COURT OF APPEAL FOR ONTARIO

CITATION: Gold v. Chronas, 2015 ONCA 900
DATE: 20151218
DOCKET: C59743

Simmons, Epstein and Pardu JJ.A.

BETWEEN

Elaine Gold, Lissa Brown, Robert Fairley and Peter Fairley

Applicants (Respondents)

and

Dianna Chronas and Mark Kane

Respondents (Appellants)

James C. Morton, for the appellants

Michael W. Carlson, for the respondents

Heard: May 27, 2015

On appeal from the order of Justice F.L. Myers of the Superior Court of Justice, dated November 21, 2014, with reasons reported at 2014 ONSC 6763.

Simmons J.A.:

A. INTRODUCTION

[1] The issues on this appeal concern whether the respondents are entitled to use a laneway located on the appellants' property to access their homes.

[2] The respondents, Elaine Gold, Lissa Brown, Robert Fairley and Peter Fairley, own homes fronting on Brock Avenue in Toronto. Except on foot – and with difficulty – the respondents have no access to their homes from Brock Avenue because of an embankment and a fence at the front of their homes.

[3] When the respondents purchased their homes, their deeds included a right of way over a laneway located on adjoining land at the rear of their properties.

[4] The appellants, Dianna Chronas and Mark Kane, own the adjoining land, including the laneway, at the rear of the respondents' properties. The appellants' property fronts onto Cunningham Avenue and is municipally known as 7 Cunningham Avenue.

[5] For the period from about 1948 to 1960, the deeds in the chain of title to 7 Cunningham Avenue stated that the property was subject to a right of way over the laneway. From 1960 onward, the deeds in the chain of title to 7 Cunningham Avenue no longer referred to the right of way.

[6] In 2003, the appellants' and the respondents' properties were all converted from the land registration system governed by the *Registry Act*, R.S.O. 1990, c.

R.20, to the electronic land registration system governed by the *Land Titles Act*, R.S.O. 1990, c. L.5.

[7] The appellants purchased 7 Cunningham Avenue in 2006. In 2013, they blocked the respondents' access to their homes via the laneway by erecting a pole at the entrance to the laneway.

[8] In response, the respondents applied for an injunction restraining the appellants from interfering with the respondents' use of the laneway. The application judge granted the respondents' application and prohibited the appellants from interfering with the use of the rights of way over the laneway as described in the respondents' deeds.

[9] At para. 16 of his reasons, in discussing the respondents' claim for a remedy based on proprietary estoppel, the application judge found the appellants' actions "unconscionable, inequitable and unjust." However, he left for another day the availability of a remedy based on proprietary estoppel.

[10] Instead, at para. 23 of his reasons, the application judge concluded, that "[t]he combined effect of [s. 113(5)(a)(iv) of the *Registry Act*] with the *nemo dat*[1]

[1] The common law principle of *nemo dat quod non habet* holds that one cannot convey what one does not already own.

principle protects the [respondents'] rights to their rights of way despite the fact that it is currently unregistered on the servient tenement."[2]

[11] In oral argument on appeal, the parties agreed that the issue of whether the respondents are entitled to use the laneway turns solely on the interpretation and application of s. 113(5)(a)(iv) of the *Registry Act*.

[12] Section 113(5)(a)(iv) is included in Part III of the *Registry Act*. Part III contains the investigation of titles provisions. The appellants rely on the investigation of titles provisions to assert that the respondents' claim to the right of way has expired. According to the appellants, that is because the respondents did not register a notice of claim against the title to 7 Cunningham Avenue within 40 years after the right of way was created – which they say was required under the investigation of titles provisions contained in Part III.

[13] Section 113(5) of the *Registry Act* sets out certain exceptions to the application of Part III. Section 113(5)(a)(iv), on which the trial judge relied, stipulates that Part III does not apply to a claim "of a person to an unregistered right of way … that the person is openly enjoying and using". The application judge found that the respondents are openly using the laneway and that the appellants were aware of that use when they purchased their property.

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[2] The servient tenement is the land that bears the burden of the right of way. The dominant tenement is the land that enjoys the benefit of the right of way.

[14] The appellants argue that the application judge erred in relying on s. 113(5)(a)(iv) of the *Registry Act*. According to them, s. 113(5)(a)(iv) applies only to prescriptive easements – that is, easements acquired through adverse possession rather than under a registered instrument. According to them, a right of way that was once registered, but that has expired because of failure to register a notice of claim within 40 years after the right of way was created, does not qualify as "an unregistered right of way" within the meaning of s. 113(5)(a)(iv). They submit that to hold otherwise would mean that a right of way would become frozen in existence as of a Land Titles conversion date, regardless of whether it continued to be openly enjoyed and used thereafter.

[15] For reasons that I will explain, I would dismiss the appeal.

B. BACKGROUND

[16] Brock Avenue is a street in Toronto that runs generally north and south. The respondents own contiguous properties fronting on the west side of Brock Avenue, as follows, beginning with the most southerly property and progressing to the most northerly property:

- Lissa Brown owns 78 Brock Avenue (the most southerly property);
- Elaine Gold owns 80 Brock Avenue;
- Robert and Peter Fairley own 84 Brock Avenue; and
- Robert Fairley owns 86 Brock Avenue (the most northerly property).

There is no property with the address 82 Brock Avenue.

[17] Cunningham Avenue is a street in Toronto that runs generally east and west and that intersects Brock Avenue immediately north of Robert Fairley's property, 86 Brock Avenue. As noted, the appellants' property, 7 Cunningham Avenue, is located at the rear (to the west) of the respondents' properties; it fronts onto Cunningham Avenue; and it includes the laneway.

[18] An examination of the chain of title to the respondents' properties reveals that the rights of way described in their deeds, and their dates of origin, vary.

