SUPREME COURT OF NOVA SCOTIA
Citation: *Laamanen v. Cleary*, 2017 NSSC 55

Date: 20170308
Docket: Hfx No. 447470
Registry: Halifax

Between:

Neil Carl Laamanen, Crystalle Lynne Laamanen

Applicants

v.

Roy Francis Cleary, Gertrude Thelma Cleary, Suzanne Cleary

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Ann E. Smith
Heard:	January 3, 4, 5; 9, 2017, in Halifax, Nova Scotia
Written Decision:	March 8, 2017
Subject:	Real property law; easements; right of way; ancillary rights; overburden; substantial interference
Summary:	The applicants have right of ways over the respondents' properties, including a right of way over a private road known as General M Drive. The applicants seek a declaration that they can re-route and widen the roadway, create associated ditches, and remove fences placed by the respondents. They also seek an injunction preventing the respondents from interfering with their use of the right of ways. The respondents seek damages for damage caused by Neil Laamanen to their property during snow removal and general damages against Mr. Laamanen for intentionally blocking their driveway and barn with snow. They also seek an injunction ordering the applicants to cease plowing snow on the right of ways in such a way as to cause damage to the

respondents' property.

Issues:

(1) What is the scope of the applicants' right of ways?

(2) Are the proposed upgrades to General M Drive reasonable?

(3) Was the fence placed by the respondents a substantial interference with the applicants' use of the right of ways?

(4) Will the applicants' proposed commercial use of the roadway overburden it?

(5) Did the applicants commit acts of nuisance and trespass entitling the respondents to damages?

Result:

The grant of the right of ways showed a clear and unambiguous intention to convey a 66-foot unrestricted right of way over General M Drive, and an 86-foot right of way over the lands of the respondent Suzanne Cleary. The proposed upgrades to General M Drive were reasonable. The fence erected by the respondents substantially and unreasonably interfered with the applicants' use of the right of ways. Neither the language of the grant, nor the surrounding circumstances, suggested that the 66-foot right of way was intended to be used for residential purposes only. However, it was inadvisable to determine whether the applicants' proposed use of the right of way would overburden it without evidence of that use. The respondents were not entitled to damages.

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Counsel:	Alex Embree, for the Applicants Jonathan Hooper, for the Defendants

By the Court:

Introduction

[1] This is an Application in Court brought by Neil and Crystalle Laamanen against Roy and Gertrude Cleary (the "Clearys") and their daughter, Suzanne Cleary. The application seeks an order enforcing the terms of a right of way over an approved private road, 66 feet wide, known as General M Drive. The Laamanens' property, Lot 5, is a dominant tenement. The servient tenement upon which the approved private road is located, is the land of the respondents, Roy and Gertrude Cleary. There is also a dispute over the extent of Lot 5's rights over an 86-foot wide right of way known as Parcel 4E, which is a portion of Lot 4, the lands of the respondent, Suzanne Cleary.

[2] The Laamanens seek a declaration that within the approved private road, General M Drive, they can make changes to the roadway including centering a gravel driveway, widening the gravel driveway to two lanes and creating associated ditches. They also seek an order that fences owned by Roy and Gertrude Cleary located in the private road be removed.

[3] The Laamanens further seek a declaration that within Parcel 4E, they can re route a portion of the driveway over the far western side of Parcel 4E.

[4] Roy and Gertrude Cleary filed a Notice of Respondents' Claim on February 12, 2016 suing the Laamanens for damage allegedly caused by the Laamanens' snow clearing on General M Drive, damage to their lawn caused by the Laamanens' snow clearing and damage to their horse pasture by the Laamanens driving a tractor on it. They seek an injunction ordering the Laamanens to cease plowing snow on General M Drive and the right of way in such a way as to be a nuisance and trespass causing damage to their property.

[5] In addition, Roy and Gertrude Cleary seek general damages for the actions of Neil Laamanen who they say used a tractor to plow and remove snow to intentionally block their driveway and access to their barn late at night and shortly after the Clearys had cleared snow from those areas, requiring them to re clear the snow late at night. They claim damages of $1.00 to their horse pasture and front lawn which they say resulted from the actions of Neil Laamanen.

[6] The hearing of the application took place over four days commencing on January 3, 2017.

[7] In support of their request, the applicants filed the following affidavits:

1. The Affidavit of Glenn Myra, sworn May 5, 2016
2. Rebuttal Affidavit of Glenn Myra, sworn June 15, 2016
3. The Affidavit of Mary Beth Tucker, sworn May 5, 2016
4. Supplementary Affidavit of Mary Beth Tucker, sworn June 17, 2016
5. The Affidavit of Crystalle Lynne Laamanen, sworn May 5, 2016
6. Rebuttal Affidavit of Crystalle Lynne Laamanen, sworn June 17, 2016
7. The Affidavit of Neil Carl Laamanen, sworn May 6, 2016 (#1)
8. The Affidavit of Neil Carl Laamanen, sworn May 6, 2016
9. Rebuttal Affidavit of Neil Carl Laamanen, sworn June 17, 2016
10. The Affidavit of Neil Carl Laamanen, sworn November 9, 2016
11. The Affidavit of Rodney Eric Robert Snow, sworn June 15, 2016

[8] The respondents filed the following affidavits in support of their requests:

