

WINDOW ON CASE LAW

Boundary Dispute

By John Durfey and Margaret Sparling

Noel v. Page (1996), 57 A.C.W.S. (3d) 234 Ontario Court (General Division). (Supplemental Reasons Fixing Costs, 62 A.C.W.S. (3d) 245 Ontario Court (General Division))

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This decision involved a boundary dispute between two neighbours owning lakefront property. The plaintiff purchased his property in 1956 at which time there was no survey for the lands and the legal description did not indicate the measurement of frontage on the lake.

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In 1960 a survey was prepared for a number of lots to the west of the plaintiff's property. In the course of preparing the survey, the surveyor misplaced the boundary between lot lines and the monuments placed for this survey were relied

on by subsequent surveyors.

In the early 1970s the plaintiff planted a row of trees on what he believed was the western boundary of his property, which complied with the 1960 survey. He subsequently cut the grass and maintained the property to the tree line. In fact the plaintiff's property actually extended beyond the tree line including an area upon which the defendant later encroached.

In the early 1970s there were a number of cases of litigation concerning lots west of the plaintiff's property which were affected by the 1960 survey. The plaintiff was not aware of this litigation. In 1977, the error in the 1960 survey was discovered in a survey prepared as a result of this litigation.

The defendants purchased their property in 1978 and were aware of the ongoing disputes as to property boundaries in the area. The defendants did not obtain a survey prior to purchasing the property, even though they were so advised by

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their solicitor who specifically referred to the lack of a survey in his reporting letter. The defendants, instead, relied on the opinion of one neighbour whom they

regarded as an astute businessman.

The defendants built an addition to their dwelling in 1980 and 1983 and on both occasions received a building permit from the municipality in spite of the fact that no information as to setbacks was given in the application. In 1987, the defendants drilled a new well on their property. In the same year the plaintiff hired a surveyor, who determined that most of the two additions and the well were located on the plaintiff's property. In 1991, the plaintiff prepared, at his expense, the survey required for an order of the Deputy Director of Titles under the *Boundaries Act*, whose order established the boundary of the plaintiff's property and confirmed the encroachment of the two additions and the well. The plaintiff sought an order by way of mandatory injunction to require the defendants to remove the encroaching portion of the defendants' residence. The defendants sought an order under section 37(1) of the *Conveyancing and Law of Property Act* which would allow them to acquire the property encroached upon, in exchange for compensation.

The Court confirmed the power of the Deputy Director of Titles to make an order establishing property boundary lines pursuant to sections 15 and 16 of the *Boundaries Act*. The Court also noted that the properties were in a Land Titles jurisdiction and that section 51(1) of the *Land Titles Act* which prevents the acquisition, through possession, of any interest in land which is adverse to the registered owner.

The Court noted that, based on the foregoing, it would have been compelled to grant the injunction to the plaintiff, but for section 37(1) of the *Conveyancing and Law of Property Act*, under which the defendant sought relief. That section states as follows:

s37(1) Where a person makes lasting improvements on the land under the belief that it is the person's own, that person, or the person's assigns, are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Ontario Court (General Division) is of the opinion or

requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

The Court proceeded to exercise its discretion to order that the defendants be entitled to acquire the land subject to the encroachment, in return for just compensation. It found that no enhancement in the value of the property encroached upon was required in order that the defendants could request retention of the property encroached upon. The Court, in deciding in favour of the defendants, examined the honest belief of the defendants, the lasting improvements made, and its discretion to grant the relief, all as set out in section 37(1) of the Act.

The Court found that even though the defendants were reckless in purchasing the property without a survey, they had an honest, bona fide belief that the tree line, planted by the plaintiff, marked the western boundary of the plaintiff's property. The Court also noted that several other owners in the area also purchased without a survey.

The Court also found that the additions and the well were "lasting" improvements in that they were permanent and not easily removable.

In exercising its discretion in favour of the defendant, the Court noted it would be expensive, if not impossible, to remove the additions to the residence without tearing down the additions. The plaintiff had not suspected that his property extended beyond the tree line until he commissioned the survey in 1987. While the decision to allow the defendants to acquire the property encroached upon would "seriously impact" the plaintiff's land in terms of shape and privacy, the Court held the balance of convenience was decidedly in favour of the defendants.

In the matter of compensation to the plaintiff, the Court considered the value of the land to be conveyed to the defendant, the injurious affection to the remainder of the plaintiff's land, and the plaintiff's costs. The Court computed the value of the land to be conveyed as a proportionate amount of the total value of the plaintiff's property, which it in

turn determined using an average of the municipal assessment of the property and the evaluation of a real estate broker. The court also held that the injurious affection suffered by the plaintiff's property as a result of the encroachments was 15% of the value of the property, which amount the defendants were also required to pay.

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The Court held that the plaintiff was in no way at fault in the boundary dispute and should not suffer any monetary loss as a result of the order. Accordingly, the Court ordered the defendants to pay the plaintiff's costs in obtaining the order under the *Boundaries Act* and in preparing the survey therefor, as well as the plaintiff's costs in the action on a solicitor and client scale. The Court reconfirmed this decision as to costs in supplemental reasons delivered after a request from counsel for further direction. The Court found that the plaintiff's costs, in excess of \$88,000.00, were not, in the circumstances, excessive, even though the value of the land to be transferred to the defendants had been set at just over \$8,700.00. The court again confirmed that the plaintiff should not be subjected to any monetary loss in view of the actions of the defendants which were "tantamount to undertaking a private expropriation."



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