[19] The deeds to 78 and 80 Brock Avenue refer to a right of way 7 feet 6 inches wide running the length of the laneway abutting lots 78, 80, 84 and 86. The deeds to 84 Brock Avenue describe a right of way 7 feet 6 inches wide running the length of the laneway abutting lots 84 and 86. And the deeds to 86 Brock Avenue describe a right of way 7 feet 6 inches wide running the length of the laneway abutting lot 86.

[20] Reference to the rights of way for 78 and 86 Brock Avenue first appeared in 1946; references to the rights of way for 80 and 84 Brock Avenue first appeared in 1948.

[21] The question when the right of way over 7 Cunningham Avenue was first created may not be entirely clear because the land included in the initial deed that created the right of way did not encompass the entire length of the right of

way that was later created. The chain of title to 7 Cunningham Avenue reveals that a right of way over that land was first reserved in a deed registered in 1948; that the lands conveyed under that deed did not encompass the entire north-south length of the current 7 Cunningham Avenue; and that the right of way is 8 feet 6 inches wide. A right of way spanning the full length of the current 7 Cunningham Avenue was referred to in a deed registered in 1954; that deed, too, referred to a right of way 8 feet 6 inches wide.[3]

[22] In 1960, 7 Cunningham Avenue was sold. The 1960 deed did not refer to the servient right of way obligation; nor have subsequent deeds and transfers of 7 Cunningham Avenue referred to that obligation.

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[3] I summarize below the particulars of the legal descriptions and origins of the right of way for all the properties.

The legal descriptions of the various properties reveal that the appellants' property, including the laneway (7 Cunningham Avenue), encompasses part of lots 11 and 12, plan 402, Parkdale. The Brown and Gold properties (78 and 80 Brock Avenue, respectively) are part of lot 11, plan 402 (the more southerly lot on plan 402). The Fairley properties (84 and 86 Brock Avenue) are part of lot 12 Plan 402 (the more northerly lot on plan 402).

The chain of title to the appellants' property (7 Cunningham Avenue) indicates that it was once part of a larger parcel of land described as the westerly 44 feet, 9 inches, of lots 11 and 12, plan 402, Parkdale. The chain of title also reveals that the appellants' property, including the laneway, comprises the easterly 27 feet of that larger parcel.

Since 1948, the deeds to the Brown property (78 Brock Avenue) have provided that the owners are entitled to an easement over the easterly 7 feet 6 inches of the westerly 44 feet 9 inches of lots 11 and 12, plan 402. Since 1946, the deeds to the Gold property (80 Brock Avenue) have provided that the owners are entitled to this same easement.

Since 1948, the deeds to the Robert and Peter Fairley property (84 Brock Avenue) have provided that the owners are entitled to an easement over the easterly 7 feet 6 inches of the westerly 44 feet 9 inches of lot 12, plan 402.

Since 1946, the deeds to the Robert Fairley property (86 Brock Avenue) have provided that the owners are entitled to an easement over the easterly 7 feet 6 inches of the westerly 44 feet 9 inches of the northerly 22 feet 5 inches of lot 12, plan 402.

[23] There was no evidence presented on the application or on this appeal regarding why reference to the right of way disappeared from the title to 7 Cunningham Avenue in 1960.

[24] In 2013, the appellants erected a pole blocking access to the laneway. This act led to the current litigation.

C. THE STATUTORY SCHEME

(1) The *Registry Act*

[25] As noted above, the issue whether the respondents are entitled to use the laneway located on 7 Cunningham Avenue turns on the interpretation and application of s. 113(5)(a)(iv) of the *Registry Act*, which is contained in Part III of the *Registry Act*.

[26] Part III of the *Registry Act* concerns the investigation of titles. It provides for a 40-year title search period in s. 112 and for a 40-year expiry period in ss. 113(1)-(4). Part III also provides for certain exceptions to its application in s. 113(5).

[27] Before examining ss. 112 and 113 more closely, I will set out certain definitions contained in s. 111, which inform the interpretation of those later provisions:

> 111. (1) In this Part,

> "claim" means a right, title, interest, claim, or demand of any kind or nature whatsoever affecting land set forth in, based upon or arising out of a registered instrument, and, without limiting the generality of the foregoing, includes a mortgage, lien, easement, agreement, contract, option, charge, annuity, lease, dower right, and restriction as to the use of land or other encumbrance affecting land;
>
> "notice of claim" means a notice of claim that is registered under subsection 113 (2) and that is in the prescribed form and includes a notice registered under a predecessor of this Part or under The Investigation of Titles Act, being chapter 193 of the Revised Statutes of Ontario, 1960, or a predecessor of it;
>
> "notice period" means the period ending on the day 40 years after the later of,
>
> > (a) the day of the registration of an instrument that first creates a claim, or
> >
> > (b) the day of the registration of a notice of claim for a claim;
>
> …
>
> "title search period" means the period of forty years described in subsection 112 (1);
>
> ….
>
> (2) A claim referred to in clause 113 (5)(a) or (b) is not confined to a claim under a registered instrument. [Emphasis added.]

[28] Section 112 stipulates that the 40-year title search period is the period over which a person must show that he or she is lawfully entitled to the land as owner through a good and sufficient chain of title. The title search period runs backward from the date of dealing and, subject to certain exceptions, deems irrelevant any claims registered more than 40 years before. One of the exceptions to the title

search period provisions is “an instrument in relation to any claim referred to in subsection 113(5)”: s. 112(3); see also the exception in s. 112(1).