1. The Affidavit of Roy Francis Cleary, sworn May 27, 2016
2. The Response Affidavit of Roy Francis Cleary, sworn June 29, 2016
3. Rebuttal Affidavit of Gertrude Thelma Cleary, sworn June 29, 2016
4. The Affidavit of Gertrude Thelma Cleary, sworn December 13, 2016
5. The Affidavit of Suzanne Cleary, sworn May 26, 2016
6. Rebuttal Affidavit of Suzanne Cleary, sworn June 29, 2016
7. The Affidavit of Colleen Patricia Clarke, sworn May 20, 2016
8. The Amended Affidavit of Colleen Patricia Clarke, sworn June 1, 2016
9. The Rebuttal Affidavit of Colleen Patricia Clarke, sworn June 28, 2016
10. The Affidavit of Anthony James Sullivan, sworn May 27, 2016
11. Rebuttal Affidavit of Anthony James Sullivan, sworn June 29, 2016

12. The Affidavit of John Douglas (JD) Clarke, sworn June 29, 2016
13. The Affidavit of Alan Stephen Paul Carragher, sworn May 25, 2016
14. Rebuttal Affidavit of Alan Stephen Paul Carragher, sworn June 29, 2016

[9] At the hearing of the application, the deponents who were cross-examined on their affidavits were Roy Cleary, Gertrude Cleary, Colleen Clarke, Glenn Myra, Suzanne Cleary, JD Clarke and Anthony James Sullivan.

[10] Mr. Myra was qualified as a Nova Scotia land surveyor entitled to give opinion evidence with respect to land surveying.

Issues

[11] The issues are as follows:

1. What is the Location and Scope of the Laamanens Right of Ways?
   (a) The Location and Width of the Right of Ways
   (b) The Scope of the Right of Ways
2. Are the proposed changes to General M Drive and Lot 4E Reasonable?
3. Was the fence placed around the Laamanens' Peninsula a substantial interference with the Laamanens' right of way to Lot 5;
4. Will the Laamanens' Proposed Use of the Right of Way Over General M Drive overburden the right of way?
5. Did the Laamanens commit acts of nuisance and trespass entitling the Clearys to damages?

Background

The Clearys Acquire the Farm and Subdivide It for Their Daughters

[12] Roy and Gertrude Cleary (the "Clearys") purchased the property known as 71 Old Truro Road in Elmsdale, Nova Scotia ("the Farm") in 1987. The Farm included a barn, a riding ring, horse paddocks and a fenced pasture. This suited Gertrude Cleary who wished to pursue a lifelong ambition of owning a stable and teaching children about horses and how to ride.

[13] At the time the Clearys purchased the Farm, Gertrude Cleary was working at Oceanview Manor in Eastern Passage. She retired from that position in 1992. After she retired, she gave more riding lessons and eventually started year-round teaching.

(a) The 1993 Subdivision

[14] The Clearys decided to give each of their four daughters a lot on the Farm. In order to do so, they subdivided the Farm twice, the first time in 1993 and the second time in 2002.

[15] In 1993, a Plan of Subdivision showing Lot 3 of the lands of Roy Francis Cleary and Gertrude Thelma Cleary was filed with the Registry of Deeds. The plan shows that not only was Lot 1 subdivided, creating Lot 3, but a private road was created known as General M Drive. The 1993 subdivision notes "future development" of a Lot 4 and a Lot 5 extending the private road further south.

[16] In 1994 Denise Cleary became the first Cleary daughter to be deeded a lot by her parents. Lot 3 was deeded to Denise and her husband Tony Sullivan.

(b) The 2002 Subdivision

[17] Between 2003 and 2004 the remaining Cleary daughters, Dawn, Colleen and Suzanne and/or their spouses were deeded lots on the remainder of the Farm by the Clearys.

[18] In 2001 the Clearys, with their former son-in-law Stephen Fiefield, applied to the Halifax Regional Municipality for a subdivision to create new lots - lots 4, 5 and 6. At that time General M Drive was an approved private road up to the southern end of Lot 3.

[19] In 2002 Glen Myra was contacted by Stephen Fiefield with a request to subdivide three lots. Mr. Myra prepared a Plan of Subdivision dated March 22, 2002 which was approved by HRM and registered (the "2002 Plan of Subdivision"). Mr. Myra was subsequently asked by a lawyer to draft legal descriptions of Lots 4 and 5. Mr. Myra testified that he likely also prepared the legal description for Lot 6.

[20] The notes on the 2002 Plan of Subdivision refer to two "unrestricted" right of ways, and state as follows:

> Notes:
>
> Lots 4, 5 and 6 are to be deeded an unrestricted right of way across the private road denoted on this plan as General M Drive.
>
> Lot 5 is to be deeded an unrestricted right of way across Lot 4.

[21] Each of the legal descriptions used for the right of ways over General M Drive refer to the 2002 Plan of Subdivision.

[22] Mr. Myra's evidence was that these notes were essential to get HRM approval for Lots 4, 5 and 6. His evidence was that "if they were not there, indicating unrestricted access, then HRM would not have granted approval to the subdivision."

[23] Mr. Myra said that the 1993 private road (General M Drive) was 66 feet wide. He said that that was the minimum width required for an approved private road in a subdivision, both in 1993 and 2002. Mr. Myra noted what he called an important distinction between a private road and "just a right of way." His evidence was that an approved private road allows properties to be subdivided. "In other words, a subdivision in 2002 would not have been approved by HRM just on a right of way, it would have had to have been done on an approved private road or public road."

