IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Deal v. Palmeter, 2004 NSSC 190

Date: 20040928
Docket: S.K.216779
Registry: Kentville

Between:

Alan Jeffrey Deal & Heather Jeanette Rand

Plaintiffs

v.

Katherine F. Palmeter & Ellen Wanda George

Defendants

Judge:	The Honourable Justice Gregory M. Warner
Heard:	July 18 and 19, 2004, in Kentville, Nova Scotia Final written submissions - August 20, 2004
Counsel:	Patrick J. Saulnier, Esquire, counsel for the plaintiffs Walter O. Newton, Q.C., counsel for the defendants

By the Court:

INTRODUCTION:

[1] Beginning in the 1950s the Palmeter family conveyed off, from their farm, cottage lots on the Minas Basin. The deeds contained no rights of way. Driveways were constructed giving access to the lots across the farm property and were used for about forty years.

[2] In 2003 the defendant, Wanda George, granddaughter of the original Palmeter farmer who commenced conveying lots proposed to build a cottage on the last remaining lot. Two of the cottage owners' driveways crossed the lot and prevented it from being developed as a cottage. The defendant George asked the cottage owners to agree to move their driveways. They refused. She built for them, unilaterally, an improved road to their lots. One of the cottage owners accepted the improved access and traded the release of their existing right of way of necessity for a deeded right over the new and improved road. The plaintiffs, who owned the other cottage, did not accept the new road and sued Ms. George and her mother for an injunction preventing interference with the original right of way of necessity and for various damages.

[3] In the twenty-first century, can a Court approve relocation of an established right of way of necessity, in circumstances where there is no detriment to the dominant owner but significant hardship to the servient owner?

FACTS

[4] Robert Lee Palmeter owned a large farm on the shores of the Minas Basin at Medford, Kings County, Nova Scotia. In the 1950s, he started selling, without a plan of subdivision, small cottage lots along the Minas Basin. After his death, his son Elliott Palmeter continued the same activity. No deeded rights of way were given with the cottage lots. The lot owners obtained access to their lots over roads which crossed the farm property.

[5] Weaver Road, a gravel public highway, extends in a easterly direction across the Palmeter farm property from the public highway. It ends several hundred feet to the west of the Minas Basin and the cottage lots.

[6] In 1952 Dr. Horace A. Foley purchased from Mr. Palmeter a lot running one hundred feet along the Minas Basin and one hundred feet deep. It contained no deeded right of way. He built a cottage on the northern part of the lot. According to Katherine F. Palmeter (widow of the late Elliott Palmeter) the

original access to cottage was from the Sexton Road by a driveway that crossed lands now owned by the Ells family.

[7] At some point before 1962 the access to the cottage was changed to a narrow lane (consisting of two tire ruts with grass growing up between) which extended in an eastern direction from the end of the Weaver Road across the Palmeter farm and down over a hill to his lot.

[8] Dr. Foley divided his lot into two 50' lots and deeded the southern lot in August of 1962 to Glendon North. This southern lot is the first of the four lots that makes up the plaintiffs' present cottage property.

[9] In 1964 Glendon North purchased an additional lot (the second lot now owned by the plaintiffs) directly from Robert Lee Palmeter. It was 50' along the Basin and 100' deep and adjacent to the lot already acquired by him from Dr. Foley. The deed contained no right of way. At about this time Mr. North constructed a small cottage on the lands.

[10] To gain access to his lots, Mr. North used Dr. Foley's driveway from the east end of the Weaver Road part way down the hill and then branched off that driveway making his own driveway to the west side of his lots. North's driveway consisted of a narrow lane with two tire ruts with grass between the ruts .

[11] The Palmeters sold several cottage lots to the south of the Glendon North lots, all of which lots appear to have been 50' wide on the Minas Basin and 100' deep. A private farm road (now called Cliffside Road) ran in a southerly direction from the eastern end of the Weaver Road and parallel to the Minas Basin but several hundred feet to the east of the Basin; it was used to gain access to these lots. It appears that these cottage lot owners did not receive deeded rights of way at the time of purchase.

[12] The shores of the Minas Basin are subject to some of the highest tides in the world and as a result the shoreline in front of the cottage lots sold by the Palmeter family eroded away quite significantly over the years.

[13] In 1976 Mr. Wray M. Reading had acquired one of the cottages to the South of Glendon North. He approached Elliott Palmeter to purchase land from his west lot in a westerly direction to Cliffside Road, so as to recover some of the lands being lost through erosion. He testified that Mr. Palmeter was only prepared to do so if everyone else did the same. Reading approached all of the lot owners; a sufficient number agreed and deeds were executed conveying to the cottage owners to the South of Glendon North the lands from the west boundary of their existing cottage lots to the eastern side of

Cliffside Road. Each deed contained a right of way along Cliffside Road which was described as follows:

> Together with right of way privileges for persons, animals and vehicles, in common with all others having a like right, over that 20' right of way leading southerly from Weaver Road extension along the west bound of lots including the lot herein conveyed.