[29] Section 112 reads as follows:

> 112. (1) A person dealing with land shall not be required to show that the person is lawfully entitled to the land as owner thereof through a good and sufficient chain of title during a period greater than the forty years immediately preceding the day of such dealing, except in respect of a claim referred to in subsection 113 (5).
>
> (2) Where there has been no conveyance, other than a mortgage, of the freehold estate registered within the title search period, the chain of title commences with the conveyance of the freehold estate, other than a mortgage, most recently registered before the commencement of the title search period.
>
> (3) A chain of title does not depend upon and is not affected by any instrument registered before the commencement of the title search period except,
>
> (a) an instrument that, under subsection (2), commences the chain of title;
>
> (b) an instrument in respect of a claim for which a valid and subsisting notice of claim was registered during the title search period; and
>
> (c) an instrument in relation to any claim referred to in subsection 113(5).

[30] Subsections 113(1)-(4) of the *Registry Act* set out the 40-year expiry period, or “notice period”. This is the period of time after which claims against title expire unless a notice of claim is registered. The expiry period runs forward from the date of registration of a claim and invalidates claims not renewed within 40 years:

> 113. (1) A claim that is still in existence on the last day of the notice period expires at the end of that day unless a notice of claim has been registered.
>
> (2) A person having a claim or a person acting on that person's behalf, may register a notice of claim with respect to the land affected by the claim,
>
> (a) at any time within the notice period for the claim; or
>
> (b) at any time after the expiration of the notice period but before the registration of any conflicting claim of a purchaser in good faith for valuable consideration of the land.
>
> (3) A notice of claim may be renewed from time to time by the registration of a notice of claim in accordance with subsection (2).
>
> (4) Subject to subsection (7), when a notice of claim has been registered, the claim affects the land for the notice period of the notice of claim.

[31] Section 113(5) sets out certain exceptions to the application of Part III. The exception at issue on this appeal is s. 113(5)(a)(iv). Section 113(5) reads as follows:

> (5) This Part does not apply to,
>
> (a) a claim,
>
> (i) of the Crown reserved by letters patent,
>
> (ii) of the Crown in unpatented land or in land for which letters patent have been issued, but which has reverted to the Crown by forfeiture or cancellation of letters patent, or in land that has otherwise reverted to the Crown,
>
> (iii) of the Crown or a municipality in a public highway or lane,
>
> (iv) of a person to an unregistered right of way, easement or other right that the person is openly enjoying and using;
>
> (b) a claim arising under any Act; or
>
> (c) a claim of a corporation authorized to construct or operate a railway, including a street railway or incline railway, in respect of lands acquired by the corporation after the 1st day of July, 1930, and,
>
> (i) owned or used for the purposes of a right of way for railway lines, or

(ii) abutting such right of way. [Emphasis added.]

(2) The *Land Titles Act*

[32] Following their conversion to the system of land registration governed by the *Land Titles Act*, the appellants' and respondents' properties were classified as Land Titles Conversion Qualified ("LTCQ") parcels.

[33] LTCQ parcels are converted to the Land Titles system without surveys or notice to owners: Marguerite E. Moore, *Title Searching and Conveyancing in Ontario*, 6th ed. (Markham: LexisNexis, 2010) at p. 294.

[34] Thus, LTCQ status does not guarantee boundaries: *Land Titles Act*, s. 140(2).[4] Further, LTCQ parcels are subject to mature adverse possession claims and prescriptive easements claims: Moore at p. 296. Under s. 44(1) of the *Land Titles Act*, they are also subject to any existing right of way or easement:

> 44. (1) All registered land, unless the contrary is expressed on the register, is subject to such of the following liabilities, rights and interests as for the time being may be subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed to be encumbrances within the meaning of this Act:
>
> …
>
> 2. Any right of way, watercourse, and right of water, and other easements.

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[4] Section 140(2) of the *Land Titles Act* states:

> 140. (2) The description of registered land is not conclusive as to the boundaries or extent of the land.

[35] Conversion to the system of land registration governed by the *Land Titles Act* from the system of land registration governed by the *Registry Act* is authorized under s. 32 of the *Land Titles Act*,[5] which was first introduced in 1972.

D. THE APPLICATION JUDGE'S DECISION

[36] In the portion of his reasons addressing s. 113(5)(a)(iv) of the *Registry Act*, the application judge rejected the appellants' argument that s. 113(5)(a)(iv) merely codifies the historic exclusion of prescriptive easements from the 40-year search rule.

[37] As a starting point, he noted that prescriptive easements are already excluded from the 40-year search rule. This is because the definition of claim for the purpose of the 40-year search rule is set out is s. 111(1) of Part III of the

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[5] The relevant parts of s. 32 of the *Land Titles Act* read as follows:

> 32. (1) A land registrar, with the concurrence of the Director of Titles, may, subject to the regulations or the orders made under subsection (4), register under this Act any land in his or her land titles division to which the Registry Act applies, including land owned by Her Majesty the Queen in right of Canada or Ontario in respect of which evidence of such ownership has been registered under the *Registry Act*.
>
> (2) A parcel of land may be registered under this section with an absolute, possessory, qualified or leasehold title, according to the circumstances, as appears most appropriate to the land registrar.
>
> (3) A parcel of land may be registered under this section with a title qualified as to the location of the boundaries and the extent of the parcel.
>
> (4) The Director of Titles may make orders governing the registration of land under subsection (1) and the procedure to be followed in connection with the registration, including the notices to be given to owners and encumbrancers.

Registry Act, and includes only claims "based upon or arising out of a registered instrument". Claims such as prescriptive easements, which do not arise out of a registered instrument, are therefore not claims at all for the purpose of the 40-year search rule and consequently are outside its ambit.

[38] Section 113(5)(a)(iv) would thus be unnecessary if it applied only to prescriptive easements.

[39] The application judge also noted that there is an interpretive question regarding whether the respondents are claiming an "unregistered right of way" within the meaning of s. 113(5)(a)(iv). This was in dispute because the right of way had been registered on the title to the servient tenement, albeit outside the 40-year search period, and continued to be referred to in the deeds and transfers of the respondents' properties.

