COURT OF APPEAL FOR ONTARIO

CITATION: Lacey v. Kakabeka Falls Flying Inc., 2023 ONCA 83
DATE: 20230203
DOCKET: C70567

Huscroft, Miller and Nordheimer JJ.A.

BETWEEN

Robin Lacey and Jennifer Lacey

Applicants (Appellants)

and

Kakabeka Falls Flying Inc.

Respondent (Respondent)

Michael Cupello, for the appellants

Jordan Lester and Nathan Wainwright, for the respondent

Heard: February 2, 2023

On appeal from the judgment of Justice F. Bruce Fitzpatrick of the Superior Court of Justice, dated March 21, 2022, with reasons reported at 2022 ONSC 1780.

REASONS FOR DECISION

[1] Mr. & Mrs. Lacey appeal from the decision of the application judge who dismissed their application for declaratory relief, a Writ of Possession, and other relief, relating to a lease held by the respondent over a portion of their property. At

the conclusion of the hearing, we dismissed the appeal with reasons to follow. We now provide those reasons.

[2] The application involved a dispute between the parties over a 99-year lease that the respondent holds over 16.5 acres of 177 acres of land owned by the appellants near Thunder Bay. The respondent operates an airfield on the property, which it has done for more that 54 years. The appellants claim that the lease is of no force or effect since it violates the *Planning Act*, R.S.O. 1990, c. P.13.

[3] The appellants purchased the lands in June 2010. They were aware of the respondent's lease when they purchased the lands. The respondent signed the lease with the previous owner of the lands in November 1968. The central issue before the application judge was whether the lease commenced prior to May 2, 1968. That date is important because, prior to May 2, 1968, the *Planning Act* contained an exemption from the general subdivision prohibition contained in the Act in circumstances where both the subdivided lands and the abutting land had an area of 10 acres or more.

[4] The application judge found, based on the evidence that was before him, that, while the formal lease was signed on November 20, 1968, the lease had actually commenced on January 1, 1967. The formal lease stipulated that this was the commencement date for the lease and the application judge had before him

evidence that supported the conclusion that the respondent had started to use the lands in 1967, including making improvements to them.

[5] The application judge also concluded that the appellants' application was statute barred under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. He found that the appellants knew of the lease when they purchased the lands in 2010, yet they did not commence their application challenging the lease until March 2017. In the interim period, the appellants had, among other things, received the rent stipulated in the lease.

[6] We do not see any error in the application judge's conclusion that the relief sought in the application was statute-barred given the factual findings that the application judge made, all of which were open to him on the record. We recognize that the application judge had to make those factual findings based on a record that he found was unsatisfactory given the quality of the evidence produced by the appellants.

[7] We also agree with the application judge that the appellants cannot avoid the application of the two-year limitation period through reliance on s. 16(1)(a) of the *Limitations Act, 2002* since the appellants' application was not limited to seeking a declaration alone. While it was not argued before us during the oral hearing, we also do not see any error in the application judge's conclusion that the

10-year limitation period in the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 does not apply to this case.

[8] Finally, we further agree with the application judge's criticism of the appellants' use of the application process for the determination of this matter, rather than commencing an action. As the application judge observed, the application process is generally restricted to matters where there are no material facts in dispute. Here, there were many factual matters that the appellants sought to dispute. Those disputes would have been better determined through the hearing of *viva voce* evidence, assuming such evidence existed. That said, the appellants chose to use the route of an application and they must accept the consequences of that choice.

[9] The appeal is dismissed. The respondent is entitled to its costs of the appeal fixed in the agreed partial indemnity amount of $12,000 inclusive of disbursements and HST. While the respondent sought costs on a full indemnity basis, we do not see anything in the conduct of this appeal that would justify an award on a higher scale.

"Grant Huscroft J.A."
"B.W. Miller J.A."
"I.V.B. Nordheimer J.A."