[24] Mr. Myra's evidence was that he considered different options in terms of the 2002 subdivision. The first option was to extend General M Drive south of Lot 3 so that the new lots, Lot 4 and 5 would have at least 90 feet of frontage on that road. The 90-foot frontage was required for subdivision approval. Mr. Myra considered option one to be problematic because at the time HRM required private roads to have engineering drawings and center line plans, adding to the expense of the subdivision.

[25] The second option Mr. Myra considered was to configure Lot 4 so as to get the 90 feet required frontage on General M Drive by extending it west over what had been planned to be the extended General M Drive, so that Lot 4 would have 66 feet of frontage on the southern end of General M Drive plus 24 feet of frontage wrapped around to the west side of General M Drive.

[26] Mr. Myra's final option, and the option which was subsequently approved by HRM, was to configure Lot 4 as he did in his second option and to configure Lot 5 by creating a 90-foot frontage west of Lot 3 connected to Lot 5 by a 20-foot wide strip of land on the western boundary of Lot 5. The configuration of Lot 5 ended up involving the creation of what the parties called a "Peninsula" with the "flag" end of the Peninsula being west of Lot 3 and approximately 40 feet wide and the narrow 20-foot wide strip of land connecting the Peninsula to the rest of Lot 5 being called the "Isthmus." Lots 4 and 5 also required right of ways.

[27] On June 20, 2002, the Clearys deeded Lot 6 to their daughter Colleen and her husband John Douglas (JD) Clarke. The parcel description refers to the 2002 Subdivision Plan and "unrestricted use" of General M Drive.

[28] By deed registered on May 27, 2003, the Clearys granted Lot 4 to their daughter Suzanne Cleary and her partner Christopher Williams. As with their deed for Lot 6, the parcel description (Schedule A), referred to the 2002 Plan of Subdivision.

[29] By deed registered on August 17, 2004, the Clearys granted Lot 5 to John Whitehead (the then partner of the Clearys' daughter Dawn Cleary). Like the deed to Lot 6, the deed refers to the 2002 Plan of Subdivision. "Schedule A" includes:

> a. The deed's "preamble" refers to the 2002 plan of subdivision:
>
> ALL and singular that certain lot, piece, parcel or tract situate, lying and being on the west side of General M Drive, Elmsdale, Halifax County, Nova Scotia and shown as Lot 5 on the plan of survey of Lots 4, 5 and 6, the subdivision of lands of Ray Francis Cleary and Gertrude Thelma Cleary, dated March 22, 2002, by G. R. Myra, Nova Scotia Land Surveyor and which Lot 5 may be more particularly described as follows:
>
> b. General M Drive (Private Road) is referred to:
>
> BEGINNING at the intersection of the west boundary of General M Drive (Private Road) and the east boundary of the remainder of Lot 1, Douglas & Barbara Walsh Subdivision;

> c. Unrestricted 66-foot right of way over Lot 1, the lands of the respondents Roy and Gertrude Cleary, this being "shown as General M Drive on the plan":
>
> ALSO the unrestricted right of the grantee, his heirs, assigns and agents of ingress and egress over, along and upon the sixty six foot (66) right of way extending from the southeast boundary of the Old Post Road across the remainder of Lot 1, Douglas & Barbara Walsh Subdivision in which sixty-six foot (66) right of way is shown as General M Drive on the plan referred to in the preamble;
>
> d. Unrestricted 86 foot right of way over "Lot 4", now the lands of the respondent Suzanne Cleary:
>
> ALSO an eighty-six foot (86) right of way lying parallel and adjacent to the southwest boundary of Lot 4, Roy and Gertrude Cleary Subdivision and which right of way extends from the east boundary of the remainder of Lot 1, Douglas & Barbara Walsh Subdivision, across the aforesaid Lot 4, at the northwest boundary of Lot 5, Roy and Gertrude Cleary Subdivision. (emphasis added)

The Travelled Portion of the Roadway on General M Drive

[30] I reviewed many photographs of the gravel roadway, fences, horse paddocks, pastures and other features along General M Drive. I viewed a drone video showing General M Drive and the Lots which abut it. I conclude that the travelled roadway is very narrow in spots and that at the narrowest point in the roadway two cars have difficulty passing each other. I accept that this is worse in winter when the roadway is narrowed by snow. In addition, the narrowness of the road is exacerbated because at certain points there are fences very near the roadway which make it difficult for snow to be removed from the road.

[31] Mr. Myra's evidence was that the travelled roadway along General M Drive varies in width, but is generally12-13 feet wide. The 2002 Subdivision Plan shows a "12 foot roadway" in the area of the "private road."

[32] When the Clearys deeded Lot 5 to John Whitehead, their deed contained no words of restriction limiting the right of way to a "12 foot roadway." Rather, the grant states that the 66 foot right of way is "unrestricted." As will be seen, the same description is found in the deed from John Whitehead to the Laamanens.

The Laamanens Acquire Lot 5 from John Whitehead

[33] In 2010 the Laamanens were each working in the Northwest Territories as aerospace technicians. They decided to move to Nova Scotia so that Neil could go to university. Crystalle obtained work as an instructor at the Nova Scotia

Community College and Neil applied and was accepted to Dalhousie University's engineering program. The Laamanens looked for rural properties near Halifax. They were looking for properties that had a large garage, as the plan was for Neil to open a business dealing with parts for the aerospace industry. They wanted to be able to commute from the property to the Community College and Dalhousie University. Crystalle's evidence was that they retained a real estate agent and looked at a few properties including Lot 5. Crystalle's email exchanges with the real estate agent show that she raised questions with the realtor about access to Lot 5.