[40] Citing Jeffrey W. Lem's annotation to the Superior Court decision in *Ramsay*, [6] the application judge noted, at paras. 21 and 22 of his decision, that the 40-year rule would not cause unregistered interests to expire, so s. 113(5)(a)(iv) must apply to easements that had been registered at one time and that were then openly enjoyed and used at the time of the dispute: "The subclause precisely fits the case where an easement or right of way existed once in a registered deed and is still used although it may not exist any longer."

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[6] Jeffrey W. Lem, *1387881 Ontario Inc. v. Ramsay (Annot)* (Dec 2004), 24 R.P.R. (4th) 37-49, a case comment on *1387881 Ontario Inc. v. Ramsay* (2004), 71 O.R. (3d) 735.

[41] Acknowledging the argument that this approach might undermine the absolute certainty of the register, the application judge noted that the existence of prescriptive title and the doctrine of actual notice both do so as well. In the application judge's view, s. 113(5)(a)(iv) promotes both fairness and certainty, for a purchaser is far likelier "to see an open use than to understand an arcanely drafted point buried in a metes and bounds description registered on title."

[42] In the course of his reasons, the application judge concluded, at paras. 11 and 13, that the laneway has been openly enjoyed and used by the respondents throughout their periods of ownership of the dominant tenements:

> The [appellants] do not deny the evidence of each of the [respondents] that each of them has used the laneway for access to their properties and, significantly, in all but one case, for tenants to obtain access to leased premises in the properties throughout their ownership (Gold from 2009, Brown from 2003, and Fairley from 2001).
>
> …
>
> As is dealt with below, subclause 113(5)(a)(iv) of the *Registry Act*, does require a finding that the [respondents] are openly enjoying and using the right of way. As noted above however, the [appellants] do not deny the [respondents'] evidence concerning their present use of the laneway.

[43] The application judge granted the respondents' application and made an order prohibiting the appellants from interfering with the respondents' use of the rights of way over the laneway as described in their deeds.

E. THE PARTIES' ARGUMENTS ON APPEAL

[44] As I have said, in oral argument the parties agreed that the only issue on appeal is the correct interpretation of s. 113(5)(a)(iv) of the *Registry Act*. Proprietary estoppel, prescriptive easements and the *nemo dat* principle are not at issue.

[45] The appellants assert that s. 113(5)(a)(iv) applies only to prescriptive easements. In their view, the intent of s. 113(5)(a)(iv) is to deal with prescriptive rights that have crystalized and to ensure that those rights are not in some way eliminated.

[46] The appellants also assert that the respondents' rights of way do not fall within the ambit of s. 113(5)(a)(iv) because this section applies to an "unregistered right of way, easement or other right". In the appellants' view, the word "unregistered" means never registered, and thus s. 113(5)(a)(iv) does not apply to rights of way, like the respondents', that were once registered on the servient tenement but have not been properly renewed within the 40-year expiry period. Moreover, to hold otherwise would mean that a right of way would become frozen in existence as of a Land Titles conversion date. This is because the *Registry Act* requirements would no longer apply. Accordingly, the right of way would continue to exist regardless of whether it continued to be openly

enjoyed and used thereafter. The appellants assert that cannot have been the Legislature's intention.

[47] The respondents argue that s. 113(5)(a)(iv) does not apply only to prescriptive easements. In their view, the intent of s. 113(5)(a)(iv) is to ensure that, in the rare circumstances where a past registered right is not validly renewed for some reason yet the usage still openly continues, no danger exists that an existing right will be lost unfairly through the operation of Part III of the *Registry Act*.

F. LEGISLATIVE HISTORY OF PART III OF THE *REGISTRY ACT*

[48] As I will explain, the 40-year title search period and the 40-year expiry period provisions of Part III have been amended on several occasions. The legislative history of these provisions is important because they are the provisions to which s. 113(5) provides exceptions. The amendments demonstrate a consistent intention on the part of the Legislature, from at least 1981 onward, to attempt to confine, as far as is reasonably possible, the 40-year search period to 40 years, and to attempt to limit the manner in which a claim can be renewed to the registration of a notice of claim.

[49] Unlike the 40-year title search period and the 40-year expiry period provisions, the language of the exception now contained in s. 113(5)(a)(iv) has remained relatively unchanged. Notably, however, the opening words of the

exception provision have been amended so that the exceptions it contains, which originally applied only to the 40-year expiry period, now apply to Part III of the *Registry Act*. Section 113(5)(a)(iv) is therefore an exception, not only to the 40-year expiry period, but also to the 40-year title search period. Where s. 113(5)(a)(iv) applies, a right will not expire after 40 years. And an instrument registered outside the 40-year title search period will continue to affect the chain of title.[7]

[50] In *1387881 Ontario Inc. v. Ramsay* (2005), 77 O.R. (3d) 666, Lang J.A. reviewed the legislative and jurisprudential history of Part III of the *Registry Act* that was relevant to that case up to 2005.

[51] Like this case, *Ramsay* presented an issue concerning how rights of way can be preserved under Part III of the *Registry Act*. Unlike this case, in *Ramsay*, after the right of way was created, each conveyance of the servient tenement stated that the new owner of the servient tenement took title subject to a right of way in favour of the owners of the dominant tenements. After the 40-year expiry period ended, the then-owner of the servient tenement sought a declaration that the dominant tenement owners' claims to a right of way had expired.

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[7] Other provisions in Part III have also been amended. I have not referred to those amendments because they are not relevant.

[52] In *Ramsay*, Lang J.A. observed that the *Investigation of Titles Act, 1929*, S.O. 1929, c. 41 (the "1929 Act"), was enacted to codify[8] the common law on title searches. In addition, she noted that the 1929 Act became Part III of the *Registry Act* by virtue of the *Registry Amendment Act, 1966*, S.O. 1966, c. 136 (the "1966 Act"). Further, she said Part III remained relatively unchanged until the *Registry Amendment Act, 1981*, S.O. 1981, c. 17 (the "1981 Amendments").

