

CANADA / JUDGMENT

Phillips v. Keefe

2012 BCCA 123

COURT

British Columbia Court of Appeal

DECIDED

15 March 2012

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2012 BCCA 123 Phillips v. Keefe

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Phillips v. Keefe,

2012 BCCA 123

Date: 20120315

Docket: CA038728

Between:

Lester G. Phillips and Colleen Burke

Respondents

(Plaintiffs)

And

Brad Keefe and Marlene Keefe

Appellants

(Defendants)

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Ryan

The Honourable Madam Justice Saunders

On appeal from: Supreme Court of British Columbia, 14 December 2010

(Phillips v. Keefe, Vancouver Registry S081200)

Counsel for the Appellants:

F.L. Lamer

Counsel for the Respondents:

K.M. Stephens

G. van Ert

Place and Date of Hearing:

Vancouver, British Columbia

6 October 2011

Place and Date of Judgment:

Vancouver, British Columbia

15 March 2012

Written Reasons by:

The Honourable Chief Justice Finch

Concurred in by:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Chief Justice Finch:

I. Introduction

[1] The defendants appeal from the order of the Supreme Court of British Columbia, pronounced 14 December 2010, in these terms:

THIS COURT DECLARES that:

1. the boundary between Lot 4 Block "C", District Lot 30, Group 2, New Westminster District, PID 011-908-203 (the Burke property) and Lot 25 Block "C", District Lot 30, Group 2, New Westminster District, PID 001-452-185 (the Keefe property) is as marked by the fence that stood between the properties prior to its removal on February 15, 2008;

AND THIS COURT ORDERS that:

2. the defendants pay the plaintiffs the sum of \$16,438.72 in damages for trespass;
3. the defendants pay the plaintiffs the sum of \$5,000 in punitive damages; ...

- [2] The dispute between the parties arose from a disagreement as to the location of the property line separating their two backyards. The plaintiffs took the position that the boundary was located along the line of a fence which had been in place when both parties purchased their properties, the plaintiffs in 2002 and the defendants in 2007.
- [3] The defendants took the position that the fence was located about 12 feet further west than the true property line, and thereby deprived the defendants of access to, and use of, the 12-foot strip of property lying to the east of the fence. In taking this view, the defendants relied upon a determination by Warren Barnard, a B.C. land surveyor who in 1989 and 1990 surveyed the lot later purchased by the plaintiffs.
- [4] Relying on Mr. Barnard's opinion, and over the objection of the plaintiffs, Mr. Keefe tore down the fence during the night of 15 February 2008.
- [5] The trial judge heard a substantial body of evidence, both lay and expert, and had evidence of numerous maps and plans of the area dating back to original subdivision survey plan of 1893, as well as aerial photography. She held that the location of the boundary was to be decided by applying the "surveyors' hierarchy of evidence", which sets out in order of precedence the types of evidence that surveyors may consider in determining a boundary line:
1. natural boundaries;
 2. original monuments;
 3. fences or possession that can reasonably be related back to the time of the original survey; and
 4. measurements as shown on the plan or stated in the metes and bounds description (Reasons, para. 39).
- [6] The judge concluded that the best evidence available in this case was of the third order: namely, fences or evidence of possession that could reasonably be related to the original survey. On the admissible evidence that was relevant to that criterion, she held that the true boundary lay along the line of the fence that Mr. Keefe took down.
- [7] Accordingly, she held the defendants liable in trespass and awarded both compensatory and punitive damages.
- [8] For the reasons that follow, I would allow the appeal in part, affirming the award of compensatory damages and setting aside the award of punitive damages.

II. The Properties

- [9] The plaintiff Colleen Burke is the owner of a property with a legal description of, Lot 4, Block C, District Lot 30, Group 2, New Westminster District and a street address of 33 - 67th Street, Delta, B.C. At the time this dispute arose, the defendants owned the property described as Lot 25, Block C, District Lot 30, Group 2, New Westminster District with a street address of 34 - 66A Street, Delta, B.C. They have since sold the property.
- [10] Lots 4 and 25 are situate back to back in Block C. Lots 1 through 14 face east onto 67th Street (formerly known as Boundary Bay Road). Lots 15 through 28 face west onto 66A Street. There is no laneway between the east and west-facing lots in Block C, so every east-facing lot backs directly onto a west-facing lot.
- [11] Block C is separated from Boundary Bay by another subdivision described as Lot A. The westerly shoreline of Boundary Bay in this area lies in a roughly north-south direction. Both 67th Street (which separates Blocks A and C) and 66A Street also lie in a north-south direction, more or less parallel to the shoreline of Boundary Bay. The high water mark of Boundary Bay was used as a reference point in the early surveys.
- [12] The International Boundary Line, separating Canada from the U.S.A., forms the southern boundary of both Blocks A and C. It lies in an east-west direction at this point, and Lots 1 and 28 in Block C lie adjacent to the boundary line.
- [13] The original subdivision survey of District Lot 30 was carried out by the B.C. land surveyor William S. Jemmett. He recorded the subdivision in Plan 712, which he completed in 1893.
- [14] The trial judge included a copy of Plan 712 as an appendix to her reasons for judgment. Her observations concerning the plan are relevant to this appeal:
- [20] ...[Plan 712] shows the lots in Block C as identical in size and shape, measuring 2.5 chains deep by 1 chain wide, or 165 feet by 66 feet. Between Block A and Block C there is a road that is shown as 0.3 chains, or 19.8 feet, wide (the "Road"), which was unusually narrow. Roads in British Columbia were, at the time, typically 33 feet, 45 feet or 66 feet wide.
- [21] Plan 712 also shows a straight line on the east of Block A and an unspecified distance between the straight line and a sinuous line. Natural boundaries, or high water marks, are depicted by surveyors on their plans as sinuous lines.
- [22] The wooden posts set by Mr. Jemmett in his 1893 survey are original monuments that established the boundaries of the lots in the subdivision, including Lots 4 and 25. As noted, Lots 4 and 25 are the current Burke and Keefe Properties. Plan 712 does not show where Mr. Jemmett set the original wooden posts that established the boundaries of these and the other lots in Block C.