[34] Crystalle Laamanen's evidence was that it was very important for her and Neil to have all the information about Lot 5's access to the public road. The realtor emailed her a copy of the property on-line parcel registry which showed that Lot 5 had deeded access to the public highway. After reviewing the 2002 Subdivision Plan and the parcel description, the Laamanens concluded that Lot 5 had direct access via the flag-shaped part of Lot 5 to the unrestricted 66-foot right of way marked as General M Drive (private road) over Lot 5 and an 86-foot wide right of way over Lot 4, known as Lot 4E.

[35] Prior to purchasing Lot 5, the Laamanens obtained legal advice on the purchase. Crystalle Laamanen's May 5, 2016 Affidavit provides as follows:

> Finding out that we had a sixty-six foot (66') right of way and an eighty-six foot (86') right of way was important to me and Neil. When I first went to the property earlier that month of January 2010, and, had seen that the roadway was quite narrow, (approximately one lane wide). I was concerned about Neil's ability to have a business in the garage. However, with the two rights of way:
>
> a. We would widen the roadway should we want in the future, and,
>
> b. We could re-route the roadway so that we could go through the "flag" part of our lot that directly abutted sixty-six foot (66?) right of way, marked as the "Private Road" on the March 22, 2002 Subdivision Plan.
>
> Regarding re-routing the road-way to the "flag-shaped" part of our lot, we planned that if we purchased the lot, we would re-route our driveway to the west side of our property to follow our flag lot once money and time permitted.

[36] The Laamanens decided to purchase Lot 5 with this information in hand. They received the deed from John Whitehouse dated May 18, 2010, and registered the deed on May 28, 2010.

[37] The Laamanens moved into their house on Lot 5 in the fall of 2010. Their evidence was that the moving company was unable to get the moving truck from Old Truro Road into General M Drive. The Laamanens rented an off-road forklift and carried their belongings from the public road down General M Drive using the forklift with the help of friends.

June, 2015 - December, 2015 Blocking and Unblocking of the Peninsula

[38] In June 2015 Colleen and JD Clarke installed posts around the Peninsula. They did so at the direction of the Clearys. By June 30, 2015 the Peninsula was surrounded with an electric fence. The Clearys' back horse pasture surrounded the Peninsula on three sides. The Clearys installed the fence without the consent of the Laamanens. They said that they did so to keep horses from wandering onto the Peninsula. There had been an incident approximately 11 months before when Colleen Cleary's horse, Tate, became sick. Colleen feared that the horse had eaten something on the Peninsula which had caused the illness. She said that she did not allow her horses into the back pasture after Tate's illness.

[39] In the fall of 2011 the Laamanens purchased a small tractor. I accept the Laamanens' evidence that they spoke to Colleen Cleary about accessing the Peninsula through a gate in the wooden fence within the right of way. Colleen Cleary did not object and the Laamanens drove the tractor through the gate in front of Lot 3. Shortly thereafter, the gate was rebuilt. It became too narrow for the Laamanens to use to access the Peninsula. I also accept that Mr. Laamanen spoke with JD Clarke (Lot 6 owner) who suggested that Mr. Laamanen take down a few rails to get through a wider spot between the fence post. Mr. Laamanen did so.

[40] After the electric fence was installed, Roy and Gertrude Cleary placed a "No Trespassing" sign on the area of the wooden fence which the Laamanens had formerly used to access the Peninsula. It is noted that this fence falls within the 66-foot right of way.

[41] The electric fence blocked the Laamanens' access to the Peninsula from General M Drive. The fence also blocked the Laamanens' access to the Peninsula from Lot 4E (86 foot right of way). Certain equipment and materials that the Laamanens had placed on the Peninsula were trapped. They had hoped to use the material for landscaping purposes during the summer months because in the fall

Mr. Laamanen would return to university and his time for such work would be limited.

[42] In December 2015 Roy and Gertrude Cleary removed the electric fencing and wooden fencing between the east side of the Peninsula and General M Drive. However, they ran the fence off the north boundary of the Peninsula towards a fence within General M Drive. This had the effect of blocking the Laamanens' path into the Peninsula because directly east of the Peninsula is a ditch. The Laamanens could not negotiate their tractor through the ditch and onto the Peninsula.

Issues with Snow Removal

[43] After purchasing a tractor in the fall of 2011, Neil Laamanen started sharing snow removal work on General M Drive with other residents, primarily Tony Sullivan and JD Clarke. Tony Sullivan used an older, but larger tractor owned by the Clearys. By the winter of 2015 the older tractor had deteriorated to the point that it was no longer being used for snow removal on General M Drive. Sometimes JD Clarke or Tony Sullivan borrowed a neighbour's truck and plow to help clear the roadway of snow.

[44] Snow removal was difficult given that the gravel travelled roadway was narrow - only 12 feet wide at points, and given that there were fences within the private road, in some places on either side of the roadway.

