumstances to serve the aims of equity.
- In short, **the non-derogation rule will inform but does not entirely subsume the circumstances under which equity will recognize an implied easement in favour of a grantor. Subject to certain parameters, grantors may still claim an equitable implied easement in appropriate circumstances.**[5] [Emphasis added]

[78] Further, at para 64, the Court of Appeal noted:

> [64] The judge referred to *Barton v Raine*, (1980), 1980 CanLII 1932 (ON CA), 114 D.L.R. (3d) 702 (ONCA), leave to appeal to the Supreme Court of Canada denied. The judge said:
>
> > [52] Writing for the Court, [in *Barton*] Thorson, J.A. confirmed that a reciprocal and mutual easement may arise in favour of a grantor in appropriate circumstances. At paragraph 21, he articulated the test as follows:
> >
> > In my opinion, the learned trial judge was correct in the conclusion which he drew from the authorities referred to above, namely that the development of the case law since Wheeldon v. Burrows has softened the rigour of the general rule set out in that case or has enlarged the scope of the exceptions to the rule. On the facts of the case at [b]ar, I am satisfied that, although the 1952 conveyance made no mention of a right of way over the driveway between the two properties, there was, **by necessary inference from the circumstances in which the conveyance was made, a common intention** on the part of both the father on the one hand and the son and daughter-in-law on the other hand that, after the conveyance, each of them would continue to use the driveway in the same manner as, in fact, it had been used without interruption since the late 1920's.
> >
> > [emphasis added]

Contract

[79] The Applicant submits that the Agreement is not a binding contract.

[80] Lisa submits she was coerced to sign the Agreement only for the purposes of appeasing her dying father. It is also submitted that there was no consideration between the parties for the Agreement, as only Kimber and Judith had an interest in the land and Lisa and Andrew had none at the time the agreement was signed,

with Andrew not offering to do or give anything in exchange for the benefit of the use of the 25 foot strip of land.

[81] Lisa directs the Court to portions of GHL Fridman, *The Law of Contracts in Canada*, 4th ed. (Toronto: Carswell, 1999) and specifically draws the Court's attention to the element of "mutuality" in which it is written that "…a bare, voluntary, gratuitous act or promise, unsupported by any reciprocal undertaking will not be enough. There must be mutuality; a contract must show that both parties are to be bound in some way. The act or promise of one party must be performed or given in exchange for something actually done or promised by the other." Lisa submits that as there is no mutual benefit flowing to Lisa from Andrew, but only from her to him, and her ability to enjoy or to sell the property would be fettered by Andrew's alleged right of use of the foreshore.

[82] Lisa's position is that as the Agreement is no more than a series of gratuitous promises, made between the parties to capture her parents' hope, wish or dream of a harmonious family setting on the lake that describes the use of the foreshore Lots as between her and her brother, then it is also absent the elements of mutuality and consideration required, and is therefore a non-binding agreement.

[83] Further, she pleads she was not required to sign the Agreement to obtain her interest in the North Lot, so there was no consideration for entering the Agreement. Lisa and all parties agree that the grants of interest in the North and South Lot were a unilateral gift from Kimber and Judith, and was not a gift subject to any condition precedent.

[84] The Applicant also submits that the offer of land was made for Kimber and Judith's benefit only, and not for her. With respect, Lisa received an interest in valuable lakefront property in Lunenburg County, and that is a material benefit with a monetary value.

[85] As *Muir, supra* (Appeal) at para 70 -72 in regard to mutuality set out:

> [70] First, as to the absence of mutuality, the Muirs contend:
>
> > 35. As set out clearly in the case law, reciprocal and mutual easements are identical easements implied in favour of both the grantee and the grantor where the deed has failed to do so, and the necessary implication is that such an easement was intended.
> >
> > 36. In this case, the right of way implied by the Court was in favour of the Days only, and thus clearly does not fit the criteria for a reciprocal and mutual easement. Such an easement may have been a consideration if the deed to Carol Muir did not reserve a right of way in favour of either Cecil Miller or Carol Muir, but those are not the facts.
>
> [71] As I understand the Muirs' argument, the 1979 deed, unlike the situation in Barton, is not silent on the expression of rights to be conveyed—Carol Muir had a right of access so there was nothing "mutual" because the right-of-way implied by the judge only favoured the Days. The problem with that argument is the access rights to the driveway expressed in the 1979 deed were unclear and required interpretation to ascertain the parties' intention.

> [72] Given these circumstances, the judge considered and declared, an implied reciprocal and mutual easement because he found, correctly in my view, that is what the parties intended at the time of the 1979 conveyance but did not clearly express so in the deed. The appellants' argument regarding a lack of mutuality is not persuasive in demonstrating error.