[53] The 1981 Amendments addressed both the 40-year title search period and the 40-year expiry period.

[54] Concerning the title search period, Lang J.A. observed that, although both the 1929 Act and the 1966 Act purported to confine that period to 40 years, cautious practitioners continued to search for a root of title before that period: *Ramsay*, at para. 16, citing *Ontario Hydro v. Tkach* (1992), 10 O.R. (3d) 257 (C.A.). Lang J.A. concluded that by using very specific language to replace the former s. 105 of the 1980 Act,[9] the 1981 Amendments established that it was unnecessary to search for an earlier root of title:[10] *Ramsay*, at para. 16.

[55] Notably, the 1981 Amendments also introduced a new provision to address the 40-year expiry rule.

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[8] I would say clarify.
[9] *Registry Act*, R.S.O. 1980, c. 445 (the "1980 Act").
[10] Section 105 of the 1980 Act essentially mirrored s. 112(1) in its current form. The 1981 Amendments replaced s. 105 of the 1980 Act with a section that essentially mirrored ss. 112(1)-(3) in its current form.

[56] The pre-1981 Amendments 40-year expiry rule was found in s. 106(1) of the 1980 Act. Section 106(1) of the 1980 Act provided that a claim that had been in existence for longer than 40 years would expire unless acknowledged, referred to, or contained in an instrument or notice of claim within 40 years from its creation:

> 106. (1) A claim that has been in existence for longer than forty years does not affect land to which this Act applies unless the claim has been acknowledged or specifically referred to or contained in an instrument or a notice under this Part or under *The Investigation of Titles Act*, being chapter 193 of the Revised Statutes of Ontario, 1960, or any predecessor thereof, registered against the land within the forty-year period. [Emphasis added.]

[57] Following the 1981 Amendments, the amended provision (which is now s. 113(1)) referred only to a notice of claim, and no longer referred to the claim being acknowledged, referred to or contained in an instrument:

> 106. (1) A claim that is still in existence on the last day of the notice period expires at the end of that day unless a notice of claim has been registered.

[58] As part of the 1981 Amendments, “notice of claim” and “notice period” were defined in s. 104 (now s.111):

> “notice of claim” means a notice of claim registered under subsection 113(2) and includes a notice registered under a predecessor of this Part or under *The Investigation of Titles Act* [citation omitted], or a predecessor thereof;

> "notice period" means the period ending on the day forty years after the day of the registration of an instrument or a notice of claim, as the case may be. [Emphasis added.]

[59] *Ramsay* was significant because this court held that, following the 1981 Amendments, a registered easement could still be preserved not only by registering on the servient tenement a notice of claim in the prescribed form but also by registering a deed referencing the right of way. This was largely because the definition of notice period referred to a period 40 years after the registration of *an instrument* or notice of claim. In the light of this conclusion, the court found it unnecessary to address the argument made in that case by the owner of the servient tenement that s. 113(5)(a)(iv) of the *Registry Act* would preserve an easement that was openly enjoyed and used.

[60] Concerning the latter issue, at para. 40, the court commented on the intent of s. 113(5)(a)(iv) and its requirements. The court also expressed concern whether the section could adequately alleviate the unfairness that would result from interpreting the 1981 Amendments to mean that a right of way would not be preserved even though it was referred to in deeds registered on the servient tenement:

> The intent of [s. 113(5)(a)(iv)], however, is not clear. It appears that, first, to be excepted, the claim must be a right of way or other right. Second, if that requirement is satisfied, the claimant will be required to establish current usage. This combination of traditional easement law with current usage raises complex considerations.

> As a result, it is not obvious that this provision would alleviate potential unfairness. [Emphasis added.]

[61] Following the decision in *Ramsay*, the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, S.O. 2006, c. 34 (the "2006 Amendments") amended the definitions of "notice of claim" and "notice period" in the *Registry Act* to read as they now do. The amended definitions confine a "notice of claim" to a notice of claim "in the prescribed form". In addition, they confine the reference to an instrument in the definition of "notice period" to "an instrument that first creates a claim".

[62] The interpretation and application[11] of the 2006 Amendments is not directly at issue on this appeal. Nonetheless, I observe that, on their face, the amended definitions I have referred to appear to be aimed at reversing the holding in *Ramsay* that a registered right of way could be preserved through the registration on the servient tenement of a deed referring to the right of way. That said, nothing in these reasons should be taken as determining the interpretation or application of the 2006 Amendments.

[63] Turning to s. 113(5), this exception provision was first introduced in the 1966 Act. However, the exceptions were to the 40-year expiry period rather than

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[11] For example, an issue could arise whether the 2006 Amendments apply retrospectively. At para. 18 of *Ramsay*, Lang J.A. said that in *Fire v. Longtin* (1994), 17 O.R. (3d) 418 (C.A.), aff'd [1995] 4 S.C.R. 3, McKinlay J.A. held that the 1981 Amendments applied retrospectively. In affirming McKinlay J.A.'s reasons, the Supreme Court effectively overruled two other decisions of this court that had come to a contrary conclusion on retrospectivity: *Camrich Developments Inc. v. Ontario Hydro* (1990), 72 O.R. (2d) 225 (H.C.J.), at p. 235, affd (1993), (C.A.) and *National Sewer Pipe Ltd. v. Azova Investments Ltd.* (1993), 14 O.R. (3d) 385 (C.A.).

to Part III.[12] As part of the 1981 amendments, the opening language of the section was broadened so that the section creates exceptions to Part III rather than simply to the 40-year expiry period. Apart from that change, the wording of the actual exception in s. 113(5)(a)(iv) has remained essentially the same since 1966.[13]

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[12] When first introduced, the exception now set out in s. 113(5)(a)(iv) was contained in s. 135(2)(d) of the 1966 Act. Section 135(1) of the 1966 Act described the 40-year expiry period. Section 135(1) and (2)(d) read as follows:

> 135(1) A claim that has been in existence for longer than forty years does not affect land to which this Act applies unless the claim has been acknowledged or specifically referred to or contained in an instrument or a notice under this Part or under *The Investigation of Titles Act* [citation omitted] or any predecessor thereof, registered against the land within the forty-year period.
>
> (2) Subsection 1 does not apply to,
>
> …
>
> (d) a claim to an unregistered right-of-way or other easement or right that a person is openly enjoying and using[.]