[Emphasis added.]

III. Reasons for Judgment at Trial

- [15] Prior to about 1990, all of the rear fences separating the east and west-facing lots in Block C were in a line running up the middle of the block in a north-south direction. In 1989 and 1990, the B.C. land surveyor Warren Barnard surveyed certain lots in Block C, including Lot 4, which would become the plaintiffs' property. He concluded that the boundary lines between the adjacent lots in Block C did not correspond with the rear fences. He produced three posting plans and a subdivision plan in accordance with his opinion. Some of the west-facing residents in Block C moved their rear fences approximately 12 feet eastward based on Mr. Barnard's opinion. Others did not. As a result, the rear fences of Block C were no longer aligned (Reasons, paras. 6 and 7).
- [16] When the plaintiffs purchased their property in 2002, they were aware of Mr. Barnard's opinion, and their contract of purchase and sale acknowledged that "the rear fence is not on the property line". However, like the previous owner of Lot 4, Ms. Burke decided not to move the fence (para. 8).
- [17] The trial judge records:
- [10] The defendants purchased the Keefe Property in September 2007. In November 2007 Mr. Barnard completed a posting plan for Lot 25 consistent with his earlier opinion that the Fence encroached on the Keefe Property by approximately 12 feet (the "Disputed Area"). Mr. Keefe relied upon Mr. Barnard's opinion when, over the plaintiffs' objection, he tore down the Fence on February 15, 2008. In June 2008, after this dispute escalated, the defendants moved elsewhere. They have since concluded an interim agreement to sell the Keefe Property.
- [18] Many subsequent survey plans, created for various purposes, were made between 1893 and Mr. Barnard's resurveys in 1989 and 1990. One such plan is number 6804, a 1928 survey by D.J. McGugan carried out for the purpose of dividing Lot 15 in Block C into two halves. Mr. McGugan did another survey in 1931 in connection with the Boundary Bay Road and Mabel Street Extension Delta Bylaw No. 155. There are two versions of this plan, the earlier of which was referred to as the "Bylaw Plan", and the later amended version which was called the "LTO filing plan".
- [19] There were inconsistencies between these plans, and between them and other plans. The two surveyors called on the plaintiffs' behalf, Mr. Scobbie and Mr. Chapman, and the surveyor called by the defendant, Mr. Barnard, gave differing explanations for the inconsistencies among the various plans. The trial judge summarized the plaintiffs' expert evidence at paras. 39 to 48 of her reasons, and Mr. Barnard's evidence at paras. 49 to 52.
- [20] The trial judge preferred the evidence of Mr. Scobbie and Mr. Chapman. She said:

- [53] All three experts testified in a direct, candid and forthright manner. I do not doubt that their differing views are sincerely and genuinely held. Taking into account his acknowledged interest in the outcome of the litigation, however, I conclude that Mr. Barnard is inevitably less objective than Messrs. Scobbie and Chapman.
- [54] I also conclude that Messrs. Scobbie and Chapman were generally thorough, careful and credible witnesses. I reject the defence submission that, for unexplained reasons, they were overzealous, partial or biased advocates on behalf of the plaintiffs. As outlined below, considered in conjunction with the evidence of Ms. Olnyk and the aerial photographs, I prefer their opinion evidence to that of Mr. Barnard.
- [21] The plaintiffs also called Susan Olnyk to testify concerning the accepted boundary between Lots 5 and 24 in Block C (the two neighbouring lots immediately to the north of the plaintiffs' and defendants' lots). Ms. Olnyk testified as to her own recollection and also as to what her mother, Doris Maki, had told her concerning the location of the rear fences. The trial judge admitted this evidence, finding that it came within the principled exception to the hearsay rule. She summarized Ms. Olnyk's evidence, which she found to be accurate and reliable, at paras. 33 to 38 of her reasons.
- [22] As to the dispute between the parties that precipitated this lawsuit, both Ms. Burke the plaintiff and Mr. Keefe the defendant testified. The trial judge preferred Ms. Burke's evidence (para. 58).
- [23] The judge held that the common law rule governing the resolution of boundary disputes "mirrors the survey profession's hierarchy of evidence" (para. 66). She stated that those common law principles were grounded in the best evidence rule, (para. 67) and that the task of the surveyor was to "re-establish original boundaries taking into account the best evidence available" (para. 69).
- [24] In the absence of evidence as to natural boundaries or original monuments, the judge resorted to the third order of evidence in the surveyors' hierarchy (para. 72). She took the view that the party choosing to dispute an established boundary bore the onus of proving that the proposed new boundary was correct on a balance of probabilities (paras. 73-74).
- [25] The judge rejected the defendants' contention that the plaintiffs had failed to establish the requisite factual nexus between the fence and the 1893 survey (para. 78). Since the fence provided a basis for resolution of the boundary dispute based on the third order of the evidentiary hierarchy, the judge opted not to rely on fourth-order evidence to decide the issue.
- [26] In assessing the competing theories of the parties, she stated:
- [80] I do not accept the defendants' submission. On the contrary, I am satisfied that the boundary between the Burke and Keefe Properties should be determined based on the third order of the evidentiary hierarchy. Given the combined effect of the evidence of Messrs. Scobbie and Chapman, Ms. Olnyk and the Aerial Photographs, I conclude that the Fence is likely a

successor to earlier fences built with reference to original wooden posts set by Mr. Jemmett and shown on Reference Plan 6804, the Bylaw Plan, and Plan 8714, as well as offset on Plan 4252. In other words, I am satisfied that the plaintiffs have demonstrated a reasonable factual nexus between the Fence and the original survey monuments that established the boundaries of the lots.

