Date: 19990708
Docket: C971708
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CLEDIA DUNCAN

PLAINTIFF

AND:

LUELLA DUNCAN

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MACZKO

Counsel for the Plaintiff:	A.E. Thiele
Counsel for the Defendant:	R.H.J. Burgess
Place and Dates of Hearing:	Vancouver, B.C. June 7, 8 and 9, 1999

[1] This is a dispute over the boundary line between two properties.

[2] The plaintiff and defendant are natural sisters and are sisters-in-law, the plaintiff having married Arthur Duncan and the defendant having married his natural brother, Thorne Duncan. The plaintiff is 83 years and the defendant is 81 years.

[3] In or about 1944, the parties purchased a piece of land in Madiera Park, B.C. with the intention that Thorne Duncan and his wife would build a home for themselves on one portion of the property and the plaintiff and Arthur Duncan would build a home for themselves on another portion of the property.

[4] The parties agreed, in or about 1958, to subdivide the property into two properties, one to be owned by the plaintiff and her husband and the other to be owned by the defendant and her husband.

[5] The plaintiff, on behalf of Arthur Duncan and herself, and Thorne Duncan on behalf of the defendant and himself, agreed upon a common boundary line. A land surveyor was retained to do a subdivision reference plan and register it in the land title office. The plan was registered.

[6] The Duncan brothers both died many years ago and the widowed sisters continued to live on their properties. The parties to this action agree that the boundary line drawn between the two properties was an error because it goes through the plaintiff's house.

[7] The issue in this case is where the parties intended to draw the boundary line.

[8] It appears that the plaintiff and defendant have had long-standing different views of where the boundary line was supposed to be. However, the matter did not come up, and was not discussed, until around 1994. The issue arose at that time because the plaintiff's son wanted to build a fish pond and did a search of the properties in the land title office. It was discovered that the boundary line went through the house.

[9] The plaintiff retained a surveyor to prepare a new plan and at that point it became apparent that the parties did not agree on where the boundary line should be drawn.

[10] Both properties sit on a point essentially surrounded by water on three sides. The defendant occupies Lot A which is the most easterly property and is surrounded by a natural boundary of water on three sides and has a waterfront of approximately 500 feet. The plaintiff's property is Lot 2 and

is immediately adjacent on the west. She has some waterfront on the north end and some waterfront on the south end and the total is in the neighbourhood of 250 feet of waterfront. The dispute lies over where the boundary line should be drawn between the two properties in a north south direction.

[11] The plaintiff says that the boundary line should be drawn between a large fir tree on the north east corner and a large fir tree on the south east corner ("fir tree boundary") as agreed to between she and Thorne Duncan.

[12] The defendant says that the boundary line should be drawn to the west of the fir tree boundary, approximately 10 feet at the northern end and approximately 18 feet at the southern end. The defendant was unable to give any reason for placing the boundary line at that point other than to say that she always believed it was there. No-one ever told her where the boundary line was.

[13] The plaintiff says that some time in 1958 she and Thorne Duncan had a discussion about the boundary line and that she saw him pace off a distance from where she and Thorne thought the west boundary line existed between Lots 2 and 3. She said he counted 30 paces to a large fir tree on the north east corner of the property and said that was 60 feet. He told her to remember that the fir tree was the boundary line. At this

time there is uncertainty as to where the pacing started because there are no posts or markings. As it turned out, the parties were mistaken about where the west boundary of Lot 2 was. A subsequent survey actually fixed the boundary some 35 feet west of where the plaintiff and Thorne Duncan thought it was. There are no posts, monuments, markings, pins, or survey plans to assist in resolving the dispute. I am left, therefore, with the testimony of the parties and the conduct of the parties over the past 40 years.

[14] There is an hierarchy of evidence recognized by land surveyors in determining the location of boundaries. This hierarchy is referred to by Goldie J.A. in ***Hawkes Estate v. Silver Campsites Ltd.*** (1994), 91 B.C.L.R. (2d) 126 at 142, as follows:

> a) natural boundaries;
> b) monuments in place;
> c) occupation by owners;
> d) field notes, distances and angles;
> e) plans and intentive plans;
> f) areas.

[15] The parties agree that there are no natural boundaries or monuments to assist in deciding this case. I must therefore turn to the occupation by owners. Prior to 1958, when the subdivision plan was put into place, the plaintiff was using the disputed area as follows; two apple trees, a clothes line attached to a tree, a wood pile, parking area, and a shed on

the southern portion of the property. All these uses are west of the fir tree boundary and east of the line suggested by the defendant. These uses were in existence prior to 1958 and continued from 1958 to the present.

[16] These uses, combined with the uncontradicted evidence of the plaintiff that Thorne Duncan suggested the fir tree at the north end of the property in line with the fir tree at the south end of the property would, in my view, be enough to decide the case in favour of the plaintiff. However, common sense and logic also support the plaintiff's case. It seems highly improbable that the plaintiff and her husband would have agreed to a line which would take away property which they had been using for a number of years and cut through a shed which they had built on the property. Some time in the '60s the plaintiff's husband built another shed which also sits in the disputed area. This again lends credibility to the fact that the parties thought the boundary line was as described by the plaintiff.

[17] It also seems logical that, when agreeing on a boundary line the parties would probably agree to a boundary that is observable. Fixing the boundary between two large fir trees and along a line of fir trees that separates the two properties seems more logical than fixing a boundary in a place with no

land markings and which cuts through the plaintiff's garden, parking and a shed.

[18] I heard a great deal of evidence from two experts who speculated as to where Thorne Duncan must have begun to pace off 60 feet. The only direct evidence we have is from the plaintiff. From the spot she indicated the actual distance is between 65 and 69 feet to the fir tree. Whether the distance was 60 feet or 69 feet, there is nothing to contradict the plaintiff's evidence that the boundary line was at the fir tree. I have no basis for disbelieving her evidence and all the circumstantial evidence tends to support her direct testimony. Virtually none of the circumstantial evidence tends to support the belief of the defendant.

[19] The plaintiff admits that the northern shed which was built some time in 1963 is over the boundary line to the extent of the eaves. This slight overhang causes no inconvenience to the defendant and I see no basis for making a compensation order in that respect considering the length of time the shed has been there. I conclude that the plaintiff is entitled to an easement for the life of the shed.

[20] Based on the whole of the evidence, I can reach no other conclusion than that Thorne Duncan and Cledia Duncan agreed to the fir tree boundary. I leave it to counsel to work out the

form of order that will best accomplish the result of this judgment.

[21] Costs will follow the event.

"F. Maczko J."

F. MACZKO J.