The hyphens in the term "right-of-way" were eliminated in the 1980 Act.

[13] The 2006 Amendments changed the wording of s. 113(5)(a)(iv) from:

> This Part does not apply to, … a claim … of a person to an unregistered right of way or other easement or right that a person is openly enjoying and using

to:

> This Part does not apply to, … a claim … of a person to an unregistered right of way, <u>easement or other</u> right that the person is openly enjoying and using.

G. ANALYSIS

[64] The main issue on appeal is the proper interpretation of s. 113(5)(a)(iv) of the *Registry Act*. This raises a question of statutory interpretation, which is reviewable on a standard of correctness.

[65] A second issue involves the application of s. 113(5)(a)(iv) to the facts of this case.

[66] I will begin with the statutory interpretation issue.

(1) The interpretation of s. 113(5)(a)(iv) of the *Registry Act*

[67] The modern approach to statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, quoting from Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87.

[68] Like the application judge, I conclude that s. 113(5)(a)(iv) of the *Registry Act* can apply to protect a dominant tenement holder's right to use a right of way that was once registered on the servient tenement but the registration of which was not validly renewed within 40 years after its creation.

[69] However, in my view, at least while land continues to be governed by the system of land registration governed by the *Registry Act*, this protection will apply

following the expiration of the 40-year expiry period only for so long as the right of way continues to be openly enjoyed and used by the owners of the dominant tenement.

[70] Accordingly, although the application judge determined that the respondents were openly enjoying and using the laneway as of the date of the application, in my view, it was also necessary that the respondents show the laneway had been openly enjoyed and used following the expiration of the 40-year expiry period (either 1988 or 1994, depending on when the right of way was first created). I will return to this issue below.

[71] A question may exist whether open enjoyment and use must continue after the date of Land Titles conversion because the *Land Titles Act* does not address the issue. However, the question does not arise in this case for two reasons. First, for reasons set out below, I am satisfied that, for all properties at issue, the respondents demonstrated open enjoyment and use to the date of the application, which was following the date of Land Titles conversion. Second, that interpretive issue was not raised as an issue on appeal.

(a) Section 113(5)(a)(iv) can protect rights of way that are no longer validly registered

[72] Like the application judge, I reach the conclusion that s. 113(5)(a)(iv) of the *Registry Act* can apply to protect a dominant tenement holder's right to use a right of way that was once registered on the servient tenement but no longer is

validly registered largely for the reasons articulated by Jeffrey W. Lem in his annotation to the trial decision in *Ramsay*.

[73] As Mr. Lem notes, the concept of prescriptive easements has long been part of the common law. Accordingly, if the Legislature had intended s. 113(5)(a)(iv) to apply only to prescriptive easements, it could easily have said so explicitly. The Legislature could have done so either by referring specifically to the concept – as it did on several occasions in the *Land Titles Act*, by using terms like "possessory", "prescription", and "length of possession" in, for example, ss. 36(1) and 51(1)[14] – or by importing language into s. 113(5)(a)(iv) that mirrors relevant portions of the well-established test for prescriptive easements.[15]

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[14] Sections 36(1) of the *Land Titles Act* reads as follows:

> 36. (1) Where on an application for first registration it appears that the applicant is so entitled by virtue of length of possession of the land, the applicant may be registered as the owner of the land with a possessory title.

Sections 51(1) states:

> 51. (1) Despite any provision of this Act, the *Real Property Limitations Act* or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription.

[15] In *Kaminskas v. Storm*, 2009 ONCA 318, [2009] O.J. No. 1547 (C.A.), Blair J.A. noted, that to establish a prescriptive easement, the owner of the dominant tenement must meet the four requirements for an easement at common law; and must also show that use was continuous for the required time period and as of right: uninterrupted, open, peaceful and without permission for the requisite time period – *nec vi, nec clam, nec precario* — without force, without secrecy and without permission.

[74] The Legislature did neither. Instead, it used the following language: “This Part does not apply to … a claim … of a person to an unregistered right of way … that the person is openly enjoying and using” (emphasis added).

[75] Further, as both Mr. Lem and the application judge correctly observed, prescriptive easements are not caught by the 40-year title search rule or the 40-year expiry rule, which Part III addresses. This is because s. 111(1) limits the definition of “claim” for the purposes of those rules to an interest “set forth in, based upon or arising out of a registered instrument”. Prescriptive rights are neither set forth in, nor based upon, nor do they arise out of registered instruments. Thus, if s. 113(5)(a)(iv) were intended to apply only to prescriptive rights, it would be redundant. If the 40-year title search rule and the 40-year expiry rule do not apply to unregistered prescriptive easements, it was unnecessary to enact s. 113(5)(a)(iv) to preserve them.

[76] In this regard, it is noteworthy that s. 111(2) expands the definition of “claim” for the purposes of s. 113(5)(a)-(b), so that it “is not confined to a claim under a registered instrument.” The expanded definition of claim is thus broad enough to encompass prescriptive easements. However, it seems unlikely that the Legislature would draft an exception to Part III that was intended to apply only to the expanded portion of the definition of “claim”, particularly when the focus of Part III is on claims arising out of registered instruments.

