SUPREME COURT OF NOVA SCOTIA
Citation: *Hart v. Pare*, 2024 NSSC 31

Date: 20240125
Docket: 522461
Registry: Sydney

Between:

Matthew Frederick Hart

Appellant

v.

Donald Pare

Respondent

Judge: The Honourable Justice Patrick J. Murray

Written Decision: January 25, 2024

Counsel: Matthew Pare, Appellant, Self Represented
Ian Parker, for the Respondent

By the Court:

Introduction

[1] The issue on this application is whether a row of trees planted by the Respondent is in violation of restrictive covenants pertaining to fences and landscaping screens.

[2] The Applicant says that on or about the 17th day of September 2022, the Respondent caused a fence to be located on the front portion of his lot contrary to restrictive covenants.

[3] Alternatively, he says on or about that same date, the Respondent caused a screen for landscaping to be located on the front portion of his lot contrary to restrictive covenants.

[4] The Respondent says that in September 2022, he did, with the assistance of a family member, plant small trees adjacent to his driveway, the road and near the property line between his house and that of the Applicant (the “trees”).

[5] The Applicant says that he and his wife spoke to the Respondent regarding the effect that these trees may have on their view.

[6] Shortly thereafter, the Applicant filed a Notice of Application in Chambers seeking an order declaring that the Respondent is in breach of the restrictive covenants contained in his deed. The Application was heard on June 5th, 2023.

[7] As such, the Applicant is seeking the following relief from this Court:

(i) An order declaring the Respondent is in breach of the restrictive covenants;

(ii) An order requiring the Respondent to remove the fence or screen for landscaping purposes within a period as determined by this Court;

(iii) Costs; and

(iv) Such further and other relief as this Honourable Court permits.

Background

[8] This case is about the definition of "fence" and/or "landscaping screen" as used in covenants restricting the use of land, within a building scheme.

[9] Under the law of real property, they are referred to as "restrictive covenants" or "building restrictions". This is old law with a "golden thread".

[10] ***Tulk v Moxhay*** [1848] 41 E.R. 1143 decided that an owner of land that is subject to restrictive covenants accepts both the burden and benefit of those

covenants, in such a way that the covenants run with and are attached to the land. Individual ownership from time to time means little. It is the land itself that governs the use that can be made by its owner. It is not uncommon that owners run afoul of these covenants from time to time. Much depends upon the use they make of the land that is within the building scheme.

[11] Difficulties have persisted over centuries given the whims of landowners and the commonly held view that, a person's land is their domain. There is little question that the right to use and enjoyment of one's land is fundamental, but this is subject to acceptance of the burdens and benefits that come with that land.

[12] Such are the tensions at issue here. Each case has its own unique facts.

The Facts

[13] It is undisputed that Mr. Hart and Mr. Pare are owners within the Alexander Drive subdivision off of Harvey Street in the village of Baddeck, Nova Scotia.

[14] The Applicant is the owner of land municipally described as 2 Alexander Drive, Baddeck, Nova Scotia. The Applicant's land is subject to restrictive covenants.

[15] The Respondent, Donald Pare, is the owner of land municipally described as 20 Harvey Drive, Baddeck, Nova Scotia. The Respondent's land is subject to the same restrictive covenants as the Applicant.

[16] The Plan of Subdivision of Mile Brook Estates Limited was recorded on October 2, 2002, as Plan No. 1912. Mr. Hart and his spouse Diane Lynne Hart purchased Lot 02-3 on July 3, 2020. Mr. Pare purchased Lot 02-2 on June 30, 2004. The Applicant lands and Respondent lands are adjacent to each other.

[17] It is undisputed that the lots are "high up", providing a view of the Bras d'Or Lakes, Cape Breton. It may be reasonably inferred that in purchasing, the members of the subdivision found this appealing, and undoubtedly it contributed to the sum paid for the lots and the willingness of the buyers to pay that price.

[18] The restrictive covenants attached to the Respondent's property read:

> (a) No fence shall be erected or maintained on the said lands which extends unto the front portion of the lot beyond the front line of the building erected thereon.
>
> (b) No fence shall be erected or maintained on the said lands or any part thereof other than an ornamental wire, iron or wooden fence, or open construction, with or without brick or stone foundations, and no such fence shall be higher than three and one-half (3½) feet except for pool enclosures. Screens for landscaping purposes may be erected upon the said terms and restrictions as other fences.