- [81] The fact that Block C was largely unoccupied prior to 1932 makes it more likely than not that the original posts survived undisturbed for several decades after Mr. Jemmett planted them. Thereafter, it is likely that lot occupants built fences with reference to those original posts and the Fence was located along the longstanding historic fence line. Taking into account Ms. Olnyk's evidence and the visible fence line in the 1949 Aerial Photograph, I reject Mr. Barnard's hypothesis that the Fence was incorrectly located based on posts planted in 1968 in connection with Mr. Thomson's road widening survey. I also reject Mr. Barnard's alternate hypothesis that the Fence was incorrectly located based on posts set by Mr. McGugan in 1928.
- [27] She concluded the plaintiffs were entitled to the declaration set out in the order quoted above, as well as to compensatory and punitive damages.

IV. Issues

- [28] The defendants did not set out clearly in their factum the errors they say the judge made in reasoning to what they maintain is a wrong conclusion. Based on the submissions of both parties I would characterize the issues as follows:
1. Did the judge err in failing to apply the provisions of the Land Title Act, R.S.B.C. 1996, c. 250, and in particular s. 23(2)(h);
 2. Did the judge err in applying the surveyors' hierarchy of evidence (if it is inconsistent with the Torrens System and the Land Title Act);
 3. Did the judge err in holding that the defendants bore the burden of proving the true property line;
 4. Did the judge err in applying an incorrect standard of proof;
 5. If the surveyors' hierarchy of evidence applies, did the judge err in applying the third criteria - "fences or possession reasonably related to the time of the original survey" - in preference to the fourth criteria - "measurements";
 6. Did the judge err in relying on evidence as to the location of the property line that was inconsistent with Plan 712 (and other plans), and in failing to give effect to the content of Plan 712; and
 7. If the third order of the surveyors' hierarchy was applicable, did the judge err:
 - (a) in admitting Ms. Olnyk's evidence,

- (b) in admitting the hearsay of Ms. Maki through Ms. Olnyk,
- (c) in giving weight to the evidence of Ms. Olnyk and Ms. Maki,
- (d) in assessing the experts' evidence.

8. Did the trial judge err in awarding punitive damages?

V. The Parties' Positions

A. Submissions of the Defendants/Appellants

[29] The defendants submit that the trial judge erred in failing to apply s. 23(2)(h) of the Land Title Act, which reads as follows:

23(2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple, subject to the following:

...

(h) the right of a person to show that all or a portion of the land is, by wrong description of boundaries and parcels, improperly included in the title;

[30] The defendants argue that the measurements found on Plan 712 support their position that the rear property line of Lots 4 and 25 lies 12 feet to the east of where the fence was; that Plan 712 is considered to be incorporated and taken to be part of the property's description (see *Kirkpatrick v. British Columbia (Registrar of Land Titles)*, 2002 BCCA 669, 8 B.C.L.R. (4th) 24); and that the provisions of the Land Title Act must be given precedence over the surveyors' hierarchy of evidence. The defendants assert that Plan 712 is "conclusive evidence" as to the location of the property lines.

[31] The defendants submit that the purpose of s. 23(2)(h) is to correct errors that amount to a "wrong description of boundaries and parcels", and that the exception it sets out must therefore be interpreted in a restrictive way.

[32] The defendants also rely on s. 24 of the Land Title Act:

24 All existing methods of acquiring a right in or over land by prescription are abolished and, without limiting that abolition, the common law doctrine of prescription and the doctrine of the lost modern grant are abolished.

[33] They maintain that since mere possession cannot create an interest in land, the third order of the surveyors' hierarchy of evidence "fences or possession ... etc." is inconsistent with s. 24 and therefore cannot be given effect to.

- [34] Accordingly, the defendants argue that the judge erred in finding the true location of the rear property line without reference to s. 23(2), and in particular in giving precedence to the third order of evidence under the surveyors' hierarchy, rather than relying strictly on the description of the property set out in Plan 712.
- [35] The defendants also assert that because the judge failed to refer to s. 23(2) of the Land Title Act, she effectively reversed the burden of proof, and applied the wrong standard of proof.
- [36] Because s. 23(2) stipulates that an indefeasible title is "conclusive proof" of ownership of the land described in the title, anyone who seeks to impeach that title must show "convincing proof" that there has been an error of the kind governed by s. 23(2)(h) (see *Hawkes Estate v. Silver Campsites Ltd.* (1991), 55 B.C.L.R. (2d) 145, 79 D.L.R. (4th) 667, (*Hawkes Estate #1*) at para. 24). Here, the defendants say it was the plaintiffs who sought to impeach the measurements on Plan 712 through extrinsic evidence. The judge decided the case on a simple balance of probabilities, without applying the requisite standard of "conclusive proof".
- [37] Moreover, the judge decided the case on the basis that it was the defendants who sought to challenge the "established" boundary, and imposed upon them the burden of proving that the fence did not mark the property line. In so doing, the defendants submit that the judge effectively reversed the onus of proof.
- [38] In the alternative, should it be held that the case is to be decided on the surveyors' hierarchy of evidence, the defendants argue that the trial judge misapplied the third criteria of "fences or possession that can reasonably be related back to the time of the original survey". The defendants say the plaintiffs must prove that the fence is a successor of a series of fences built on the same location over time, and that the first of those fences would have been built with the assistance of the original survey posts planted by Mr. Jemmett in 1893.
- [39] The defendants assert that it cannot reasonably be concluded on the evidence that the first fence in Block C marking the rear property line was built in accordance with Mr. Jemmett's 1893 posts. In the defendants' submission, the assessment of reasonableness in this context "must be informed by the legal requirements imposed" by s. 23(2)(h): namely, that the evidence "must at least amount to 'convincing proof' that 'land' is 'improperly included in the title'".
- [40] In her reasons for judgment, the judge stated that "it more likely than not that the original posts survived undisturbed for several decades after Mr. Jemmett planted them", and that the disputed fence "is a likely successor to earlier fences built with reference to the original posts as set by Mr. Jemmett". The defendants maintain that these findings are clearly wrong, given the lack of evidence to suggest that wooden cedar posts planted in 1893 could have survived in place until the 1940s, when the earliest fence was built in the vicinity. In their submission, it is unlikely that any of Mr. Jemmett's posts would have survived the road construction and enlargement activities that took place in the area before the 1920s.

