COURT OF APPEAL FOR ONTARIO

CITATION: Hunsinger v. Carter, 2018 ONCA 656
DATE: 20180720
DOCKET: C64923

Feldman, Hourigan and Brown JJ.A.

BETWEEN

Ray Christian Hunsinger

Applicant (Appellant)

and

Jonathan David Carter and Christina Carter

Respondents (Respondents)

C. Edward McCarthy, for the appellant

Tyler Nicholson, for the respondents

Heard: July 6, 2018

On appeal from the order of Justice James A. Ramsay of the Superior Court of Justice, dated January 8, 2018.

REASONS FOR DECISION

Introduction

[1] The appellant brought an application to declare an easement over a strip of land between his property and the property of the respondents, and to restrain the respondents from blocking his right of way by erecting a fence. Although the application judge found the appellant had established an easement over the strip,

he declared the easement over only the rear part of the strip, and concluded that the respondents could erect a fence to block the front of the strip, as its use was not necessary for the appellant. The appellant appeals the order allowing the respondents to erect the fence. There is no cross-appeal.

Background Facts

[2] Since 1948, the appellant's family has operated a plumbing business on the appellant's property. The respondents purchased their property in 2017 for residential use. However, they intend to operate a daycare there. There is a gravel driveway between the two properties. The respondents own a strip of the gravel driveway running lengthwise that varies in width from 8.5 feet to 11 feet. Following their purchase, the respondents advised the appellant that they proposed to erect a fence along the boundary of their property in the middle of the gravel driveway. The purpose of the fence is for the safety of the children at the daycare.

[3] The gravel driveway has been used and maintained by the appellant and his family since at least 1965 in connection with their plumbing business in order to access the rear of the property, which has buildings used for storage and other purposes. Many delivery trucks, as well as the appellant's vehicles, regularly use the driveway for ingress and egress. The appellant also parks his two large commercial trucks at the rear of his property, fuel and water deliveries are made there, and supplies for the business are stored there. The appellant gave detailed

evidence regarding the difficulties he, his suppliers and customers, and his tenant would face if their vehicles were required to manoeuver around vehicles parked on the respondents' side of the strip or if it was otherwise blocked. The respondents asserted that the appellant and others needing to access the rear of his property were able to manoeuver their trucks and other vehicles on the appellant's own portion of the driveway and that using the entire strip was not necessary. The application judge stated that the respondents had demonstrated that it was possible to get trucks between their property line and the appellant's buildings, but only with great difficulty.

[4] The respondents' predecessors never disputed the appellant's right to use the strip. Additionally, they used the driveway themselves in order to access the rear of their property.

The Application Judge's Reasons

[5] Referring to this court's decision in *Weidelich v. de Koning,* 2014 ONCA 736, 122 O.R. (3d) 545 to conclude that the test for establishing a prescriptive easement is "reasonable convenience", the application judge found that the appellant had established his right to a prescriptive easement. The appellant's property was the dominant tenement, while the respondents' property was the servient tenement. The properties are and were owned by different people. For over 40 years before 2007, when both properties were registered in the Land Titles system, the

appellant and his family had made use of the gravel driveway “openly, continuously, and without licence”.

[6] The application judge then came to the issue of the proposed obstruction of the easement. He stated that the obstruction would only be actionable “to the extent that the property was actually used and the easement actually exists.”

[7] He then made the finding that vehicles that either parked in front of the appellant’s building or gained access to the rear would not need to use the front part of the strip. He inferred that the vehicles used the part that they needed to use and concluded that the easement had been established only over the rear portion of the strip, not the front, and made the declaration accordingly.

Issues

[8] With respect, the application judge erred in his articulation and application of the tests for determining whether a prescriptive easement has been established and the basis on which an obstruction of an easement or right of way will be allowed or limited.