The Evidence

[19] The Applicant objected to paragraphs 8, 12, 13, and 14 of Mr. Pare's affidavit sworn April 20, 2023. In my oral decision on June 5, 2023, I ruled those paragraphs were admissible, with the exception of the following phrase at the beginning of paragraph 14: "It is my belief that the trees do not constitute a fence or landscaping therein". This portion of paragraph 14 was found to be in the nature of a submission and, moreover, the issue the Court must decide.

[20] The Applicant also objected to paragraph 7 of the Respondent's affidavit sworn April 25, 2023, which referenced Exhibit "A". On the Exhibit, the Respondent drew several arrows to show older trees and shrubbery in various places in his neighbourhood. The Court ruled that paragraph 7 and the Exhibit were sufficiently relevant to be admitted.

[21] The evidence of the Applicant is contained in his Affidavit filed on March 14, 2023, and a supplementary affidavit, filed on April 28, 2023.

[22] Mr. Hart states that a large number of trees were planted by Mr. Pare around the perimeter and along of the front of Mr. Pare's lot. These are shown in the photos attached as Exhibits to the Applicants' affidavits.

[23] In his oral submissions, Mr. Hart addressed the crux of his concern, stating:

> Again, we are living on top of a hill in Baddeck, there are properties here with the view of the Bras d'Or Lakes. The reason why people purchase those properties are up there because of the view. So, if you place trees within certain areas that don't impact an individual's view and like depending on the size of the trees and how far they are apart, the height of those trees, that would definitely need to be addressed to determine what that subdivision should entail. So, by leading the court to say, well these trees exist on these properties so the respondent should have the same ability is, I believe, improper.

[24] Mr. Hart argues the Court must consider that the trees will continue to grow.

[25] This is contrary to the position of Mr. Pare, who argues the Court may consider only the evidence before it and not what may occur in future.

[26] The Respondent also filed an affidavit on April 20, 2023, and a Supplementary Affidavit on April 26th, 2023, in response to the Application.

[27] In his affidavits, the Respondent says the trees are spaced widely enough for passage between them and are located several feet back from the property line.

[28] The Respondent argues these trees do not form a boundary line, nor are they intended to prevent ingress or egress onto his lot. They are decorative and not a fence, as alleged by the Applicants.

[29] Mr. Hart says that primarily these cedar trees planted in sequence will grow in height and width to form a barrier, well above the 3.5 foot height permitted for

a fence. More particularly, he argues such a barrier "extends unto the front portion of the lot beyond the front line of the building erected thereon".

[30] The Respondent submits the Court should look at the purpose of the restrictive covenants in this case. The trees were erected for decorative purposes, as per Mr. Pare's affidavit. While they do pass near the property line, they do not serve the function of delineating that line, as they are a few feet removed. It may be argued that they are close enough to establish a boundary. If that is the case, that is not their primary purpose and is ancillary to the decorative nature of these trees.

[31] The Respondent says if this treeline is not permitted, he is in need of guidance as to the use that can be made of his land. That said, Mr. Pare adamantly denies that what he has done falls within the covenants.

[32] Counsel have submitted that the common law in Nova Scotia is bereft of any cases that address this scenario, that is, whether a row of trees can constitute a fence, or a screen for landscaping purposes.

Caselaw

[33] In ***Rideout v Fliss,*** [1998] B.C.J. No. 714, the Plaintiff, Rideout, alleged that his neighbor, Fliss, was in breach of a covenant not to construct a wire fence.

The subdivision was constructed in a rural area. Accordingly, the lots were subject to visitation by the deer population in the area.

[34] The Defendant, Rideout, neatly arranged for three (3) strands of unbarbed wire to be strung along or atop of the hedges on his property. As the learned trial stated the wires had, for some unknown reason, worked. They kept the deer away from the Fliss hedges while the other hedges in the subdivision were eaten:

> 46. In terms of delineation of the defendants' lot the wire also performs no function. It is the hedges, whether or not they can be deemed to be a fence, which in fact perform that function.
>
> …
>
> 49. The consequences of the removal of the wires is evident from the affidavits of Mr. and Mrs. Modershead, Judith Walker and Garry Campbell. Without them the garden of the defendants would be lost to the ravages of the deer.
>
> …
>
> 52. I therefore conclude that the three wires erected by the defendants are not a fence within the meaning of that word as used within paragraph 15 of the Building Scheme.