[45] Snow removal became a major issue during the winter of 2015/2016. Roy Cleary claimed that when Neil Laamanen plowed snow, he blocked the pathways to the horse paddocks, manure pile and barn entrances and plowed snow on the electric fence of one of the horse paddocks. His evidence was that he didn't initially say anything to Neil Laamanen because he didn't want to discourage his help with snow plowing. Mr. Laamanen's evidence was that he did not block the barn entrances, although there might have been a small amount of spill from the side of the bucket on his tractor. The bucket on the tractor could not push snow sideways. His evidence was that he did not plow across the path to the manure pile, which would mean driving behind the barn, well into Roy and Gertrude's land, outside of General M Drive. Mr. Laamanen did pile snow adjacent to the electric fence, but he tried to avoid the fence.

The Myra Site Plan of General M Drive and Parcel 4E - July, 2015

[46] In the summer of 2015, Mr. Myra was contacted by the Laamanens and asked to survey the Peninsula and mark out the approved private road. Mr. Myra's May 5, 2016 Affidavit describes what happened when he attended the Laamanens' property on July 7, 2015.

> I went to the property on July 7, 2015.
>
> I parked at the Laamanens' driveway, by their house, and I started to walk the lines, using GPS. I had my helper, Jason Roberts with me. The Laamanens were not with me.
>
> When I was on General M Drive, I saw a woman at one of the houses, on her deck, filming me. I do not recall which house, but it was likely at Lot 6 or Lot 3.
>
> I kept working. I was placing wooden stakes on the boundaries of the approved private road.
>
> These were placed about 50 feet apart by me and Jason Roberts. They were wooden stakes, painted red. They are 30 inch long wooden stakes. They were hammered in, and, they protrude from the ground, about 24 inches.
>
> Many of the stakes Jason and I hammered into the ground, were inside fences. Some (sic) the fences were electrified, so we went through gates where there were gates, or underneath them.
>
> Shortly afterwards Gertrude Cleary came on to the approved private road.
>
> Gertrude Cleary appeared agitated, emotionally and physically. She appeared to me to be on the verge of tears.
>
> I identified myself as Glenn Myra, and, that I was a land surveyor. I likely gave her my card, and showed my Nova Scotia Land Surveyors' (NSLS) identification card. This is my general practice, but I have not specific memory if I did it then.
>
> I told her that I was marking the boundary of the approved private road (or I may have said simply "private road"). Gertrude Cleary said she did not want the boundaries marked out on "our" land.
>
> As Gertrude and I were talking, the woman who had been filming me came over. From my observation she was a daughter of Gertrude Cleary. She referred to "my parents" when she spoke of Gertrude Cleary and the land.
>
> The daughter said, in reference to the boundaries of the approved private road being marked, that she did not want it either.
>
> I informed them, that the Laamanens wanted it marked out.
>
> The daughter again said, but "I" do not want it.
>
> I said it did not matter, as the Laamanens wanted it.
>
> Gertrude Cleary and the daughter asked me what the wooden stakes represented.

> I said the wooden stakes represented the boundaries of the approved private road.
>
> They said that the "right of way" was confined to the driveway itself.
>
> I said that it is a legal matter, and, contact your daughter and follow the lawyer's advice.
>
> I did not want to get into an argument with them about the difference between the approved private road, which was 66 feet wide, and the actual travelled way, which was a gravel driveway, approximately 12 feet wide.
>
> Gertrude Cleary said that the stakes inside the horse paddock were not liable to last, because of the horses.
>
> Gertrude Cleary asked me to leave.
>
> I told her I could not do that.
>
> Gertrude Cleary returned to her house, and, I do not remember where the daughter went, but she left as well.
>
> Jason and I kept on placing stakes.
>
> A few minutes later, no (sic) long, Roy Cleary came out of his house, just himself.
>
> From my observations, Roy Cleary's demeanour was agitated.
>
> Roy Cleary asked me to leave the property.
>
> I told him I could not do that until I was finished.
>
> Roy Cleary said he would call the police.
>
> I said I would be more than glad to speak to the police.
>
> I said to him that he may not want to call the police, as it is an offence to inhibit a land surveyor.
>
> I do not recall Roy Cleary saying anything in response.
>
> Roy Cleary returned to his house.
>
> Gertrude Cleary came out, and, apologized for interfering with me and asking me to leave.
>
> Then Gertrude Cleary proceeded to engage in a litany of her complaints about the Laamanens.

[47] Mr. Myra returned to the site on July 17, 2015 to locate all the encroachments, which he noted as fences, a horse paddock and "anything in the area of the approved private road for the purposes of making a plan." Gertrude Cleary spoke to him. She told him that the right of way "was confined to the gravel driveway." Mr. Myra subsequently produced a plan showing the boundary of the approved private road, and the encroachments within it (the "2015 Site Plan").

[48] The evidence is undisputed that Roy and Gertrude Cleary's two horse paddocks on the northeastern part of their property fall directly within the 66-foot wide unrestricted right of way.

ISSUE 1:

What is the Location and Scope of the Laamanens' Right of Ways

(a) The Location and Width of the Right of Ways

[49] I note at the outset that with an easement, the owner of the servient tenement still has legal title to the property. The owner is entitled to use their property provided this does not undermine the rights of the holder of the easement. As such, there has to be some balancing of the respective interests of the parties in their use of this common area.

[50] Unfortunately, by 2015 the Laamanens and the Clearys were no longer amicably able to exercise their respective rights over the roadway. This was caused in part because of the narrowness of the travelled roadway and exacerbated by snowfall and fences along both sides at various points. The Clearys had blocked the Laamanens' access to the Peninsula for six months (between July and December, 2015).