[14] At about the same time Glendon North, who already owned two lots, purchased from Elliott Palmeter a lot to the west of his existing cottage. According to Mr. Reading, Mr. North only purchased as far back as he thought he needed and he did not, in fact, purchase west to Cliffside Road. The conveyance from Elliott Palmeter to Glendon North for lot "G" is shown on a plan of survey attached as Tab 13 to Exhibit 1 and described in a deed attached as Tab 14 to Exhibit 1. This deed, dated February 28, 1979, included the same right of way privilege described in paragraph 13, even though lot "G" did not abut Cliffside Road.

[15] In 1979 Joan Pauline Ashby (wife of Donald Ashby) purchased Dr. Foley's cottage property. The conveyance did not include a deeded right of way as Dr. Foley did not have a deeded right of way. In the same year the Ashbys acquired from Elliott Palmeter lands abutting the west side of the cottage lot they had just purchased. These lands did not extend as far west as Cliffside Road or the east end of Weaver Road. The lands they purchased are shown

as lot “H” on the plan of survey attached to Exhibit 1 as Tab 16. The deed to the Ashbys from Mr. Palmeter for that lot included the following described right of way:

> Together with right of way privileges for persons, animals and vehicles, in common with all others having a like right over that existing right of way leading to Weaver Road Extension. [emphasis added]

[16] This description is different from the right of way description contained in all of the deeds for the lots to the south (including the Glendon North lot). Donald Ashby’s evidence was that the description of the right of way on the conveyance to him was of the existing single lane driveway built by Dr. Foley down over the hill from Weaver Road to his cottage property (from which driveway the North driveway branched). Mr. Ashby stated that the deeded right of way was intended to cover the existing driveway. He testified that at the time he acquired the lot “H” from Elliott Palmeter there was no suggestion by Mr. Palmeter that the right of way to his property (shared in part with Glendon North) was in the wrong place or was subject to change at any future date.

[17] In 1981 Glendon North acquired a fourth lot from Elliott Palmeter. This lot (“Lot G1") lay to the west of the lot he had acquired from Mr. Palmeter in 1979. It is shown on the survey plan attached to Exhibit 1 as Tab 18 and described in the deed attached to Exhibit 1 as Tab 19. While the legal

description does not say so, the plan appears to show that this lot extended to the west to the point where the north-east corner of Joan White's property (the adjacent southern owner) intersected with the west side of Cliffside Road; however, lot G1 did not extend along Cliffside Road. There is no right of way contained in the deed for lot G1.

[18] Donald Ashby testified that at some point subsequent to 1981, he attempted to acquire lands to the west of his and Glendon North's lot (between their west boundaries and the east end of Weaver Road) but Elliott Palmeter declined to do so on the basis that he was concerned that if he attempted to move Glendon North's right of way, it would upset Mr. North. This evidence is a factor in the court's conclusion about the existence of a right of way in favour of the plaintiffs' land .

[19] Patrick J. Barry purchased the four Glendon North lots by deed dated June 20, 1997. The deed description consisted of the four original descriptions contained in the four deeds to Glendon North(only one of which described a right of way). Mr. Barry, a retired bank manager, owned the Glendon North cottage property from 1997 to 2002. He gained access to the property along the existing driveway that extended easterly from Weaver Road down over the hill. He testified that Mr. North showed him the pins marking the

boundary lines of his lands and explained to him that the driveway was his right of way. There was no discussion at this time that the right of way might be subject to being moved or was not where the driveway on the ground existed. Mr. Barry explained that the gate (an old cattle gate) that existed across his driveway on the Palmeter land was replaced by him with a steel gate. He spent almost every weekend in the summer season at the cottage property and always used the existing driveway to gain access to the property; at no time during his ownership did anyone suggest that the driveway was not his right of way. He did indicate that in the spring the driveway was so soggy at the bottom of the hill that vehicles would get stuck so he would not drive a vehicle over it during wet seasons.

[20] By warranty deed dated September 27, 2002, Patrick Barry and his wife conveyed the cottage property to the plaintiffs, Heather Jeanette Rand and Alan Jeffrey Deal. The description used was the description contained in the deed from the Norths to the Barrys.

[21] Wanda George is the daughter of Elliott and Katherine Palmeter and granddaughter of Robert Lee Palmeter. She grew on the Palmeter farm and moved away in 1965. Her husband died in 1985 so in 1987 she returned

with her four children to Medford and built a home on the Palmeter farm near the end of the Weaver Road.