- [41] Not only do the various plans registered in the Land Title Office not support the plaintiffs' case (or the trial judge's findings), the defendants argue, but none of the plans refer to the existence of the original 1893 posts. The defendants assert that the plans are in fact inconsistent with the plaintiffs' case, and the inconsistencies were not satisfactorily explained by the plaintiffs' experts.
- [42] Finally, the defendants say that if the case were properly to be decided on the third order of the surveyors' hierarchy of evidence, the trial judge erred in admitting some of the evidence adduced for that purpose, and further erred in the assessment or weight she gave to that evidence.
- [43] The defendants argue the trial judge should not have admitted the evidence of Susan Olnyk, concerning what her mother, Doris Maki, told her about the boundary between Lots 5 and 24. That evidence, submit the defendants, was not within the principled exception to the hearsay rule, and did not meet the threshold test of reliability or trustworthiness. Moreover, the defendants assert that none of that evidence can link the fence in question to the 1893 wooden posts.
- [44] The defendants also argue that the trial judge erred in assessing the credibility of the three expert witnesses who testified. They maintain that the trial judge misapprehended critical evidence which undermined the credibility of the plaintiffs' experts, Mr. Scobbie and Mr. Chapman, and ignored or overlooked inconsistencies in their evidence in chief and on cross-examination (paras. 55-71).

B. Plaintiffs' Submissions

- [45] In overview, the plaintiffs submit that the principle factual question before the trial judge was not the correctness or inaccuracy of Plan 712, as now alleged by the defendants, but rather the location on the ground of the original wooden posts placed by Mr. Jemmett. In the absence of surviving posts, the plaintiffs' task was to lead the best evidence of where those posts were located.
- [46] In the plaintiffs' submission, the trial judge's conclusion that the fence is "likely a successor to earlier fences built with reference to the original wooden posts set by Mr. Jemmett" (Reasons, para. 80) was a finding of fact as to the boundary's location. The plaintiffs say there was evidence to support this finding.
- [47] The plaintiffs maintain that the trial judge accepted Plan 712 as "the governing plan" (para. 18), and assert that they have never challenged that plan's correctness. In addition to resting their case on the third order of evidence under the surveyors' hierarchy, the plaintiffs argue also that their case is supported on the fourth order - that is, the distances and measurements as shown on plans and as given in descriptions.

- [48] The plaintiffs assert that they never have disputed that the defendants were indefeasibly entitled to Lot 25. The question before the Court was where the lot they owned was located on the ground. The plaintiffs argue that ss. 23(2) and 24 of the Land Title Act say nothing about the location of the lot on the ground. Those sections speak only to the legal effect of a person being named as the owner of land in the B.C. Land Title Registry.
- [49] The plaintiffs argue that the surveyors' hierarchy of evidence is not inconsistent with the Torrens System or the Land Title Act. They submit that the Torrens System depends upon surveys made on the ground, and that every parcel of land must be capable of identification on the ground in some way.
- [50] Accordingly, the plaintiffs submit that ss. 23 and 24 have no relevance in determining the location of the boundary between the lots. The plaintiffs did not plead or rely on s. 23(2), and did not claim rectification of title. The standard and the burden of proof advocated by the defendants cannot be supported. The burden of proving the location of the property line was on the party who sought to challenge the long-established location, and the trial judge applied the correct standard of proof: namely, the balance of probabilities.
- [51] The plaintiffs maintain that there was a body of evidence on which the judge could properly find that location of the existing fence was reasonably related to the location of the original wooden posts placed by Mr. Jemmett in 1893.
- [52] Furthermore, the plaintiffs submit that the judge did not err in her admission of Susan Olnyk's evidence, nor in the weight she attributed to it. The plaintiffs contend, likewise, that the judge did not err in preferring the evidence of the plaintiffs' experts, Mr. Scobbie and Mr. Chapman, to that of Mr. Barnard.
- [53] In short, the plaintiffs argue that the trial judge made no reviewable error of law, and no palpable or overriding error of fact.

VI. Discussion

A. The Applicability of s. 23(2)(h) of the Land Title Act

- [54] On this appeal, the defendants contend that the trial judge erred in failing to apply s. 23(2)(h) of the Land Title Act (see paras. 29-34 above).
- [55] It should be noted at the outset that this is a new argument on appeal. The statutory provision was not pleaded by either party, and there is no reference to it in the reasons for judgment.
- [56] The Court's usual practice in these circumstances is to decline to consider the new argument, unless the question is one of pure law, and can be adequately addressed on the record created at trial. However, counsel for the plaintiffs in this case did not argue that the defendants should not be allowed now to raise this argument. This is the second appeal in this litigation, following a second trial. With a view to removing, so far as possible, any

uncertainty in the law touching on the parties' rights, I think it proper to address the issue here.