(a) The Scope of the Right of Ways

[51] I now look to the deeds conveying the right of ways to the Laamanens in order to determine their scope. In *Knock v. Fouillard* 2007 NSCA 27, Fichaud J.A. held that the Court's first task when interpreting a conveyance is to determine whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes, motives or recollections (para 27).

[52] Fichaud J.A. stated:

> Third, the court's first task is to determine whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes, motives or recollections. The primary source is the document, not the psyche. *Fridman*, p. 15 states:
>
> > Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such

> contract. The law is concerned not with the parties' intentions but with their manifested intentions…
>
> Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed and if so, upon what. This is especially true where a document containing their agreement has been prepared and signed by the parties. If the plain meaning of the document reveals a clear and unambiguous intent, it is not necessary to go further.
>
> In the process of interpretation, a court may not utilize the parties' subjective wishes, motives or intent to alter the unambiguous and objectively intent in the deed's wording. *Fridman*, at pp. 443-4 and cases cited; *Hawrish v. Bank of Montreal*, [1960] S.C.R. 515 (S.C.C.) at p. 518-520; *Bauer v. Bank of Montreal* (1980), 110 D.L.R. (3d) 424 (S.C.C.) at p. 432; *Anger and Honsberger* 17:20.20(a) quoted below at 60. (emphasis added)

[53] On the face of the deed the Laamanens received from John Whitehead there is clearly a manifest intention to convey to the Laamanens: (a) an unrestricted sixty six foot (66') wide right of way over General M Drive; and (b) an eighty-six foot (86') wide right of way, known as parcel 4E, being a portion of the lands of Suzanne Cleary. There is nothing ambiguous about the width or location of the right of ways deeded to the Laamanens. The purpose of the right of way over General M Drive is for "ingress and egress." The purpose of the right of way over Lot 4 is for access to Lot 5. The 2015 Site Plan prepared by Mr. Myra shows the location of the right of ways and his evidence in that respect was not disputed.

[54] Roy and Gertrude Cleary acknowledge that the Laamanens were deeded a 66-foot right of way over General M Drive. Their argument is that the terms of the grant do not permit the Laamanens to build the proposed new roadway and its shoulders and ditches. They say that the Laamanens cannot use the 66-foot unrestricted right of way over General M Drive in a manner that is unreasonable; i.e., that interferes with their horse pastures, the location of their fences and their movement and pasturing of horses as part of their farm, Maple Oaks Farms. The Clearys say that the Laamanens' right of way is for ingress and egress and that the current travelled roadway is sufficient for that purpose. They argue that the width of the proposed new road and ditches would reduce the size of their horse pastures substantially and that the proposed change in route of the road would go through two horse paddocks, bleachers and the regular parking spot of a horse trailer. In sum, the Clearys say that there is nothing in the current right of way that is obstructing or substantially interfering with the Laamanens' ability to ingress and

egress their property and that the Court should not allow the Laamanens to widen and improve the road.

[55] Suzanne Cleary says that the Laamanens' re-routing of the 86-foot right of way will result in the destruction of maple trees on Lot 4E which she taps for maple syrup.

[56] The Clearys in essence want the Court to rewrite the legal description to the Laamanens' deed to modify the wording of the right of ways from a 66-foot width and an 86-foot width right of way to read, "the current 12 foot graveled roadway" on General M Drive and "86 feet less any portion on which Suzanne Cleary harvests maple syrup from maple trees."

[57] The Clearys may well have intended that the roadway over General M Drive be a small one. They may have agreed to the 66-foot wide right of way and the creation of a private road only in order that they could obtain subdivision approval in 1993. The 2002 Subdivision Plan with the creation of the 86-foot easement might have been effected for the sole purpose to obtain subdivision approval so that lots could be deeded to their daughters. All that may be true. However, those subjective intentions are not relevant to the Court's interpretation of the right of ways because the language of the grants is clear and unambiguous as to location and scope.

[58] The fact of the matter is that the Clearys could not, even if they had wanted to, restrict the grant of the right of way to Lot 5 over General M Drive to 12 feet, based on the applicable subdivision by laws.

[59] The grant of the right of ways to the Laamanens by deed shows a clear and unambiguous intent to convey a 66-foot "unrestricted" right of way over General M Drive and an 86-foot right of way, being Lot 4E, over the lands of Suzanne Cleary.

[60] LeBlanc, J. in *Jerome v. Akers*, 2013 NSSC 154 notes that a relevant principle on interpreting grants is that "it is appropriate to consider any plan reference as part of the grant." Reference to the 1993 Subdivision Plan and the 2002 Subdivision Plan is relevant.

[61] The Laamanens' right to use their right of ways cannot be merely theoretical. In *Smith v. Morris* (1935) O.R. 260 (C.A.), the Court of Appeal noted at para. 12:

> While the burden imposed on the servient tenement is not to be increased by the action of the owner of the dominant tenement, regard must be had to the fact that the predominant idea is that the dominant tenement shall really enjoy the easement granted not as a mere theoretical right on paper, but by a real physical enjoyment of the right conferred. (emphasis added)

[62] The Laamanens are entitled to receive what they bargained for when they received their deed to Lot 5, i.e. an unrestricted 66-foot wide right of way over General M Drive and an 86-foot right of way over Lot 4.

ISSUE 2:

Are the proposed changes to General M Drive and Lot 4E Reasonable?