[86] In this case, it was demonstrated to the Court's satisfaction that all of the parties to the Warranty Deed had knowledge about the planned easement from the drawing of April 8, 2019. All of the parties to the Warranty Deeds also were parties to the Agreement. The Agreement set out with particularity who would be the holders of interest in each Lot.

[87] While the Court in *Muir v Day*, *supra* relied upon the reference in the Deed to a right of way as part of its finding, the Court in *Barton*, *supra* found a reciprocal and mutual easement in the absence of language in the deed. It is possible to make a necessary inference of mutuality among the parties that would support a finding of a reciprocal and mutual easement in the absence of express language in the Warranty Deed.

[88] The Court finds that there was a valid contract created between the parties, with the respective rights and responsibilities for them created and defined in the Agreement, and that there was no undue influence proven, with the parties each obtaining a benefit.

[89] The only fully executed document as between all the parties to this litigation concerning the Lots was the Agreement. All the parties confirmed by their evidence that they were fully informed as to its terms, and obligations, prior to the execution of the Warranty Deeds including the use of the foreshore by Andrew, the storage of items at the shore, setbacks, and contemplation of a septic system for both properties. These were all mutually agreed upon, with benefits and obligations.

[90] The Agreement references the property to be burdened (Lisa's Lot) and the property to receive a benefit (Andrew's Lot). The reference to the 25 foot foreshore reservation is consistent with the handwritten note made by the grantor Kimber, and his testimony in Court, as well as reflected in the email and the testimony of Lisa and Andrew.

[91] Lisa's own evidence was that she constructed her cottage in accordance with the obligation on the setback as defined under the Agreement. Her actions indicated she had knowledge of the reciprocal interests of all the parties and that she was willing to be bound by the terms of the Agreement. In addition, she and Andrew traversed each of the Lots during the construction period of the cottages, and she stored items for the first year post the grant of the North Lot in accordance with the terms of the Agreement, which were defined benefits for her, as well. In

reviewing these surrounding circumstances, I find that the Agreement was a binding contract.

[92] The terms of the Agreement, and the surrounding circumstances around the signing of the Warranty Deed adding Lisa as a joint tenant to the North Lot, support a finding that there was a reciprocal and mutual agreement.

Easement

[93] The Applicant submits that if Kimber and Judith created an easement to the 25 feet of the foreshore to themselves in relation to each of the Lots evidenced by the Agreement, then their failure to register this easement creates a void so subsequent owners like Lisa are not bound by the Agreement.

[94] However, as the Respondents note, subsection 73(1)(e) of the *Land Registration Act*, SNS 2001, c. 6 ("LRA") provides that notwithstanding anything contained in the Act, an easement or right of way that is being used and enjoyed shall be enforced with priority whether or not recorded or registered. Andrew was exercising his rights in the Agreement in August 2019, upon the grant of the Warranty Deed, as well as when Lisa acquired sole title to the North Lot upon the execution of the Quit Claim Deed in February 2021. (see also *MacDonald v Korol*, 2021 NSSC 297).

[95] Further, the Applicant submits that if the Agreement were binding that it creates only a licence. Lisa relies upon para 19 of *Maritime Telegraph and Telephone Co. v Chateau Lafleur Development Corp.* 2001 NSSC 14 (CanLii) regarding the law of easement. In *MTT v Chateau*, *supra*, the Court in quoting *Anger and Honsberger Law of Real Property*, noted that the "… essential qualities of an easement are (i) there must be a dominant and servient tenement (ii) an easement must accommodate the dominant tenement (iii) dominant and servient owners must be different persons (noted by counsel: this aspect of the test is overturned by s. 61(3) of the *LRA*, *supra*) (iv) a right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant."

[96] Kimber and Judith are capable grantors, and were grantors and grantees in each of the subsequent Warranty Deeds granted with Lisa and Andrew as their joint additional grantees. It can't be said they were not all fully informed of the contents and terms of the Agreement, and were aware of their intent as Grantors, or that they hid this from Lisa or from Andrew. In the event that Kimber did pass, Lisa and Andrew's mother, Judith, would have remained on title, as this was intended to ensure the lands were not "broken up" out of the family, as Kimber gave evidence of this intention as a Grantor.

[97] Lisa submits that the purported Easment is not a subject matter for a Grant, as specifically listed in regard to element (iv) that the decision in *Sturgeon Hotel Ltd. V St Albert (City)* 2010 ABQB 725, would indicate, as the Court is quoting Ziff, at para 18 of its decision that: "… the easement cannot be a mere right of recreation without benefit or utility; it cannot require the servient owner to spend money… and cannot confer on the holder a right to possession of the servient lands to an extent that is inconsistent with the possessory rights of the servient owner."

