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Bob Aaron bob@aaron.ca

April 4, 2001

Squatter's rights a tricky issue

Encroachment disputes can be bitter, hostile and and costly

With the possible exception of family law, few areas of the law inspire litigation as bitter and as hostile as land boundary disputes. Often referred to as squatter's rights or adverse possession, the law, in some circumstances, allows a trespasser or squatter to acquire ownership of someone else's property.

In order to terminate the rights of the deeded owner, the trespasser must occupy the deeded land without permission. In Ontario, the occupation must be actual, open, notorious, exclusive and continuous for a period of 10 years. There must also be an intention to exclude the true owner. If these tests are met, the occupier will usually have a successful defence to a claim for eviction.

Within the last year, three reported Ontario Superior Court cases have revealed the intensity and bitterness these kind of land boundary cases can generate. Frequently, the legal costs involved in the litigation can exceed the value of the disputed slivers of land involved.

The case of Bacher v. Wang dealt with a strip of land between neighbouring properties on Fleming Dr. in North York. Fay Bacher and Shu Fen Wang were neighbours. Their properties were separated by a fence which had been constructed sometime between 1968 and 1972.

Unfortunately, the fence was not on the actual deed line. At one point there is a bend in both the fence and the deed line.

The evidence of three surveys showed different measurements of the distance between the fence post at the bend and an iron bar planted in the deed line at the bend. These measurements varied between 2.8 and 4.1 feet.

This strip of land, with the bend in the middle, was the subject of the dispute. Each party claimed ownership of it, and in 1998, Wang tore down the old post and wire fence which encroached on to her own property and replaced it with a larger fence constructed on the deed line.

Both neighbours headed off to court, claiming ownership of the disputed strip. Wang argued that the fence had been moved over the years and that Bacher did not have the necessary continuous use of all of the disputed land.

Mr. Justice Ian Nordheimer ruled that Bacher had actual possession of the disputed strip of property for 22 years and had become the owner of that strip.

Bacher and her family had used it for recreational purposes, and their use was continuous, open and exclusive for that time. There was no requirement that Bacher had to use every inch of the disputed yard every day over the 22 years.

Since more than the 10-year period had elapsed, Wang was prohibited by the Limitations Act from dispossessing Bacher. Wang was ordered to remove the new fence at her own expense and pay costs.

A similar case arose in Windsor last year, but the boundary line there was a cedar hedge rather than a fence.

Tullio Meconi owned a house on North Talbot Rd. In 1991, his wife planted 15 cedar trees along what she thought was the property line between her property and the neighbour's property. After the neighbour, Lawrence Collavino, surveyed his property in 1994, Meconi learned that the cedar hedge was about two feet onto the Collavino property.

Meconi took no steps to move the hedge back to the lot line or claim the land under the cedars.

The Collavino land was later sold and a new house built next door to the Meconis. Bradley and Lisa Crichton bought it in 1997, but had no notice that the Meconis claimed the trees. The Crichtons assumed the hedge was theirs.

They built a chain link fence on the property line, cutting off access by the Meconis to their cedars.

Mrs. Meconi asked for permission to dig up and move the cedars, but the Crichtons refused, claiming ownership of the hedge.

By the time Meconi v. Crichton got to trial last year, the hedge was 10 to 12 feet high, and its replacement cost was about $6,000. Mr. Justice William Jenkins dismissed Meconi's claim to the hedge. He ruled that Mrs. Meconi failed to take reasonable steps to locate the boundary line before planting the hedge, and simply planted them in a convenient location. The Crichtons bought the property believing that they owned the hedge.

The Meconis failed to move the trees when the encroachment was discovered, and were taken to have abandoned the hedge when they refused to move it.

The doctrine of possessory title did not apply because there was no continuous 10-year period without objection by the underlying land owner.

The third case concerned two adjacent rowhouses on Concord Ave. in Toronto. The dispute was so bitter that the trial before Mr. Justice Robert Sutherland took four days, and produced a judgment of close to 20,000 words.

In Vaz v. Jong, Cesar Vaz sued the current and former owners of the attached house for structural trespass to his property. The eaves of the neighbouring property encroached onto his side of the deed line, as did the second floor deck at the rear of the house.

When Vaz discovered that the deck was causing roof leakage in his house, he cut it back to the property line, only to find himself arrested by the police.

The charges were dropped when Vaz agreed to restore the deck to its encroaching position on his property. The neighbours claimed that their encroachments were protected by the 10-year rule, since they had been in place since 1985.

When the case was over last May, the neighbours failed in their claim to possessory title, since Vaz had objected to the encroachments in 1993, well within the 10-year period.

The neighbours were forced to remove the encroachments on the veranda and the rear deck. They also had to pay Vaz damages of about $6,000 for restoration of the property, trespass, the indignity of being arrested, and having to replace a deck which was wrongly installed in the first place.

Two lessons emerge from these cases. If you are about to build on or near your property line, check with a surveyor first. And if you find yourself involved in an encroachment dispute, think long and hard of the emotional and financial costs before you head off to court.

Bob Aaron is a leading Toronto real estate lawyer.

Please send your inquiries and questions to bob@aaron.ca or call 416-364-9366.

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