[77] Further, I agree with Mr. Lem and the application judge that once-registered rights of way that are not effectively renewed within the 40-year search period meet the definition of “unregistered”. In its plain meaning, the word “unregistered” is not synonymous with “never registered.” In my view, on its face, “unregistered” right of way also encompasses a right of way that once was, but no longer is, effectively registered.

[78] In relation to this point, the main focus of Part III of the *Registry Act* is on claims “set forth in, based upon or arising out of” registered instruments, their impact in the chain of title, their expiry and how they can be renewed.

[79] Through various amendments, the Legislature has attempted to confine, to the extent possible, the title search period to 40 years and to eliminate any mechanism for renewing a claim, other than by registration of a notice of claim in a prescribed form.

[80] Considered in that context, it makes sense that the word “unregistered” in a provision creating an exception to Part III would encompass claims that were once registered but are no longer validly registered. In my view, the purpose of s. 113(5)(iv) is, at least in part, to preserve, because of particular circumstances relating to the claim, a claim that was once registered, but which is no longer validly registered. The particular circumstances are the fact that the underlying right continues to be openly enjoyed and used.

[81] In *Ramsay*, at para. 46, this court articulated the overall purpose of the *Registry Act* as seeking to promote commercial certainty; to simplify the title search process; and, to this end, to eliminate stale claims.

[82] Through s. 113(5)(iv), the Legislature protects claims that are old, but not stale, in a manner that is consistent with the purposes of the *Registry Act* and that is not unfair to purchasers. Even though not validly renewed, the claims are not stale because they are still being openly enjoyed and used. And protecting such claims does not defeat the purposes of Part III – nor is it unfair to purchasers. This is because the enjoyment and use is open. The claims are there to be seen.

[83] Moreover, assuming the Legislature intended to reverse the result in *Ramsay*, which held that rights of way could be preserved if referred to in registered deeds on the servient tenement, s. 113(5)(iv) is the only mechanism that would protect against the manifest unfairness that could accrue to dominant tenement owners because of the legislated change in the law. Prior to the 2006 Amendments, dominant tenement holders may have relied reasonably on references to rights of way in deeds registered on the servient tenement. Properly interpreted, s. 113(5)(a)(iv) could protect them from losing, unfairly, a right of way they continue to use and enjoy, openly.

[84] In oral argument on appeal, the appellants submitted that the application judge's interpretation of s. 113(5)(a)(iv) creates a title search problem, in that it defeats the 40-year title search rule, and effectively requires a search back to the Crown grant. I reject this argument. The words "openly enjoying and using" do not point to doing a title search; rather, they point to conducting a careful inspection of the property and of all available (or new) surveys.

[85] Fairness suggests that a right of way that was once registered and continues to be openly enjoyed and used should be exempted from the operation of the 40-year rules set out in Part III. This must have been what the Legislature intended – and is what a proper interpretation of s. 113(5)(a)(iv) requires.

[86] Having regard to these factors, I reject the appellants' argument that s. 113(5)(a)(iv) applies only to prescriptive easements.

[87] I also reject the appellants' argument that the impact of Land Titles conversion has any bearing on the interpretation of s. 113(5)(a)(iv). Section 113(5)(a)(iv) was enacted originally in 1966, prior to the enactment of any section authorizing conversion to Land Titles.

[88] In any event, the factors I have enumerated mandate the interpretation I have reached. The fact that the Legislature may not have addressed the impact of Land Titles conversion does not diminish the weight of those factors. I

conclude that s. 113(5)(a)(iv) can apply to preserve a right of way that was once registered but that is no longer validly registered.

(b) An applicant must show open enjoyment and use from the expiration of the 40-year expiry period

[89] In my view, however, to succeed in demonstrating that s. 113(5)(a)(iv) applies in a particular case, an applicant must show that, at least while governed by the *Registry Act*, the owner(s) of the dominant tenement have openly enjoyed and used the right of way continuously from the expiration of the 40-year expiry period in relation to the creation of the right of way on the servient tenement.

[90] I reach this conclusion because of the requirements of s. 113(5)(a)(iv). I agree with Lang J.A.'s *obiter* description of those requirements in *Ramsay*. On a plain reading of s. 113(5)(a)(iv), the subsection has two requirements. First, to be excepted, the claim must be a right of way or easement or other right. Second, if that requirement is satisfied, the claimant will be required to establish current usage.

[91] In my view, to satisfy the first requirement, the right of way must not have expired through the operation of the 40-year expiry period. Under s. 113(1), a "claim that is still in existence on the last day of the notice period *expires* at the end of that day unless a notice of claim has been registered."

[92] Where no notice of claim has been registered, which is the situation in this case, "notice period" means the period ending on the day 40 years after the day

of the registration of an instrument that first creates a claim. This means that, where a notice of claim has not been registered, unless s. 113(5)(a)(iv) applies, a right of way will expire 40 years after it was created.

[93] If the right of way expired at any point following the expiration of the 40-year expiry period, it would no longer be a valid right of way. To show that the right of way has never ceased to be a valid right of way, a claimant must satisfy the other requirement of s. 113(5)(a)(iv), namely open enjoyment and use. Accordingly, to qualify for the exception in s. 113(5)(a)(iv), a claimant must show open enjoyment and use continuously from the expiration of the 40-year expiry period – at least to the date of any Land Titles conversion, at which point the *Land Titles Act* would apply.