[57] Relying on s. 23(2), the defendants assert that Plan 712 is conclusive evidence as to the location of the property lines. With respect, that is not what the section says. The provision is concerned with the legal effects of land title. It establishes that a registered owner of a piece of land has conclusive proof of ownership against all others, subject to the lettered exceptions. Section 23(2)(h) allows for the possibility of showing that lands have been improperly included in the title by misdescription of boundaries or parcels.

[58] For their part, the plaintiffs acknowledge that the defendants were "indefeasibly entitled to Lot 25, Block C, Plan 712, District Lot 30" (para. 53). As they note in their factum, however, the legal effect of being named as the owner of land in the B.C. Land Title Registry says nothing about where the land described in such title is located on the ground.

[59] The application of this statutory provision (previously numbered s. 23(1)(i)) was considered in *Hawkes Estate #1*. As in the present case, "the fundamental issue is the present location on the ground of the ownership boundary" between the two properties.

[60] In his concurring judgment, Locke J.A. stated (at para. 68):

The modified Torrens system of British Columbia is based ultimately upon a survey and in the last resort every parcel of land must be capable of identification on the ground in some way.

[61] Later, referring to *Canadian Pacific Railway v. Turta*, [1954] S.C.R. 427, he said at para 74:

These two men may have been under a misapprehension as to where the common dividing line between the two properties was, but the misapprehension extended only to the physical location of the boundary on the ground, not as to any problem with the description in the title.

[62] That is precisely the issue in the case before us. It is not disputed that the defendants have title to the property bearing the legal description of Lot 25, Block C, District Lot 30, Group 2, New Westminster District. What is in dispute is where the rear boundary of the property so described is located "on the ground".

[63] There is no inconsistency, as the defendants suggest, between the statutory provisions of the Land Title Act, which govern the indefeasibility of title, and the surveyors' hierarchy of evidence, which is used to locate boundaries on the ground. The Act speaks to legal title. The survey evidence speaks to the physical location of what is described in that title.

[64] Section 24 of the Act is likewise not inconsistent with the surveyors' hierarchy of evidence, and is of no assistance to the defendants' case. The use of "fences or possession reasonably related to the time of the original survey" for the purposes of locating a boundary is not a resort to adverse possession or the acquisition of a right to land by prescription. It is a category of evidence relied on by surveyors to assist in locating, on the ground, a boundary which cannot be determined by better evidence.

B. The Surveyors' Hierarchy of Evidence

- [65] I have already stated that, in my opinion, the surveyors' hierarchy of evidence is not inconsistent with the provisions of ss. 23 or 24 of the Land Title Act.
- [66] The surveyors' hierarchy has been relied on by surveyors for years, and is accepted by this and other courts as a precedential ranking of the best evidence with which to locate physically a disputed boundary: see for example *Hawkes v. Silver Campsites Ltd.*, [1994] B.C.J. No. 1094 (C.A.).
- [67] There is no authority to suggest that the use of the evidential hierarchy conflicts in any way with the Land Title Act.

C. Who Bore the Burden of Proof?

- [68] In her reasons for judgment the learned trial judge stated:
- [73] If a party chooses to dispute an established boundary line, that party bears the onus of proving on the balance of probabilities that the proposed new boundary is correct: *Palmer v. Thornbeck*, [1877] O.J. No. 170; *Thelland. In Aqua Pura Salmon Ltd. v. Hooper*, 2004 NBQB 224, McNally J. cited *Palmer* with approval and stated:

It has long been established that in actions brought to determine the true boundary line between properties, the burden of proof lies upon the plaintiff who seeks to change the possession.

- [74] In my view it matters not whether the party seeking to challenge settled possession is the plaintiff or the defendant in an action. Consistent with the presumption described in *James*, the persuasive burden rests upon the party seeking to justify the change. In this case, the evidence demonstrates that from at least 1949 until Mr. Barnard's 1989 and 1990 surveys the Fence marked the generally accepted boundary between the two properties and thus settled possession. That being so, the party with the persuasive burden in this case is the defendant.
- [69] The defendants say this conclusion is in error, and that the plaintiffs bore the burden of proving where the true boundary lines lay. The defendants express the point in their factum as follows:
25. The trial judge also ruled that the Appellants, although defendants in this case, bore the burden of proving that the line of the fence was not the correct boundary on the proposition that the party who seeks to alter possession bears the burden of proof, citing old jurisprudence from jurisdictions that had not adopted a Torrens system. To the extent that the outcome depends on where the burden of proof lies, the trial judge ought to have considered the impact of the "conclusive evidence" mandated by section 23(2) of the Land Title Act and placed the onus on the party seeking to invoke any one of the exceptions set out in paragraphs 23(2), namely the Plaintiffs in this case. The trial judge erred in law in failing to do so.

[70] This submission appears to be premised on the application of s. 23(2)(h), which reserves to non-owners the right to show that lands have been improperly included in a title by misdescription. I think it is correct that in a case where s. 23(2)(h) was relied on, the person attempting to show misdescription would bear the onus of proof. However, as I have said above, that provision has no application in this case. As the trial judge found, the fence that had previously marked the boundary had been in place for some 40 years at the time of Mr. Barnard's surveys. It was the defendants, relying on these surveys, who sought to move the boundary 12 feet to the east.

[71] The trial judge did not err in holding that the defendants bore the burden of proof.