(1) Establishment of an easement by prescription

[9] An easement by prescription can arise either under s. 31 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, or pursuant to the doctrine of lost modern grant. Both have the same four requirements, which were properly recognized by the application judge: i) a dominant tenement that enjoys the benefit

of the easement and a servient tenement whose owner suffers some use of its land; ii) the properties cannot be owned by the same person; iii) the benefit of the easement must be reasonably necessary for the enjoyment of the dominant tenement; and iv) there must be 20 or 40 years' (see: *Kaminskas v. Storm*, 2009 ONCA 318, 95 O.R. (3d) 387, at paras. 31-36) continuous, uninterrupted, open, and peaceful use enjoyed without obtaining the permission of the servient tenement owner. See: *Henderson et al. v. Volk et al.* (1982), 35 O.R. (2d) 379 (C.A.).

[10] After a property has been registered under the Land Titles system, a pre-existing prescriptive easement over the land can be established if the four criteria can be proved to have been met before the land was transferred into Land Titles: *Carpenter v. Doull-MacDonald*, 2017 ONSC 7560, at paras. 54-55.

(2) Ability to encroach

[11] Where an easement has been found to exist, an adjoining owner will be entitled to encroach on it unless that encroachment amounts to substantial interference with the use of the easement. In *Gale on Easements*, 19th ed. (London: Sweet & Maxwell, 2012), at para. 13-06, the authors quote the test from Cockburn C.J. in *Hutton v. Hamboro* (1860), 175 E.R. 1031 (U.K. Assizes):

> [W]here the obstruction of a private way was alleged … the question was whether practically and substantially the right of way could be exercised as conveniently as before.

[12] In *Weidelich*, Doherty J.A. discussed how that test should be applied in the context of a right of way granted in a deed. He concluded at para. 15 that "[t]he dominant owner is entitled to every reasonable use of the right-of-way for its granted purpose." He adopted as correct the articulation of the test in the case of *B & Q Plc v. Liverpool and Lancashire Properties Ltd.*, [2000] E.W.H.C. 463 (U.K. Ch.), as follows:

> In short, the test … is one of convenience and not necessity or reasonable necessity. Provided that what the grantee is insisting on is not unreasonable, the question is: can the right of way be substantially and practically exercised as conveniently as before?

Analysis

[13] In our view, the application judge erred in law when he referred to the *Weidelich* case when discussing the criteria for finding a prescriptive easement. He also erred in his application of the test in *Weidelich* by conflating the criteria for finding an easement with the criteria for finding an encroachment. Finally, he erred by imposing a test of necessity on the owner of the dominant tenement, rather than the test of whether the dominant owner would be able to use the easement as conveniently as before.

[14] The evidence before the court clearly showed a prescriptive easement through over 40 years' use by the appellant and his family of the entire strip of gravel driveway from front to back.

[15] The question then became whether a fence running lengthwise on either all of the strip or down the front portion of the strip would practically interfere with the appellant's use of the right of way to the extent that he would not be able to use it as conveniently as before. Framing the question in that way, the answer is clear on the finding by the application judge that it would be possible to drive trucks there, but only with great difficulty.

[16] The uncontradicted evidence was that large trucks have accessed the back of the appellant's property regularly over the entire time the appellant and his family have operated their business. The motion judge inferred that the trucks did not need to drive over the portion of the strip at the front half of the driveway but could stick to the appellant's side of the driveway until they got to the back half. Although this may be possible, it is clearly not as convenient as having access to the full driveway. One need only consider a large truck backing into the driveway, not straight backwards as before over the whole driveway, but now having to stick to the appellant's side at the front, then making a turn onto the entire strip at the back end.

Conclusion

[17] In our view, the appeal must be allowed, and the easement granted over the entire strip, with an order that the respondents be enjoined from obstructing the

easement with the proposed fence or otherwise in a way that would similarly interfere with its established use.

[18] Costs of the appeal to the appellant in the amount of $10,000 inclusive of disbursements and HST. The motion judge ordered no costs on the basis that success was divided. As the result has now changed, the appellant is entitled to its costs of the motion in the amount of $12,000 inclusive of disbursements and HST.

“K. Feldman J.A.”
“C.W. Hourigan J.A.”
“David Brown J.A.”