(2)The application of s. 113(5)(a)(iv) to the facts of this case

[94] As noted above, the application judge found that the respondents were openly enjoying and using the laneway as at the date of the application. Although he did not expressly address whether they had demonstrated open enjoyment and use of the laneway from the expiration of the expiry period, he did discuss whether their evidence could show a prescriptive easement. He found the

respondents' evidence insufficient to meet the test for a prescriptive easement prior to 2003, the Land Titles conversion date for 7 Cunningham Avenue.[16]

[95] Nonetheless, read as a whole, in my view, the application judge's reasons demonstrate that, had he turned his mind to the issue, he would have made a finding that the respondents had demonstrated open enjoyment and use of the right of way from the expiration of the expiry period, whether it was 1988 or 1994. That is because he observed there were statutory declarations registered on title purporting to show continuous usage of the rights of way from the date of their creation. Further, he concluded the vague assertions of the appellant Kane, based on information and belief, concerning the positions of prior owners, were either not admissible or not sufficiently cogent to disprove the respondents' evidence.

[96] In the course of his reasons, at paras. 12 and 13, the application judge said:

> There are statutory declarations registered on title that purport to show continuous usage of the rights-of-way as far back as their creation in 1948. [The appellant,] Kane[,] recites, by way of information and belief, some evidence to the contrary. I note that the evidence from [a prior owner] is not inconsistent with the evidence of long-term use by the [respondents]. The evidence of the [appellants'] next door neighbour is double hearsay and inadmissible as the neighbour is not identified. The

[16] A prescriptive easement cannot arise after Land Titles conversion: *Land Titles Act*, s. 51.

> evidence concerning [other prior owners] is wholly unparticularized.
>
> While I would not accept this evidence as disproving the [respondents'] evidence, I do not need to make a historical finding in this case. The [respondents'] do assert prescriptive easements. They do not have sufficient evidence to meet the test prior to 2003 when 7 Cunningham Ave. was registered under qualified land titles. As is dealt with below, subclause 113 (5)(a)(iv) of the *Registry Act*, does require a finding that the [respondents] are openly enjoying and using the right-of-way. As noted above however, the [appellants] do not deny the [respondents'] evidence concerning their present use of the laneway. [Emphasis added.]

[97] In any event, based on my review of the record, I am satisfied that, collectively, the evidence supports a finding that the respondents openly enjoyed and used and enjoyed the right of way from at least the expiration of the expiry period, to 2003, when the servient tenement was converted to Land Titles, and from that date to the date of the application. I base this conclusion on the following factors:

- depending on one's view of whether the 1948 deed or the 1954 deed created the right of way at issue over 7 Cunningham Avenue, the 40-year expiry period elapsed in either 1988 or 1994;
- the record includes a document purporting to be a copy of the parcel register for 7 Cunningham Avenue. That document discloses a date of conversion to Land Titles of February 24, 2003;

- the respondents' evidence includes statutory declarations from individuals claiming to have owned 78 Brock Avenue (the most southerly property claiming access to the right of way), between June 20, 1946 and July 17, 2003.[17] The declarants of these statutory declarations claim to have had, during the period they each owned 78 Brock Avenue, either "free and uninterrupted use" or "continuous, open, undisturbed and undisputed use" of a right of way over 7 Cunningham Avenue, which had a width of approximately seven feet six inches and a depth of approximately 89 feet nine inches;
- the respondents' evidence also included a statutory declaration from a Jenny Ramlogan who claimed to have owned 80 Brock Avenue between 1998 and September 14, 2009. In the statutory declaration, Ms. Ramlogan claims that while she (or she and her husband) owned 80 Brock Avenue they used, on a regular and continuous basis, the right of way over 7 Cunningham Avenue, which was referenced in their deed and also shown on a survey dated May 2, 1986. She also states that the right of way has been used, "based on [her] personal knowledge and observations, by the

[17] The deponents of the statutory declarations who claim to be prior owners of 78 Brock Avenue and the period during which they claim prior ownership are, respectively: Ernest Harrest Lund and Renee Olive Lund, June 20, 1946 to February 28, 1990; Gobin Persuad and Radica Persaud, February 28, 1990 to November 30, 1999; and Kenneth John Mogridge, December 1, 1999 to July 17, 2003.

owners of 78, 82 [sic], and 84 Brock Avenue, and/or their tenants and guests" throughout her period of ownership;

- each of the respondents filed an affidavit establishing their open enjoyment and use of the right of way from the date they acquired their respective properties: Brown – 2003, Gold – 2009, and Fairley – 2001.
- the photographs appended as exhibits to the respondent Elaine Gold's affidavit demonstrate the impossibility of gaining vehicular access to the dwellings depicted by the photographs except by use of the laneway depicted in the photographs; and
- the photographs appended as exhibit 12 to the respondent Elaine Gold's affidavit bear out the application judge's comment discounting the appellant Kane's claim that when the appellant's bought their home, there was no suggestion any of the respondents had a right to use 7 Cunningham Avenue:

> He must not have realized that the laneway was part of the property that he was buying since it is perfectly obvious that it serves as the driveway for the [respondents'] homes.

[98] Like the application judge, I conclude, for the reasons he stated, that the appellants' evidence does not displace the respondents' evidence of ongoing open enjoyment and use.

[99] I acknowledge that only one of the respondents (Brown) filed direct evidence demonstrating open enjoyment and use of the laneway from the expiration of the expiry period until 2003. Further, the record does not reveal when the respondents' houses depicted in the photographs I have referred to were built.

[100] Nonetheless, taken as a whole, I am satisfied that the record creates an inference, on a balance of probabilities, that all of the respondents and their predecessors in title, dating back to at least 1988, openly enjoyed and used the right of way. That is because using the laneway is the only realistic way to access the respondents' homes and associated parking.

H. DISPOSITION

[101] Based on the foregoing reasons, I would dismiss the appeal with costs to the respondents on a partial indemnity scale fixed in the amount of $7,000 inclusive of disbursements and applicable taxes.

Released:
"GE"
"DEC 18 2015"

"Janet Simmons J.A."
"I agree Gloria Epstein J.A."
"I agree G. Pardu J.A."