[22] When Elliott Palmeter died in 1997, Katherine Palmeter promised the remaining lot (over which the North/Ashby driveways are situate) to her daughter. The lot was bounded on the north-east by the Ells property, on the south-east by the Ashby cottage property and the plaintiffs' cottage property, on the north-west by Cliffside Road, and on the north by the eastern end of Weaver Road. A survey plan of the lot is contained at Tab 22 of Exhibit 2.

[23] Wanda George accepted the lot for the purpose of building a cottage on it. She acknowledged that she had never thought about the status of the driveways to the Ashby and plaintiffs' cottages until environmental testing for the development permit for the cottage caused her to recognize that the driveways would have to be moved in order to obtain a development permit. Exhibit 4 was a plan showing the proposed development; it shows a twenty-foot-wide right of way along the north-east boundary of her lot from Weaver Road to the Ashby property and thence in a south-westerly direction along the Ashby lot to the plaintiffs' property.

[24] In the summer of 2003 Ms. George approached the Ashbys and the plaintiffs to obtain their consent to relocate their rights of way. Originally she

proposed two rights of way, the first along the Ells lot to access the Ashby lot and the second from the end of Weaver Road along Cliffside road and then entering the plaintiff's lot at its north-west corner (adjacent to the White cottage). The plaintiffs rejected this proposal because it would interfere with trees that formed part of the boundary line and would force constructing a driveway on marshy land. Ms. George then proposed that the Ashbys and the plaintiffs share a right of way to the Ashby property and then along it to the plaintiffs' property. The plaintiffs eventually advised Wanda George that they would not accept any relocation of their driveway.

[25] In or about October, 2003, Ms. George obtained a warranty deed to the property and constructed the road from the end of the Weaver Road along the Ells property to the Ashby property and then to the plaintiff's property; it is shown in several photographs attached as Tab 14 to Exhibit 2 and Tab 27 to Exhibit 1. The road constructed by Ms. George is impressive; it is wide and built on a solid foundation - the opposite of the two ruts that made up the existing narrow driveways. It appears to be an all season roadway.

[26] In the process of constructing the new road, Ms. George caused the gate that controlled access over the portion of the old driveway to the plaintiff's lot, and which was located on her land, to be removed and placed on the

plaintiffs' land, and she caused a large boulder to be placed on the plaintiff's old driveway that would interfere with vehicle access.

[27] Alan Deal, originally from Windsor, Nova Scotia but presently residing in Ontario, stated that the plaintiffs' interest in the North/Barry property came from the fact that Ms. Rand's parents owned one of the nearby cottages to the south. They had hoped to own the Rand cottage but decided to make a move when the Barry property became available with the present intent to use it as a summer cottage and a future intent to possibly construct a new cottage or residence.

[28] The cottage on the property was not in good repair and the prior owner had arranged for a new well to be drilled and a septic approval to be obtained for a new cottage further back (away the Basin) on the lot. Mr. Deal had constructed the new septic system for future development, but he had not settled on a particular plan or location for a new cottage as of the trial.

[29] At trial, Mr. Deal objected to the new road constructed by Ms. George for practical and aesthetic reasons. These reasons appear to be:

(a) the new road was, he said, "significantly longer than the old right of way";

(b) the road would require a sharp turn as it entered his lot that would cause him to use up some of his own land for turning;

(c) the road would give him access to his land very close to the septic system which might be endangered if heavy equipment were used in developing their property;

(d) finally, the aesthetics of his lot were adversely affected by the location of the new road which passed near the Ashby cottage.

First Issue Do the Plaintiff's have a right of way over the driveway that was used from the early 1960s until 2003?

[30] Beginning in 1952 Robert Lee Palmeter sold cottage lots on the Minas Basin without including a deeded right of way. The lots were land locked. The only access was across his remaining farm property. The first lot was sold in 1952 to Dr. Foley. He built a cottage on part of the lot and sold part to Glendon North (now part of the plaintiffs' property.)

[31] The access to the Foley lot, since at least the early 1960s, was the narrow driveway just wide enough for a car to pass and extending in an easterly direction for a distance of about 300' from the eastern end of the Weaver Road down over a hill to the west side of his lot.

[32] Glendon North used the same driveway to a point part way down the hill where his own driveway branched off to the right to the west bound of his lot.

[33] The cottages were seasonal and used primarily in the summer. The driveways were also seasonal. There were wet areas at the bottom of the hill where vehicles had got stuck when they tried to pass in the spring or during wet weather.

[34] I accept that these driveways were in fact used by the Foleys and the Norths in connection with their cottage properties from the early 1960s until the fall of 2003 when Wanda George constructed the new road to their lots.