[63] I find that the changes to the travelled roadway within the 66-foot wide deeded right of way to the Laamanens are reasonable. It is reasonable that the roadway be widened to allow vehicles to pass each other. I find that currently it is difficult in certain parts of the roadway for two vehicles to pass each other with ease.

[64] It is reasonable for the Laamanens to want to be able to clear snow from the roadway in an efficient manner, which is currently difficult due to the narrowness of the road and wooden fences at various points. Snow removal has also been made difficult by Roy Cleary's demands that the Laamanens plow and pile snow in areas of his choice. He has dictated to the Laamanens that he will take over snow plowing General M Drive in 2017.

[65] I find that the Laamanens are entitled to clear snow on General M Drive.

[66] It is reasonable for the Laamanens to be able to access their Peninsula from General M Drive.

[67] It is reasonable for the Laamanens to build a new road over the Peninsula which will help to avoid unpleasant interactions with Suzanne Cleary of the kind and nature that have occurred in the past.

[68] It is also reasonable for the Laamanens to upgrade the roadway and ditches within the area shown on the 2015 Plan by building a roadbed from the western border of Parcel 4E and Lot 5’s isthmus connecting Lot 5’s Peninsula.

[69] I accept the evidence of the Laamanens that when they purchased Lot 5 in 2010, they hoped that Neil would start and grow a business making prototypes for the aerospace industry. To date, all the work that he has carried out in that regard has been contract work, performed off-site. I also accept that the Laamanens' primary concern at present is that they can take advantage of their deeded right of ways for personal reasons - snow removal and to help eliminate future unpleasantness with the Respondents. There were confrontations with the Clearys over snow removal on December 29, 2015 and again on January 16, 2016. On each occasion a number of members of the Cleary family stopped Neil Laamanen from plowing snow from the roadway. Roy Cleary directed foul language to the Laamanens on three occasions. Suzanne Cleary posted "the Ten Commandments" on a post at the intersection of her lot and Lot 5, with hand-drawn arrows pointing to "Thou shalt not steal", "Thou shalt not bear false witness against thy neighbor" and "Thou shalt not covet thy neighbour's house, nor anything that is thy neighbor's." The latter phrase was bracketed with the words "nor anything that is thy neighbor's" underlined. I do not accept the evidence of Suzanne Cleary that the "Ten Commandments" she posed were merely part of her annual Christmas decorations; rather, I find that at least part of the reason for posting the Ten Commandments and pointing out the various "shall nots" was a mean-spirited demonstration of ill will directed at the Laamanens.

ISSUE 3:

Was the fence placed around the Peninsula a Substantial Interference with the Laamanens' right of way to Lot 5?

[70] I find that the Clearys substantially and unreasonably interfered with the Laamanens' right to ingress and egress Lot 5 when they dug posts and strung electric wire around the Peninsula. Whether they did so to protect their horses from eating mulch or other materials, they had no legal right to block the Laamanens from access to the Peninsula. While not every obstruction or interference with a right of way is actionable, in the circumstances I find that the blocking of the Peninsula for a six-month period was a substantial interference of the Laamanens' right to access the Peninsula.

ISSUE 4:

Will the Laamanens' Proposed Use of the Right of Way Over General M Drive overburden the right of way?

[71] The purpose of the Laamanens' right of ways is for "ingress" and "egress" over General M Drive and Lot 4 to their property.

[72] I have been asked to consider the Laamanens' proposed use of the right of way over General M Drive and to determine whether that use is "commercial" or "public" in nature. The Laamanens say that their deed allows for "the limited commercial use they are proposing for General M Drive." They say that their property is zoned mixed use, i.e. residential and commercial. This evidence was not disputed.

[73] In their Amended Notice of Respondents' Claim, Roy and Gertrude Cleary seek an injunction "preventing the Applicants from using the right of way for commercial use."

[74] The Respondents claim that the Laamanens' proposed use of the right of way over General M Drive will overburden the right of way, turning it from a private road to a public road, which they say was never intended at the time the easement was granted. They say that the right of way was granted to the Laamanens personally, and not to Neil Laamanen's incorporated business.

[75] In *Oostdale Farm v. Oostvogels*, 2016 NSSC 146, [2016] N.S.J. No. 214, Scaravelli J. explained what it means to overburden a right of way:

> **27** The grantee of a right of way cannot "overburden" the right of way. In other words, the grantee cannot use the right of way "excessively". In *Sunnybrae Springbook Farms Inc. v. Trent Mills (Municipality)*, 2010 ONSC 1123, [2010] O.J. No. 3715, aff'd 2011 ONCA 179, [2011] O.J. No. 965 at para. 93 [*Sunnybrae*], Lauwers J. explained, "Overburdening of a right of way occurs when it is used excessively or significantly beyond the rights and nature conveyed in the grant of easement."
>
> **28** Some examples of excessive use are:
>
> 1.The grantee unreasonably interferes with other users;
>
> 2.The grantee's use is inconsistent with the purpose of the right of way;
>
> 3.The grantee's use exceeds the permitted scope or mode of use; and
>
> 4.The right of way is being used to access property beyond the dominant tenement.
>
> See *Anger & Honsberger*, at s.17:20.30(b).

[76] In this case, the Clearys say the Laamanens are proposing to use the right of way in a manner that is inconsistent with its intended purpose.