D. The Standard of Proof

[72] Because s. 23(2)(h) is not relevant to the determination of this appeal, there is no requirement for either party to provide "convincing proof" to challenge the "conclusive evidence" of indefeasible title. The trial judge therefore applied the correct standard of proof throughout her reasons.

E. Application of the Surveyors' Hierarchy of Evidence

[73] It appears to be common ground that the first two categories of evidence in the surveyors' hierarchy - namely, natural boundaries and original monuments - are not available in this case.

[74] The trial judge relied on the third order of evidence: fences or possession that can reasonably be related back to the time of the original survey. The defendants argue that this was an unsound approach, and in error, because the plaintiffs could not show the necessary factual connection between the fence and Mr. Jemmett's 1893 survey.

[75] The defendants dispute the judge's finding that Mr. Jemmett's survey posts could have survived for several decades after Mr. Jemmett planted them. They contend that there was no evidence to show that an original fence was located with the assistance of Mr. Jemmett's survey posts. And they argue there is no evidence of possession dating back to the lots' creation. The defendants maintain that without evidence of long-standing possession, the third order of the evidentiary hierarchy is inapplicable.

[76] The trial judge discussed what would qualify as evidence under the third order of the hierarchy at paras. 66-72 of her reasons. She said that what was required was "a reasonable factual nexus" between evidence of possession and the presence of original monuments (para. 72).

[77] The answer to this question lies in an appreciation of the evidence before the judge, and in particular in her assessment as to whether a reasonable factual nexus had been established (para. 80).

[78] In my respectful opinion, it was open to the judge to reach this conclusion on the evidence. As noted above, the trial judge preferred and relied upon the expert evidence of the plaintiffs' witnesses, Mr. Chapman and Mr. Scobbie. She summarized their evidence at paras. 39-48 of her reasons. It does not appear to me that she has misapprehended their evidence in any material way. In his report of 21 February 2010, Mr. Chapman said:

It is my professional opinion that the old fence on the common boundary between Lots 4 and 25, Block 'C', Plan 712 is situate in the original position of the common boundary between the two lots as established on Plan 712. I reached my conclusion based on my chronological review of all pertinent plans I could find dating back to Plan 712 in 1893, and all descriptions for the land covered by Lot 1, Block 'A' dating back to 1891 under Titles 64039'E' and 71332'E'.

[79] In his report of 11 February 2010, Mr. Scobbie said:

In my opinion, the location of the existing rear fence line between Lots 3 and 26, and the original location of the fence line between Lots 4 and 25, prior to its removal, would support the demarcation of the rear property line as surveyed by Jemmett, and that the best evidence presently available to determine the location of Jemmett's original monuments in Block C would be that shown on McGugan's Reference Plan 6804.

[80] The judge found the evidence of the plaintiffs' experts to be supported by the aerial photographs and other evidence.

[81] In my opinion, the defendants' attack on the judge's use and application of the third order of evidence in the surveyors' hierarchy cannot be sustained.

F. Did the Judge Err in Relying on Evidence that was Inconsistent with Plan 712?

[82] The defendants contend that Plan 712 is a pictorial expression of the lots that it encompasses: a graphic version of a "metes and bounds" description. They rely on *Kirkpatrick v. British Columbia (Registrar of Land Titles)*, 2002 BCCA 669, [2002] B.C.J. No. 2716, where Mr. Justice Smith said:

[33] When lands conveyed in a grant are described by reference to a plan, the description of the lands is a question of legal construction: see *Grasett v. Carter* (1884), 10 S.C.R. 105, per Strong J. at p. 114:

When lands are described, as in the present instance, by a reference, either expressly or by implication, to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself. Then, the interpretation of the description in the deed is a matter of legal construction and to be determined accordingly as a question of law by the judge, and not as a question of fact by the jury.

[34] When such a grant contains words expressing area that might create doubt or uncertainty as to the extent of the grant, resort must be had to the plan to resolve the uncertainty.

[83] These passages must be read in light of what follows in the judgment:

[35] Moreover, where doubt remains after examining the grant, the survey is determinative. In *Re Ward*, *supra*, the Court examined the official plan and the field notes from which it had been prepared and concluded, at pp. 116-17:

...it was apparent that the lines enclosing section 49 had been actually run and marked out on the ground, the corner boundaries distinctly marked, and posts put in from place to place, to establish by determinate metes and bounds on the land the exact limits of section 49, and Beaver Lake was within those limits.

It is a rule of law (*Burton, Real Property*), enforced by all the Courts from the earliest times, that where there is any doubt in the language of the deed as to the content, when words indicative of boundaries are used, the actual work on the ground shall determine.

In *Re Registration of an Indefeasible Fee*, [1913] 5 W.W.R. 99 (B.C.S.C.) at 101, Murphy J. said, referring to *Re Ward*:

That case decides that what is conveyed in a Crown grant worded as these are is a particular "parcel or lot" and that the boundaries of the parcel or lot are to be determined by the official plan or survey of the particular district in question...

[84] The defendants contend that if one applies the measurements found on Plan 712 then the plaintiffs must fail. The defendants go so far as to claim that the plaintiffs agree with this proposition.

[85] The defendants assert that Plan 712 is "anchored on a well-known location" (the high water mark on the International Border at Boundary Bay) and that it is "determinative because it shows Block C located 10.3 chains from that location". The defendants therefore argue that the judge erred in giving the third order of evidence in the surveyors' hierarchy precedence over the measurements shown on Plan 712.

[86] In answer, the plaintiffs submit that the issue at trial did not depend on the correctness of Plan 712, as the defendants now allege. The plaintiffs argued below that the location of the rear property lines was to be resolved on the basis of the third order of evidence. However, they contended before the trial judge that they should succeed on the fourth order of evidence as well: namely, distances and other measurements as shown on plans and descriptions.