[35] Katherine Palmeter, one of the defendants and the widow of Elliott Palmeter, testified with regard to the right of ways as follows:

> (a) Originally access to the Foley property was from the Sexton Road across lands now owned by Karnan Ells, but when the property was acquired by Ells this access was cut off and Dr. Foley just built the driveway where it existed until 2003 without, to her knowledge, asking for consent;
>
> (b) Originally access to the cottage lots to the south of Foley and North was from the "Lower Beach Road" but eventually this route was closed and access was by a private road (later called Cliffside Road) which ran from the end of the Weaver Road in a southerly direction and parallel with the Minas Basin;

(c) The Weaver Road was originally part of the Palmeter farm property before it became a public road and

(d) Most importantly, even though she was not actively involved in the sale of the cottage lots, she said that the rights of way "were never a problem" until 2003.

[36] The defendants submitted that the location of the driveway to the Foley and North lot was with the consent of Palmeter and therefore the dominant owners did not acquire a legal right to the driveway in the location where they were; in effect, they submit that while possession was open, notorious and continuous, it was not adverse.

[37] The defendants further submit that by reason of the inclusion of a right of way in the conveyance of lot "G" to Glendon North in 1979 -which conveyance stipulated an express right of way, that this described right of way constituted the legal right of way of the plaintiffs as of 1979.

[38] The description of the right of way contained in the 1979 deed was identical to the rights of way that were granted to the cottage owners to the south and clearly referred to the private road now known as Cliffside Road; however, lot "G" did not abut Cliffside Road and its closest point to Cliffside Road is 92' from it. There was no description in the deed setting out how Glendon North would gain access to lot "G" from the Cliffside Road, if the intent was

to give him a different right of way than the driveway being used since the early 1960s.

[39] The onus is on the defendant to give meaning to the right of way that they claim was granted (as an alternative to the existing driveway) by the 1979 deed. They were not able to do so. The deeded right of way makes no sense when one tries to relate the words used to what exists on the land.

[40] What the existence of the deeded right of way in the 1979 deed does establish is that, if Elliott Palmeter intended to replace the existing driveway with a new right of way by the 1979 deed, then the continued use of the existing driveway from 1979 until the fall of 2003 (a period of 24 years) certainly made the use of that driveway adverse to the servient owner - the Palmeters.

[41] Furthermore, the evidence of Donald Ashby that, when he approached Elliott Palmeter to purchase the land on which the driveway was situate, Elliott Palmeter declined to do so on the basis that moving Mr. North's right of way would upset him, supports the view that North's use of the driveway was not by consent.

[42] It is also significant that on the deed for lot "H" from Elliott Palmeter to the Ashbys, a right of way was granted using the following words: "together with right of way privileges for persons, animals and vehicles, in common

with all others having a like write [right] over an existing right of way leading to Weaver Road extension." The only "existing" driveway was the driveway shared by the Ashbys and Glendon North. A plain meaning of the words used by Elliott Palmeter in this deed are that the driveway was a right of way in common with others and the only "others", by the evidence before this Court, was Glendon North. It is an acknowledgement of the right of way in favour of Glendon North, the predecessor- in-title to the plaintiffs.

[43] There are two methods of establishing an easement by prescription: one is by the presumption of lost modern grant and the other results from the effects of the Limitation of Actions Act.

[44] The former is a fictional notion that a grant must have been given when enjoyment of an easement has been uninterrupted for a period of twenty years with the knowledge of the servient owner. The latter is a statutory injunction against stale and obsolete claims and operates in a negative manner. This is well established law and is reflected for example, by Roscoe J. (as she then was), in **MacIntyre v. Whalen and Kehoe** (1990) 97 N.S.R.(2d) 317.

[45] In this case, no right of way was expressly granted in the pre-1979 deeds; the rights of way were created by necessity.

[46] I find that the plaintiffs have established a prescriptive easement (a right of way of necessity) over the existing driveway from the east end of Weaver Road to their lot.

Second Issue Did the defendants have a legal or equitable right to relocate the driveway?

Factual Context

[47] In the summer of 2003 the defendant, Wanda George, developed a plan for the construction of a cottage on the lot over which the driveways to the Ashby cottage and the plaintiff's cottage ran. As a result of seeking approval for the development of her property, she learned that she could not build a residence on the lot without moving the rights of way.

[48] She therefore approached the Ashbys and the plaintiffs to request agreement to relocate their rights of way at her expense. After several meetings and some correspondence, the defendant, Wanda George, altered her proposal in an attempt to accommodate the concerns and objections of the plaintiffs. She went to the point of making undertakings as to the location and construction of the road, and preparing an draft agreement to construct the road to their satisfaction.

[49] In the end the plaintiffs refused to consent to a relocation of the right of way without giving any reason or specifying their objection.

[50] I have found that the new road built by the defendant on her own land and which, after construction was accepted by the Ashbys in exchange for a release of their existing right of way, is an improvement in the access to the plaintiffs' cottage property.