[77] A determination as to the nature and extent of a right of way, like its scope, begins with the words of the grant. "[T]he court's first task is to determine whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes, motives or recollections": *Knock v. Fouillard*, 2007 NSCA 27, at para. 220.

[78] Where the language is ambiguous, resort can be made to the circumstances existing at the time of the grant: *Laurie v. Winch*, [1953] 1 S.C.R. 49. As Scaravelli J. observed in *Oostdale Farm* at para. 31:

> it will be a rare case when resort to the surrounding circumstances will not be necessary in construing the bounds of an easement. This would only be inappropriate where the words of the grant are clear and unambiguous, and expressly and satisfactorily resolve the problem before the court: para. 31.

Surrounding circumstances may include: (1) the historic use of the easement, (2) the physical conditions which existed at the time of the grant, (3) the purpose for which the easement was granted and (4) the subsequent conduct of the parties: *Viehbeck v. Pook*, 2012 NSSC 48, [2012] N.S.J. No. 59, at para. 79. Where there is doubt, the grant should be construed in favour of the grantee: *Knock*, at para. 60, quoting from Anne LaForest, *Anger & Honsberger, Law of Real Property* (Toronto: Thomson Reuters Canada Limited, 2016).

[79] In *Laurie*, the Supreme Court of Canada recognized that a right of way's purpose can evolve, so long as the change in use remains within the right of way's reasonable ambit. It is a general principle, however, that the grantee of a private right of way cannot convert it into a public one: *Oostdale Farm*, at paras. 33 and 40; *Granfield v. Cowichan Valley (Regional District)*, 1996 CarswellBC 1328, [1996] B.C.J. No. 261 (C.A.). As explained in *Anger & Honsberger, Law of Real Property* at §17.20.30(a):

> A public right which is open to and enjoyed of common right by all members of the public as, for example, a highway, is not an easement. A private right-of-way is an easement which permits the owner of the dominant tenement to pass over some defined portion of the servient tenement in order to gain access to or egress from the dominant tenement for some purposes connected with the better enjoyment of the dominant tenement.

[80] Just as there is a distinction between a right-of-way's purpose and its mode of usage, there is also a distinction between the purpose and the nature of a right of way. For example, a right of way may be used for residential purposes only, with

commercial purposes being prohibited. However, a right of way that can be used for both residential and commercial purposes, can be either of a private nature or of public nature. Such a right of way of a public nature would be open to free access by members of the public. In contrast, a right of way for a commercial purpose, but of a private nature would not permit access by general members of the public in this fashion.

[81] I find that historically, General M Drive was used for both commercial and residential purposes. When the Clearys purchased the Farm, Gertrude Cleary began offering riding lessons on the property. By the time General M Drive was created, Mrs. Cleary had retired from her full-time job and increased her riding lessons. She eventually began teaching year-round, as weather permitted, and put on horse shows. The Clearys operate a business, "Maple-Oak Stables", at the northern end of General M Drive. Students and their families come by motor vehicles and park in General M Drive. Horses are boarded at Maple-Oak Stables.

[82] In October, 2016 the Clearys installed a new sign on General M Drive "PRIVATE ROAD" – not easily visible from Old Truro Road entrance to General M Drive. This sign is only visible after passing the barn when approaching Clearys' Lot 6.

[83] I find that neither the language of the grant, nor the surrounding circumstances, suggest that the 66-foot right of way was intended to be used for residential purposes only. Although it is not necessary, in my view, to resort to this principle in this case, I further note that where doubt exists, the grant is to be construed in favour of the grantee.

[84] The Clearys describe the Laamanens' proposed use as "public commercial", but these terms are not synonymous. The fact that a right of way is used for commercial purposes does not, in and of itself, make it a public right of way. A right of way that allows for both residential and commercial use can be either of a private or public nature. A grantee who invites the general public to use a private right of way risks overburdening it.

[85] Neil Lamanen's evidence was that due to the highly specialized nature of his business, he has no plans to advertise his services to the public. He says business would be conducted by appointment only, but he also expects that there would be an increase in vehicular traffic.

[86] It is both unnecessary and undesirable for the Court to comment on whether the commercial use anticipated by Neil Laamanen would be permitted by the terms of the grant; i.e. whether commercial use would overburden the private right of way and turn it into a public road. That is a matter to be determined on the evidence if and when such use occurs, and the parties seek findings by the Court.

ISSUE 5:

Did the Applicants commit acts of Nuisance and Trespass?

[87] The Clearys claim that on the evenings of December 29, 2015 and January 16, 2016, Neil Laamanen damaged their fences and lawn while clearing snow. They claim $1.00 in damages for each incident.

[88] All the claims in the Amended Notice of Respondents' Claim filed October 18, 2016 are dismissed. Any damage caused to Roy and Gertrude Cleary's fencing by Neil Laamanen's plowing of the roadway were accidental and caused by the narrowness between the fences. I agree with counsel for the Laamanens that the damages were trifling and minor in scope. They are not actionable.

[89] It is also noted that in prior winters members of the Cleary family plowed snow into some of the same areas that are alleged by Roy and Gertrude Cleary to constitute actionable trespass and nuisance.

Conclusion

[90] The Laamanens are entitled to an order incorporating my findings. I ask Mr. Embree to provide the Court with a proposed form of draft Order.

Costs

[91] If the parties are unable to agree on costs, I shall receive written submissions no later than thirty (30) days after the date of this decision.

Smith, J.