[35] I find that ***Rideout***, is instructive. It references numerous cases, albeit from other jurisdictions, that have considered the issue of fences and restrictive covenants:

> [35] In American jurisprudence the issue of fences and restrictive covenants has been considered in a number of cases.
>
> [36] In *Brookside Community, Inc. v. Williams*, 290 A.2d 678 (Del. Ch. 1972) a defendant had erected a 4 foot high fence of wood and wire that substantially

enclosed all of his front yard. Chancellor Duffy of the Court of Chancery of Delaware considered the term "fence" as used in restrictive covenants contained in all deeds to properties in the community. He referred both to the *Random House Dictionary* definition (to which I have already referred) and to *Webster's New International Dictionary* (2nd ed. 1944) which provided a further definition of fence as:

> an enclosure about a field or other space or about any object; esp., an enclosing barrier, as a structure of wood, stone, or iron, intended to prevent straying from within or intrusion.

[37] At p.681 of his judgment Chancellor Duffy observed the following:

> A fence is thus not merely any barrier, but rather one which encloses a space or an object. It is, of course, impossible to state as an abstract fact the length or height to which a barrier must go in order to be, or to become a fence. That depends on the space to be enclosed. But the idea of structure or barrier for "enclosure" purposes is common to all of these definitions.

[38] A similar definition was adopted in an earlier decision by the Supreme Court of Nebraska in *Shamberg v. City of Lincoln*, 116, N.W.2d 18 (Neb. 1962) in which Chief Justice Simmons on behalf of a seven member panel adopted the following definition of "fence" at p.20 (as defined in *Corpus Juris Secundum*, Vol. 36A, Fences par. 1, p.258):

> A fence is an inclosing structure, composed of any material which will present a sufficient obstruction, about a field or other space intended to prevent intrusion from without or straying from within.

The judgment confirmed a trial decision that a tennis court backstop was not a fence.

[39] In *Stauss v. Park*, 259 N.Y.S.2d 61 (1965), Mr. Justice Witmer of the New York Supreme Court, Trial and Special Term, tried an action not dissimilar to this matter in which one neighbour sought a restraining order in respect of an enclosure of a swimming pool that was said to violate a deed restriction (building scheme). Mr. Justice Witmer considered the purpose of the enclosure and at p.64 he observed:

> The term "fence" may be used in many ways, but with respect to subdivided lots it is commonly used in connection with separation of the lots....

He then continued:

> This structure, "fence", is designed to protect the users of the pool from wind and view, and to protect wanderers from the dangers of the pool. In no way does it have the appearance of, nor does it constitute, a spite fence.
>
> [40] I conclude from this review of authorities, albeit sparse, that in determining whether a structure is a fence the determinative feature is the function of the structure.

[36] In this case, the Applicant argues that ***Fliss*** is not applicable because it was the three wires that were found not to be a fence. The Applicant noted however, the Court's statement that hedges could be deemed to function as a fence.

[37] The Respondent argues that ***Fliss*** is applicable because the primary function is not to impede passage and the trees do not function as a fence.

[38] In either case it is the function of the trees that is determinative of the question before this Court.

[39] In ***Suprun v Bryla***, 2007 CarswellOnt 8221, the Plaintiffs applied for an Order declaring that a barrier erected by their neighbours along a property line was a fence within the meaning of the Norfolk County by-laws. The barrier consisted of 18-foot trees planted to form a hedge, atop of a retaining berm comprised of railway ties. The Court held that the barrier fell within the definition of a fence and of a boundary fence, which was defined to include a "fence, hedge, freestanding wall or something similar to delineate a property boundary."

[40] ***Suprun*** is instructive in that the Court held, although the intention of the neighbours may have been to landscape their property, the effect of planting (bushes) that reached 18 feet was to create a fence. The Court held that "effect trumps intention."

> [40] Mr. Cline argues that the barrier is a retaining wall or berm and, as it is incorporated into a landscaping design, it does not constitute a "fence." The *New Shorter Oxford English Dictionary* defines "retaining wall" to mean "a wall supporting or confining a mass of earth or water" and a "berm" as "a flat strip of land, raised bank, or terrace bordering a river, etc." Even if the barrier may accurately be termed a retaining wall or a berm, its label is unimportant. The thrust of the Fence By-law is more the regulation of the height of a fence and not so much its composition. **Although the intention of the individual respondents in erecting the barrier may have been to landscape the Sloat property, the effect was to create a fence: and, effect trumps intention.**

[41] I note the Court was more concerned with the height of the structure, and less concerned with what it was comprised of, in arriving at its conclusion that the "effect was to create a fence."