[51] Some of the particulars of this improvement (which are self evident from the photographs) include the fact that the roadway is built with a solid foundation to a high standard in contrast to the existing driveways that were simply two

ruts between grass; the roadway constructed by Mrs. George is 20' wide in contrast to the existing driveways which were approximately 8' wide. The new roadway appeared to be an all season road in contrast to the existing driveways which were seasonal in nature and not passable in the spring or wet seasons.

[52] With respect to the specific complaints made by Mr. Deal at trial, I find them to be exaggerated and somewhat artificial. His first complaint was that the defendant's roadway was "significantly longer" than the existing one. When scaled on the survey plan (Exhibit 2, Tab 22) it appears that the existing driveway from the end of the Weaver Road to the corner of lot "G" was about 225' and that the road built by the defendant to get to the same point is about 275'.

[53] Secondly, the plaintiff complained that the angle at which the defendants' road enters the plaintiffs' property and the fact that it had a turn in it would require him to use up some of his land as a turning lane. Mr. Deal acknowledged that the cottage on his lot was in poor condition and, while satisfactory for his present minimal use, would be replaced by a new structure set back on the lot (closer to the well and septic bed.) This evidence and a review of the photographs suggests that the angle of the driveway as constructed by the defendant would be incorporated into any future development of the plaintiffs' land without any loss or disadvantage.

[54] Thirdly, Mr. Deal suggested that the turn in the road would cause problems for heavy equipment that may have to get into and out of the lot in connection with any future development. He failed to recognize that the access road constructed by the defendant was 20' wide and built up and would probably make access by heavy equipment easier than over a narrower driveway down a hill with soft ground at the bottom.

[55] Finally, Mr. Deal stated that the defendants' driveway was not as aesthetically pleasing as the old one, primarily because it passed in front of the Ashby cottage. The photographs speak for themselves and negate this assertion. The Ashby cottage is visible both from the old and the new driveway and does not appear to be in poor condition or a distraction to the neighbourhood. Mr. Deal did not state that the whole neighbourhood consists of seasonal cottages built on 50' wide lots leaving little privacy.

[56] In summary, the roadway constructed by Ms. George is superior in quality and width to that which was used previously by the plaintiffs to gain access to their lot.

The Law

[57] The leading case in England is **Pearson v. Spencer** (1861) 121 E.R. 207 where the Exchequer Court held that a way of necessity, "once created, must remain the same way as long as it continues at all." The Chancery Division came to the same conclusion in **Deacon v. The South-Eastern Railway Company** (1889), 61 L.T.R. 377 where the court said (with respect to an express grant of a right of way):

> [1] In the present case it being conceded the defendants had the right to select the way, and it being clear they are the persons who did select it . . . it is clear . . . that it is not open to them when once it has been fixed and defined in that way to take it on themselves to change it and say that another way shall be substituted for it.

[58] The point was canvassed in Nova Scotia in the decision of Nathanson J. in **Wells v. Wells** (1994) 132 N.S.R.(2d) 388. The case involved a dispute between the plaintiff and the defendant over whether the plaintiff (the servient owner) could "alter, change the location of, or substitute a right of way of necessity which has been used by the owner of the dominant tenement openly, continuously and adversely for a period in excess of 40 years." The defendant's lot was landlocked, and it was established that the defendant had been using a driveway across the plaintiff's land for more than 40 years. There was a right-of-way of necessity. The plaintiff wanted to construct a new right-of-way (apparently in order to make his land easier to sell), and a potential buyer began construction of a new road, which the defendant refused to use, whereupon the plaintiff's sale to the third party fell through.

[59] Nathanson J. reviewed several cases - including **Deacon** - that were unhelpful on the facts; **Deacon,** for instance, dealt with "the entirely different fact situation of an express grant." He also discussed **Wynne v. Pope** (1960)3 S.A. 37 (Cape Provincial Division), the only authority provided by the plaintiff that was "clearly on point and established that the owner of the servient tenement had the right to relocate a right-of-way of necessity." He found the case "neither binding nor persuasive." It appeared to rely upon South African - rather than English or other Commonwealth - precedents, and may have arisen ultimately from Roman-Dutch law rather than the common law. On a close reading, he questioned whether the case even stood for the proposition for which it was cited.

[60] The apparent basis for the use of **Wynne** are the following passages:

> As I understand the law, a *via ex necessitate* can be claimed by an owner where it is necessary for him to have ingress or egress from his property by such a way in order to reach a public road. Such a servitude is created *simpliciter*, and could be altered by the owner of the servient tenement if he can afford to the owner of the dominant tenement another route as convenient as the old route. For the owner of the dominant tenement to be able to claim the right of *via ex necessitate* along a specific or defined route it would be necessary for such servitude to have been duly constituted, for example, by an order of Court, or by prescription, or by any form recognised by the law ....
>
> ... defendant is not claiming to have acquired a right to cross plaintiff's property by prescription, but she claims that by prescription she has acquired a right to do so along a particular route. Mere proof of the use of that route for thirty years does not establish that it has been used adversely to the plaintiff or that it has been used as of right. The use of that particular route did not arise from contract or in any other legally recognized manner. It was a *precarium* tacitly granted ... and was accordingly not exercised as of right by defendant or her predecessors in title. The plaintiff could at any time had put a stop to the use by defendant of that particular route provided he placed at her disposal an equally convenient route....