[87] Plan 712 shows the east-west dimension of each of the lots in Block C, including Lots 4 and 25, to be 2.5 chains, or 165 feet. The east side of Block C is bounded by 67th Street, which Plan 712 marks as 30 "links" wide (0.3 chains, or 19.8 feet). Lot A, which lies to the east of 67th Street, is 10 chains, or 660 feet, in its east-west dimension.

[88] The uncertainty arising from Plan 712 concerns where the 10 chain measurement for Lot A had its easterly point of commencement. Plan 712 is a representation of the ground survey made by Mr. Jemmett, but the plan does not show any survey posts. In his report, Mr. Scobbie wrote that "none of the lots in Blocks A and B on Plan 712 extend to the High Water Mark".

[89] Mr. Chapman stated:

When Mr. Jemmett prepared Plan 712, it appears it was without the knowledge of the Indenture prepared two years previously. Plan 712 appears to create Lots in both Blocks 'A' and 'B' that do not reach the shore of Boundary Bay, but leave a width fronting the lots contiguous with the shoreline. On the other hand, the description in the document filed under Title 64039'E' clearly states that that parcel is "Commencing at a post planted at High Water Mark on the shore of Boundary Bay at the International Boundary Line..."

[90] Title 64039'E' is the title created by the Indenture of 13 January 1891. With respect to this indenture, the trial judge said:

[17] The indenture in connection with the purchase and sale of the 6.5-acre Parcel is dated January 13, 1891 (the "1891 Indenture"). It was not filed with the Land Registry Office, however, until February 10, 1893. The 6.5-acre Parcel is described in the 1891 Indenture as:

Commencing at a post planted at high water mark on the shore of Boundary Bay at the international boundary line.

[91] The trial judge referred to Plan 712 further as follows:

[21] Plan 712 also shows a straight line on the east of Block A and an unspecified distance between the straight line and a sinuous line. Natural boundaries, or high water marks, are depicted by surveyors on their plans as sinuous lines.

[22] The wooden posts set by Mr. Jemmett in his 1893 survey are original monuments that established the boundaries of the lots in the subdivision, including Lots 4 and 25. As noted, Lots 4 and 25 are the current Burke and Keefe Properties. Plan 712 does not show where Mr. Jemmett set the original wooden posts that established the boundaries of these and the other lots in Block C.

[92] And further:

[42] As noted, the measurements found in Plan 712 and several subsequent surveys are not all consistent or reconcilable. For example, Plan 712 shows the Road as 19.8 feet wide but Reference Plan 6804 shows it as 31.68 feet wide. Messrs. Scobbie and Chapman hypothesize that the discrepancies may be explained, albeit imperfectly, by the possibility that Mr. Jemmett started his 1893 survey inland of the high water mark but Mr. McGugan started his 1928 survey for Plan 4252 at the high water mark in accordance with the terms of the 1891 Indenture. As a result of Mr. Jemmett's inland starting point, the southwest corner of Lot 1 of Block A did not align with the southwest corner of the 6.5 Acre Parcel.

- [43] In support of their hypothesis, Messrs. Scobbie and Chapman note that Plan 712 shows a straight line on the east of Block A, which cannot be the high water mark. They also note that there is a space between the straight line and a sinuous line that represents the natural boundary. This, they say, suggests that Mr. Jemmett's 1893 survey started inland of the high water mark, perhaps because he was unfamiliar with the 1891 Indenture (which was filed two days after his survey was completed). In contrast, however, Mr. McGugan started his 1928 survey for Plan 4252 at the high water mark and tried to address the resulting discrepancies thereafter in other surveys, without complete success.
- [93] What emerges from the evidence, and from the trial judge's analysis of that evidence, is that the location of the southeasterly corner of Lot 30 could not be determined from any fixed reference point shown on Plan 712. Mr. Jemmett did not record on Plan 712 the location of the posts he planted. He indicated the easterly boundary of Lot 30 as a straight line, and the three sinuous lines drawn to the east of that straight line suggest that he may have commenced his measurement some unknown distance to the west of the high water mark.
- [94] A further uncertainty arises from the width of 67th Street, shown on Plan 712 as 30 links (19.8 feet) wide, when other evidence (including, the 1928 survey of Mr. McGugan) shows the width of that street as 31.68 feet.
- [95] In light of this evidence, and given the evidence of other survey plans, the discovery by other surveyors of stakes likely placed by Mr. Jemmett, and the expert and lay evidence, it seems entirely reasonable that the trial judge should have preferred evidence of the location of fences or possession, rather than Mr. Barnard's evidence as to what could be determined by relying strictly on measurements.
- [96] As the trial judge stated (para. 84) "Mr. Barnard was insufficiently attentive in his resurveys to historic occupation and concluded too quickly, based on measurements, the fence was out of place".
- [97] In my respectful opinion, the trial judge did not err in relying on evidence in the third order of the surveyors' hierarchy, in preference to measurements shown on Plan 712, to the extent they might be considered inconsistent.

G. The Trial Judge's Admission and Assessment of the Evidence

- [98] The defendants argue that the trial judge erred in admitting and giving weight to the evidence of Susan Olnyk. She testified as to her observations and recollection of matters she was aware of as a resident of, or visitor to, Lots 5 and 24. She also testified as to what her mother, Doris Maki, had told her concerning the location of fences at the rear of Lots 5 and 24. Together with members of her family, Ms. Maki lived on one or both of these lots, on and off, from around 1930 until 1999. From the 1970s until 1999, she occupied Lot 5.