[42] By analogy, the building restriction in Clause (b) here places a height restriction of three and one half (3.5) feet in its definition of what constitutes a fence, i.e., no fence "other than an ornamental wire, iron or wooden fence, with or without brick or stone foundations."

[43] It would seem a reasonable inference that the drafters of the covenants were intent on preserving the integrity of the lots in the subdivision, and particularly that any enclosure should be a maximum of three- and one-half feet in height, except for pool enclosures. Nearly all of the many definitions of what constitutes

a fence, have in common the word "enclosure", as shown in ***Brookside Community Inc. supra,*** (cited in ***Rideout***), where Chancellor Duffy of the Court of Chancery of Delaware observed:

> A fence is thus not merely any barrier, but rather one which encloses a space or an object. It is, of course, impossible to state as an abstract fact the length or height to which a barrier must go in order to be, or to become a fence. That depends on the space to be enclosed. But the idea of structure or barrier for "enclosure" purposes is common to all of these definitions.

[44] A contrary view was taken in ***Crawley v. Wolff,*** 4 T.L.R. 434, where it was alleged that a covenant not to obstruct a sea view was infringed.

[45] In 1887 Sir Henry Wolff purchased land known as Boscombe Towers from Lord Malmesbury. At that time he agreed "that he would not thereafter erect or permit to be erected, any buildings whatsoever which would interfere with the view of the sea as then enjoyed from the Grantor's villa"; and also covenanted that he would "not make or permit to be made, any other alteration in the laying out or the use of the land, either by planting or otherwise", which would have that effect. The successor in title to the "Grantor's villa", Captain Crawley, claimed that he was entitled to the benefit of the covenant.

[46] Sir Henry thereupon proceeded to "lop off" (cut down) the trees that he had planted but allowed the trees that had been planted by his predecessor (Lord Malmesbury) before 1867 to remain and continue to grow.

[47] Lord Justice Fry said that the object of the covenant was to prevent alteration in the use or laying out of the land that would obstruct the view from the villa.

[48] The Court held that although Sir Henry did "lop off" the trees he had planted, the use of the land had not been altered, as it remained a plantation due to the remaining older trees. Notably, the Court ruled that it would have been "quite easy" to frame a covenant that would not permit any obstruction to the sea view and said that such a covenant would have required him to, "no doubt, to cut (lop) the trees as they grew."

[49] From this, it can be seen that the specific wording of the covenant can be significant as to its purpose. In ***Crawley***, a narrower view of the obligation of the covenanter was taken in finding that Sir Henry was not required to remove the trees that remained. Mr. Pare argues that the specific wording here, does not mention trees.

[50] In the present case, the use of the land has clearly been altered, and the present facts are distinguishable from ***Crawley*** in that Mr. Pare did plant the trees in question but has not removed them. The question is, are his actions in breach of the covenants that he agreed to, which place restrictions on erecting a fence or

landscaping screen. Further, the issue in ***Crawley*** was not whether the trees constituted a fence, but whether the use of the land had been altered.

[51] According to *Merriam-Webster Dictionary*, fence is defined as: "**Fence** (noun): a barrier intended to prevent escape or intrusion or to mark a boundary".

Landscaping Screen

[52] Primarily the Applicant submits that the 50 or more trees on the Respondent's land constitute a screen for landscaping and has resulted in the Applicant having his view taken away. Landscaping screens are clearly restricted by the covenants and may be an impermissible use by Mr. Pare.

[53] The Respondent has denied that the trees constitute a fence and says the purpose of these trees is decorative and is not intended to form a barrier or enclose or delineate his lot. The covenants therefore do not apply, he says.

[54] In my respectful view, the Respondent's submission that the covenants do not apply begs the question. If the treeline constitutes a fence or screen, then the covenants apply, and what is erected must follow the building scheme.

[55] In terms of a what constitutes a "screen for landscaping", there is no definition contained in the covenants, nor has counsel found any authority on point.

[56] The Respondent submitted that the trees would not be considered as such, arguing that a "screen" would have the effect of concealing or shielding something from view. Mr. Pare argues the small trees as depicted in the Applicant's affidavit do not conceal or shield anything except perhaps a small portion of the Applicant's lawn, as any tree naturally would.