[61] Nathanson J. noted that in **Wynne** there was no proof of adverse use, and therefore "the owner of the servient tenement could at any time put a stop to the use of the particular way of necessity provided that he placed at her disposal an equally convenient route in order to service the continuing necessity" In the case before him, however, there was proof of a prescriptive right. He concluded, referring to **Pearson v. Spencer,** that "the plaintiff has no authority for his claim that he, as owner of the servient tenement, has the right to relocate the driveway and, therefore, to alter the right of way which the defendant acquired by prescription." He added that "the plaintiff has no right to alter the way of necessity which is vested in the defendant by prescription attained as a result of open, continuous and adverse usage for more than 40 years."

[62] Like the case law, the commentators are all but unanimous in the view that an easement of necessity, once established, cannot be relocated by the servient owner without the consent of the dominant owner. **Gale on Easements**, by J. Gaunt and P. Morgan, 17th Ed. (Sweet & Maxwell: London, 2002), states at

page 350 that once the servient owner has indicated where a right-of-way is located or the way has been defined by usage, "it cannot (except by agreement) be altered ." At page 150, the authors state:

> Where a way of necessity arises, whether in favour of the grantee of the enclosed land, or of the grantor retaining the enclosed lands, its line is to be chosen by the grantor; but it is for the person entitled to it to make it up. It has been said that the line, once established, cannot be altered by the servient owner.

[63] D. A. Stroud's **The Law of Easements** (Sweet & Maxwell: London, 1934) at page 170 states that "in the case of a way of necessity, whether impliedly granted or impliedly reserved, selection of a convenient way must be made by the former common owner. Once made, the selection cannot be altered, unless by consent." A similar assertion is found in J. L. Goddard's **A Treatise on the Law of Easements,** 8th ed. (Stevens and Sons: London, 1921). C. W. MacIntosh, in the **Nova Scotia Real Property Practice Manual** (Buttersworths:looseleaf), writes that a servient owner "cannot alter the location of or substitute another location for an existing way of necessity which has been used in excess of 40 years." MacIntosh relies upon **Wells v. Wells**.

[64] A leading Canadian text, Ziff's **Principles of Property Law** 3rd edition (Carswell, 2000), hints at a rule slightly more generous to the servient owner. Ziff states that "[w]hen the easement is one of strict necessity, it is the grantor who selects the access route, and this assignment will govern unless it is shown to be unreasonable, or it is changed afterwards by agreement [emphasis added]". Ziff cites **Wells**. The source for his comment about "reasonableness" may be **Noye v. Ocean Park Ltd** (1991) 97 Nfld. & P.E.I.R. 55, a Prince Edward Island decision cited in his footnotes. **Noye** involved a dispute as to the most "reasonable" location for a right-of-way created by an express grant. This would not change the general rule relating to rights-of-way of necessity. The case involved the most reasonable construction of an express grant, not the relocation of an existing right-of-way of necessity.

[65] In another case cited by Ziff, **Greenwich Healthcare National Health Service Trust v. London and Quadrant Housing Trust and Others** [1998] 3 All E.R. 437 (Ch.D.) at 442, the English Chancery Division affirmed the rule in **Deacon**. Unfortunately, due to the results on other issues, Lightman J. did not feel it necessary to address the argument that

> even if the servient owner has no right to realign, none the less such a realignment will not constitute an actionable interference with the easement if

> the realigned route is equally convenient, and that this is *a fortiori* in cases where no grounds exist for any reasonable objection to the realignment ....

Nevertheless, Justice Lightman expressed (in *obiter*)

> considerable sympathy for this submission. For insistence on an existing route may (as in the present case) frustrate a , or indeed any, beneficial development or use of the servient land, whilst protecting no corresponding advantage of, and conferring no corresponding advantage on, the dominant owner; and there is (unfortunately) no statutory equivalent in case of easements to the jurisdiction vested by statute in the Lands Tribunal in case of restrictive covenants to modify the covenant to enable servient land to be put to a proper use. There is something to be said for the approach that the test should be whether the dominant owner 'has really lost anything' by the alteration: ... On the other hand, it may be said that the dominant owner loses the property right to the easement over the original way....