[98] In regard to the Applicant's submission that the utility and benefit of an easement is an appropriate subject matter of a grant, rather than one in which the subject matter of the grant is access for recreation, the Court is mindful that there is authority for recreation in an easement at common law as found in the Supreme Court of Canada's decision *Dukart v Corporation of the District of Surrey*, [1978] 2 SCR 1039, as was cited in Alexander Wiebe, *Nova Scotia Real Property Practice Manual* (Markham: LexisNexis, 2022) looseleaf Release 131 at page 13-24. In *Dukart, supra* the Court upheld an easement for persons "…to wander at large over a beach reserve." (As was remarked upon in *NS (Community Services v J.P* 2021 NSCA 45 at para 32, "A judge may conduct research (*IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282)...").

[99] The Respondents submit the easement is also necessary for the transport of "equipment and materials" used by Andrew for the benefit of the dominant tenement of the South Lot to build his cottage and he must traverse over the servient tenement of Lisa at the North Lot.

[100] Further, it was not proven by the Applicant that the easement requires her to spend money other than the taxes on the North lot itself, the bounds of which are not altered, as she would be required to do. There was an argument made concerning recurring additional insurance cost but no evidence was put before the Court concerning this potential higher cost.

[101] Lisa submits that the Agreement, if accepted as creating an easement, would create an interest personal only to Andrew and as such must fail as it cannot "run with the land" as a true easement, as she directs the Court to consider the term in the Agreement for the use of the 25 feet of foreshore is to Andrew "for his life or for as long as he owns the land." However, this is not the only language in the Agreement concerning its term or scope, as the penultimate paragraph of the Agreement states: "Note: This agreement is being prepared by Kim and Judy Publicover, with the sincere hope and intention that both our children Lisa and Andrew and their children, present and future will be able to own and enjoy a place on Sherbrooke Lake for their lifetimes in harmony and without conflict". This

would appear to also address the concern around exclusivity of the right to use of the 25 feet to Andrew personally, as well as to address the issue of whether an easement can run with the land, as the Agreement provides it is intended to persist for a term of lives of Lisa, Andrew, their current and future children for their lifetimes.

[102] The Applicant then states that the Agreement's terms, specifically regarding the foreshore, are not reflected in the Warranty Deeds from Kimber and Judith and then as grantees with Andrew and Lisa to the Lots on August 5, 2019. The Agreement is not reflected or referenced in the terms of the Quit Claim Deed from Kimber and Judith to Lisa in February 2, 2021.

[103] However, it is open to the Court to consider what was the content of the legal interests in the land on the execution of the Warranty Deeds, in context. It was the gift to Lisa of a joint tenant interest in the North Lot, as shared with the other joint tenants Kimber and Judith, subject to the preceding Agreement and an implied reciprocal and mutual easement created by their common intention, as shown on the evidence accepted by the Court.

[104] While it is difficult for a grantor to demonstrate that they have reserved an interest, this is just such an unusual circumstance in which the Grantor has

demonstrated that at the time just prior and at the creation of the grant, there was a mutual agreement between the grantors and grantees evidencing a mutual common intention to have an equally shared lake front as a family recreational site in order to effect an equitable split between them all.

[105] Kimber and Judith did quit claim their interests in the North Lot to Lisa, however when Lisa asked her parents to renounce their interests in January 2021, their eventual Quit Claim did not change the nature or the terms of the implied reciprocal and mutual easement created by the Agreement, with its burden on title, as was created contemporaneously with the Warranty Deed.

[106] On an examination of the evidence before the Court, there is a sufficient factual basis and a legal foundation for the Court to determine that the Quit Claim Deed executed by Kimber and Judith transferred title to Lisa Dickson in her name alone, however subject to the continued implied reciprocal and mutual easement of a 25 foot portion of the North Lot's lake shore, to the benefit of the South Lot.

[107] There is a remedy available and, in all the circumstances, the interests of justice requires a declaration. With these elements satisfied, the Court will issue a declaration on the matter, for the purpose of resolving the issue.

Conclusion

[108] Whether the Court grants the Applicant's request for a declaration of invalidity of the Agreement, or accepts the Respondents' position in regard to the easement and shared access to the foreshore strip of land at the lake, the Court is mindful of the impact on the familial relationships of this dispute. This application before the Court is part of a more complex familial relationship, predating the litigation and ongoing in time.

[109] The Court will issue a declaration that the Quit Claim Deed dated February 2, 2021, vested Lisa Dickson as the sole title holder of the North Lot, subject to an implied reciprocal and mutual easement to the benefit of the South Lot, established in accordance with the terms of an Agreement, July 19, 2019, as between Lisa Dickson, Kimber Publicover, Judith Publicover, and Andrew Publicover.

[110] If the parties can not come to an agreement on the issue of costs, I will seek submissions in writing setting out their position, to be provided 30 days from the date of this decision, to inform the Court.

Diane Rowe, J.