- [99] The defendants argue that Susan Olnyk's evidence, based on her own recollections, did not relate the location of any building or fence to any monuments or stakes, and could not be relevant to any connection between the 1893 stakes and the fence built later in the 1970s.
- [100] In addition, the defendants submit that the judge erred in admitting hearsay evidence of what Ms. Maki told her daughter, since her statements were not made in circumstances rendering them reliable or trustworthy. Moreover, they argue that even if the hearsay was properly admitted, it does not link the fence to the original 1893 monuments.
- [101] The trial judge's discussion of Ms. Olnyk's evidence appears at paras. 80 and 81 of the reasons. She considered that testimony together with all of the other evidence before her. It does not appear to me that she gave any undue weight to either Ms. Olnyk's own recollections, or to the hearsay statements of her mother, Ms. Maki.
- [102] In my view, Susan Olnyk's evidence was properly admitted as evidence going to historical occupation or possession, under the third order of the surveyors' hierarchy of evidence, and its weight was entirely a matter for the trial judge.
- [103] As for the defendants' argument that Ms. Maki's statements to Ms. Olnyk were improperly admitted under the principled exception to the hearsay rule, I am unable to agree. The question for the trial judge, according to the principles set out in *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, was whether the requirements of necessity and reliability were met for the hearsay evidence in question. The defendant does not comment on the necessity criterion, but argues that the evidence was not reliable, given that Ms. Olnyk said she did not remember her mother's exact statements about location of the fence, that the evidence was "vague" (as the trial judge herself admitted), and that it was contradicted, in some respects, by other evidence.
- [104] This argument confuses threshold reliability with ultimate reliability, as that distinction is explained in *Khelawon* and other cases. Only threshold reliability is relevant in assessing the admissibility of hearsay evidence. As the Supreme Court of Canada explained in *R. v. Starr*, [2000] 2 S.C.R. 144, threshold reliability:
- [215] ... is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness.
- [105] The issues raised by the defendants are all concerned with ultimate reliability. They may be properly taken into account in assessing the weight of the evidence, but they are irrelevant to the question of admissibility. The defendants do not dispute any of the indicia of threshold reliability identified by the trial judge, including the findings that the statements were made spontaneously, and that Ms. Maki had no motive to lie. In my respectful opinion, the judge did not err in admitting Ms. Maki's statements.
- [106] I see no reversible error in the judge's admission of, or treatment of, the lay evidence.

[107] The defendants also say the judge erred in her assessment of the expert evidence. This argument is essentially an attempt by the defendants to have this Court retry the case. The judge made clear findings of credibility and reliability concerning the three experts, and gave reasons for doing so. The defendants have not pointed to any error of law or principle that would allow this Court to interfere with her evaluation of the experts' opinions.

H. The Trial Judge's Award of Punitive Damages

[108] The trial judge awarded punitive damages of \$5,000 based on Mr. Keefe's "high-handed, arrogant manner when he removed the Fence in the dead of night." She relied on the decision of *Cantera v. Eller*, [2007] O.J. No. 1899 (Ont. C.J.), a case which also concerned a defendant's unilateral destruction of a fence during a dispute over property boundaries. In that decision, the trial judge found that the defendant's conduct was not mitigated by his belief that he had an "honest" claim to the disputed territory.

[109] The defendants argue that, given Mr. Keefe's honest belief that the fence was inside his property, his conduct in removing it does not rise to the level of a "marked departure from the ordinary standards of decency" (*Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3). The plaintiffs submit that the trial judge applied the law correctly, relying on *Cantera* as well as two British Columbia cases, *Glashutter v. Bell*, 2001 BCSC 1581, [2001] B.C.J. No. 2587, and *Hanna v. Muir*, 2000 BCSC 1388, [2000] B.C.J. No. 1890.

[110] The standard of review for an award of punitive damages is based on a "rational purpose" test: see *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 at paras. 100-101, and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 197.

[111] In the circumstances of this case, I am not persuaded that the trial judge's award of punitive damages served a rational purpose.

[112] As the majority held in *Whiten*, punitive damages should be ordered "only in exceptional cases and with restraint" (para. 69). The facts of the present case are not sufficiently egregious to justify an award of this kind. At the time Mr. Keefe removed the fence, he had been told by Mr. Barnard, a qualified land surveyor, that it did not mark the true property line. Several of his neighbours had acted on Mr. Barnard's earlier survey to adjust their own boundaries. Furthermore, Mr. Barnard testified at trial that he had himself told Mr. Keefe it was unnecessary to obtain a permit in order to remove the fence. Although the plaintiffs' lawyer did send Mr. Keefe a letter warning him not to tear down the fence unilaterally, she did not provide any survey evidence to contradict Mr. Barnard's opinion.

[113] No doubt Mr. Keefe acted rashly in refusing the invitation to negotiate. He is paying for that error now, through a judgment made against him in trespass. However, this is not a case of an especially high-handed or arrogant course of conduct. On the evidence, it appears that Mr. Keefe had a good-faith reason to believe that he had acted within his own rights. In my view, the Supreme Court's direction to order punitive damages "only in exceptional cases and with restraint" does not permit such an award in this case.

VII. Conclusion

[114] Although the appellants have succeeded on the issue of punitive damages, I would award the respondents the full cost of the appeal. As is apparent from the judge's reasons for judgment, and the parties' submissions on appeal, the real issue in this case was the appellants' liability. The appellants' submission on punitive damages occupied one paragraph in its factum, and the oral submission was correspondingly brief.

[115] I would vary the judgment by setting aside the award of punitive damages, affirming the award of compensatory damages, with costs to the respondents.

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Madam Justice Ryan"

I agree:

"The Honourable Madam Justice Saunders"

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