[66] The solution proposed in **Greenwich Healthcare** resembles the rule in certain American jurisdictions that "the owner of a servient estate, upon a showing that the current location of the easement burdens the servient estate, [may] relocate the easement to a place where it would be equally beneficial to the owner of the dominant estate.", **The Right of Owners of Servient Estates to Relocate Easements Unilaterally**, (1996), 109 Harvard Law Review 1693 at 1695-1696. There is apparently a compromise approach taken by some American courts whereby the " courts state the traditional rule [i.e. the American rule corresponding to **Pearson**], but then refuse to require the owner of the servient estate to return the easement to its original location, and instead award the dominant estate nominal damages only." **supra**, at 1697.

[67] The American **Restatement of the Law (Third) of Property (Servitudes)** §4.8 (2000) advocates allowing the servient owner to unilaterally alter the location of an easement, provided that certain conditions exist:

> The rule stated in this section grants the servient owner the right to change the location or dimensions of an easement, at the servient owner's expense, if the changes do not significantly lessen the utility of the easement, increase the burdens on the holder of the easement benefit, or frustrate the purpose for which the easement was created.

> ...
>
> This rule is designed to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder. (**Restatement, supra**, §4.8 comment f.)

[68] The **Restatement** acknowledges that it is adopting a minority postion, but says that the traditional rule is based on mistakenly equating the vulnerabilities of the dominant and servient owners. The **Restatement** further says that the balancing factors, inherent in the rule, will serve to adequately protect the interest of the dominant owner.

[69] The New York Court of Appeal adopted this position in 1998, relying in part on an early draft of the **Restatement.** In **Lewis v. Young** (1998), 92 N.Y. 2D 443, 705 N.E.2d 649, 682 N.Y.S.2d 657 the dispute was over a driveway running through a lot that the defendants wished to develop. To this end, the defendant relocated the driveway, moving it 50 feet or less from the original location. The plaintiff opposed this relocation, and sought an injunction from the court to compel the defendant to return the driveway to its original location. Reversing the lower courts, the Court of Appeal dismissed the plaintiff's request for an injunction, concluding that "a balancing test is ... appropriate," (**Lewis v. Young, supra** at paragraph 4) and that the requirements detailed above were met.

[70] In **Macmeekin v. Low Income Housing Institute, Inc (LIHI)**,111 Wn.App. 188; 45 P.3d 570; 2002 Wash.App. LEXIS 612, a 2002 Washington Court of Appeal's decision, the court recognized the debate between those who adhere to the traditional approach and those who favour the "reform" or **Restatement** approach. The former approach favoured uniformity, stability, predictability and property rights. The latter favoured flexibility and better utilization of property. After recognizing that LIHI'S argument that prescriptive easements may be judicially altered where property conditions have changed so as to interfere with the enjoyment of the property interests as originally established, it felt constrained by dicta of the Supreme Court to follow the traditional rule.

[71] The traditional approach and the **Restatement** approach have been analyzed in at least two American law reviews:

1. **The Right of Owners of Servient Estates to Relocate Easements Unilaterally**, (1996), 109 Harvard Law Review 1693;

2. **Balancing the Equities: Is Missouri Law adopting a progressive rule for relocation of easements?** (1996) 61 Missouri Law Review 1039.

[72] In the Harvard Law Review Article, a comparison is made of the traditional versus the **Restatement** approach from three perspectives:

First, it concluded that, from the economic perspective, permitting unilateral action pursuant to the **restatement** approach would increase the costs of the bargaining process between the dominant and servient owner;

Second, it concluded that,from the property rights point of view, the law should favour the servient owner because the interest of dominant owners in the location of an easement is almost always an economic one, whereas the interest of the servient owner usually affects personal and other fundamental issues and more than simply economic issue; and

Thirdly, it concluded that, from the perspective of promoting social goals, the traditional rule forces the dominant and servient owners to recognize each other and develop their interdependence through negotiation.

[73] While favouring the traditional approach, the writers at page 1697 recognized the compromise or middle ground created by decisions such as **Umphres v. J. R. Mayer Enterprises , (**1994) 889 SW 2d 86 (Missouri Court of Appeal). That decision purported to recognize and comply with the traditional rule but, on the basis that the value of the dominant owners' property was not diminished by the relocation and the fact that the original easement imposed a substantial hardship on the servient owner, it refused the dominant's owner's request for an injunction and awarded only nominal damages.

[74] The Missouri Law Review article was a commentary on the **Umphres** decision. The writer gives reasoned support to the **Umphres** approach "if applied evenly and cautiously". The article differentiated between reasonable relocations and unreasonable relocations and the remedies that should flow from each. It seems to endorse a more flexible approach that recognizes equity in individual cases.