[57] Furthermore, the Respondent argues, there are trees throughout the neighbourhood and on the properties of the Applicant and Respondent. It is submitted that the covenants are not intended to prevent the planting of trees, as the Respondent has done or prevent them in any other manner.

[58] Under the restrictive covenants, the erection of screens for landscaping purposes are subject to the same terms and restrictions that apply to fences. By virtue of the use of "other fences", the developers considered such screens as fences, and therefore subject to the three- and one-half feet requirement.

[59] According to the *Merriam-Webster Dictionary*, "landscaping screen" is not a definition as a single term; however, when separated, the definition of "landscaping" and "screen" is as follows:

> **Landscaping** (verb): to modify or ornament (a natural landscape) by altering the plant cover.
>
> **Screen** (noun): something that shelters, protects or hides, such as:

> a: a growth or stand of trees, shrubs, or plant.

[60] The trees are described as followed in the Respondent's affidavit filed April 20, 2023:

> 7. The Trees are arranged in a line which begins at the inside of my driveway near my house, extends along the driveway, curves along the road, and extends within my Property along an area that is between my house and the house of the Applicant, Matthew Hart.
>
> 8. The Trees were placed for decorative purposes only and are not intended to be a barrier, a delineation of a property line, nor are they intended to separate my Property from the lands belonging to the Applicant.

[61] In ***North Cowichan (District) v. Fokkema Enterprises Ltd.*** [2014] B.C. 1381, the district's zoning by-law required that a landscaping screen be provided by the developer to shield from view from any property line all derelict vehicles on the property. The Court said:

> 4. The Defendant must submit a development permit application for the construction of a **landscaped screen** consisting of vegetation and a fence at least 2.0 meters in height along the length of the Property's northern and eastern boundaries and a **landscape screen** consisting of a vegetated area at least 6.0 metres in width and a fence at least 2.0 metres in height along the Property's southern boundary with 90 days of the order…

[62] In ***North Cowichan (District)***, the bylaw contained a definition of landscape screen that "consisted of vegetation and a fence". Fences were required to be 2.0 metres in height. The second component consisted of "a horizontal landscaped

area of not less that 6 metres along the entire length of any lot line, which abuts any other zone".

[63] The developer challenged the applicability of the zoning bylaw, arguing the screen was only required if two lots have the same use in different zones.

[64] In the present case, there is no definition of what constitutes a landscaping screen, but it is clear from ***Cowichan*** that it would have the effect of "shielding the view of certain properties from the highway, as a result of their use".

[65] In this case, Mr. Hart has argued the line of trees has and will continue to have the effect of shielding his view of the Bras d'Or Lakes. He submits that the height restriction for fences and landscaping screens exist for this reason.

Decision

[66] I find as a fact that the trees planted by Mr. Pare show continued growth between September 22, 2022, and March 7, 2023. This can be seen in Exhibits "D" and "E" of the Applicant's affidavit filed March 14, 2023, and as noted in paragraphs 19 and 20.

[67] It is a fact that the owners of Lots 02-1 through 02-8 in the Mill Brook Estates Limited Subdivision all have the same Restrictive Covenants registered against their lands, in the same manner as the Applicant's lands and Respondent's lands.

[68] I am satisfied that the criteria to constitute a building scheme has been met in that title is derived from a common vendor, the covenants are intended for the benefit of all lots in the subdivision, and that there was in this way a general scheme of development. (***Moorhouse v. Black,*** 2014 NSSC 13)

[69] It is undisputed that such covenants run with the lands. Accordingly, this would include the period of growth of any trees or vegetation from time to time that contributes to the formation and/or erection of a fence or landscaping screen.

[70] I have concluded that the primary function of the trees planted by the Respondent is to mark the perimeter of his property, much the same as a boundary fence would. From the various definitions of what constitutes a fence, I further conclude with the growth that has already occurred, and if left to stand will form a dense line of trees that constitute an enclosure. A hedge or a closely planted line of trees may constitute a fence, but the more apt description in these circumstances is that the many trees planted in close proximity form a landscaping screen.

[71] I have concluded that Mr. Pare is in breach of the Restrictive Covenants.

Conclusion

[72] The Order sought by the Applicant declaring the Respondent to be in breach of the Restrictive Covenants is hereby granted, together with an Order requiring the removal of the trees, as they constitute a fence and /or screen for landscaping purposes on or before April 30, 2024.

Murray, J.