Conclusion

[75] This court finds itself in agreement with the equitable principles and approach applied in the **Umphres** case and explained in the Missouri Law Review. While it is arguable that it is unreasonable to permit a servient owner to unilaterally move a right of way of necessity, it is reasonable to give an adjudicator, such as a court, the authority to effect equity between dominant and servient owners.

[76] Unfortunately, like the Washington Court of Appeals in **Macmeekin v. LIHI**, I finds myself bound by **Pearson** and **Deacon** as previously applied in Nova Scotia in **Wells v. Wells.**

[77] The law of easements is founded on the common law. Legislation in modern society has had a tremendous effect upon traditional views of property law. Legislation is based on a public recognition of the communal interest in land, its use, and its development.

[78] The common law, when applied to prescriptive easements, can lead to substantial hardship to one party and no equivalent benefit or gain to the other. It has, in its favour, predictability and stability, but it can also lead to unfair results not contemplated at the time of their creation. This area of the law merits review.

[79] The facts of this case exemplifies the unfairness of the inflexible common law rule. The servient owner's land is effectively sterilized for development purposes by reason of the existence of a driveway running through it. The alternative roadway built by the servient owner for the dominant owner improves access to the dominant owners' property. The original driveway was built forty years ago when the land's appearance and occupancy was substantially different. The dominant owners bargaining position vis-a-vis the servient owner is, in the case at bar, inequitable.

[80] It is with reluctance that I dismiss the defendants request for equitable relief pursuant to s. 41 of the **Judicature Act.**

DAMAGES

[81] The plaintiffs claim damages for the interference with their right of way, including damages for trespass, emotional upset, special damages and general damages.

[82] The defendants' actions, which might constitute an actionable wrong, consist of placing a large rock in the plaintiffs' old driveway and

removing the steel gate that was placed across the right of way on the defendants' land by the plaintiffs' predecessor after 1997.

[83] The test of whether there has been an actionable disturbance of a right of way is stated in **West and Anor v. Sharp** (1999) E.W.C.A. Civ 1292 at p. 6, where Lord Justice Mummery of the Court of Appeal said:

> Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction

This statement of the law has been followed by the New Brunswick Court of Appeal in **Voye v. Hartley** (2002) NBCA 14.

[84] The defendant was not entitled to place the rock on the plaintiffs' driveway. No evidence was lead as to the cost of removal of the rock. I am prepared to allow the defendants to arrange for the removal of the rock they placed. If they do not do so within thirty days of this decision, the plaintiffs may do so and apply to the court for the reasonable costs of so doing.

[85] The plaintiffs' steel gate was placed on the defendants' land after 1997. There is no evidence that it was damaged, when it was removed by Ms. George and placed on the plaintiffs' land. I dismiss the claim for damages with respect to the moving/removing of the gate.

[86] There was no evidence of emotional upset as claimed in the statement of claim and I see no basis for awarding damages in respect thereof.

[87] Finally, the defendant, Wanda George, left the plaintiffs with better access to their lot than they had. I see no interference with the plaintiffs' ability to enjoy their property by reason of the placing of the stone in the middle of the old driveway.

[88] The claim for damages is dismissed.

<u>CLAIM AGAINST MS. KATHERINE PALMETER</u>

[89] The Originating Notice (Action) was commenced against Wanda George and her mother Katherine Palmeter.

[90] The evidence showed that Ms. Palmeter gave the lot to her daughter after Elliott Palmeter's death in 1997. A warranty deed carrying out the transfer was executed and delivered on Oct 9, 2003 (Exhibit 1, Tab 26).

[91] There was no evidence of any interference by Ms. Palmeter with the defendants' right of way at any time and the construction of the new roadway was carried out by Ms. George in October 2003 after the conveyance to her.

[92] There is no basis in law for any claim against Ms. Palmeter and the claim is dismissed.

COSTS

[93] **Civil Procedure Rule** 63.02 states that costs are in the discretion of the court.

[94] Mark M. Orkin in **The Law of Costs, 2nd Ed.** (2001) writes that a successful party is entitled to its costs except for good cause. He states that good cause includes not only oppression or misconduct by the successful party but also anything which would make it just and reasonable that he or she be deprived of costs.

[95] In this case, the defendant put forward a reasonable proposal and attempted to accommodate the plaintiffs. She made adjustments to her proposed right of way and offered in writing to build it "in a manner that is satisfactory" to them and forwarded a draft agreement containing the commitment she was prepared to make before asking for a release of the old right of way. The plaintiffs ultimately replied with a one sentence letter refusing to consent without reasons. The plaintiffs' reasons for objecting to the relocation, given at trial, were exaggerated and unreasonable. While the plaintiffs were, in law, entitled to refuse, their refusal was unfair and unneighbourly. They may have been taking advantage of a superior bargaining position. If this court did not feel bound by precedent, it would have decided for the defendant. For these reasons, the court awards no costs.

Gregory M. Warner, J.