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## Neighbours in talks after mutual drive dispute

Of all the cases that reach our courts, perhaps the most bitterly contested are disputes between neighbours. A classic example of a disagreement which should never have gone before a judge was heard in Ontario Superior Court last month.

Gary Fife and Karen Cohan are neighbours on Roslin Ave. in North Toronto. Fife has lived in his home since 1984, while Cohan bought her house in May of this year.

Registered on the title to both properties is a shared driveway that is 76 feet long and seven feet wide. It was created in 1923 to allow the owners of each house to encroach on 3 1/2 feet of the other's land for the full length of the 76-foot right-of-way, in order to access backyard parking areas.

When the original 1923 houses were standing on the lots, the 76-foot driveway was long enough to allow both neighbours to drive up to the end of the right-of-way and turn easily into their respective rear yards.

In 1985, the Fife house was enlarged by an addition at the rear. After construction was completed, the 76-foot driveway wasn't long enough to allow Fife to drive into his backyard.

He then extended the driveway by an additional 39 feet to get past the house addition and turn into his backyard. He used the extension continuously until 2007.

In 2003, a builder bought the house next door and constructed a new three-storey house with an integrated front-facing garage and front driveway. The old garage that had been used by the owners of that house for years was no longer needed and was demolished.

When Cohan purchased the new home in May, her husband told Fife that he would be fencing the backyard down to the upper end of the 76-foot right of way, which would block access to the undocumented 39-foot extension of the driveway. This would effectively prevent Fife from using his backyard parking pad.

In response, Fife brought an application last month before Justice Edward Belobaba to allow him to continue to use the 39-foot "extension" of the driveway.

Unfortunately for Fife, title to both properties is registered under the Land Titles Act.

This legislation makes it impossible to obtain rights to another person's land by adverse possession, or what is commonly known as squatter's rights.

As a result, even though Fife had used the driveway extension for more than 20 years without opposition, he was unable to acquire any additional rights to the Cohan property. The law calls these rights an easement by prescription, or a right-of-way that arises by the passage of time.

Fife argued that he needed the driveway as an "easement of necessity," but Justice Belobaba ruled that denial of access to the parking pad is at best a "serious inconvenience." The law, he said, would not grant an easement of necessity because the Fife property was not landlocked.

In the end, Justice Belobaba dismissed Fife's application although it seems he did so reluctantly.

"I do, however, offer this comment," the judge wrote. "Mr. Fife and the previous owners of (the property next door) have been using the mutual drive amicably and in good faith for more than 20 years to access their backyard parking areas.

"Because of the Land Titles registration, Mr. Fife cannot be granted a prescriptive easement and the Cohans can legally build a fence across the top end of the laneway even though this will block the access to Mr. Fife's backyard parking pad. In these circumstances, I would hope that Mr. and Mrs. Cohan would give Mr. Fife permission to park his car on the registered right-of-way. The Cohans no longer need this laneway and it would be the right thing to do."

Earlier this week Fife told me that he had not decided on an appeal, but that negotiations were ongoing with the neighbours in the wake of the court decision.

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Ontario > Superior
Court of Justice > 2007 CanLII 28324 (ON S.C.)

# Fife v. Cohan, 2007 CanLII 28324 (ON S.C.)

Date:2007-07-20
Docket:07-CV-332734PD2
URL:http://www.canlii.org/en/on/onsc/doc/2007/2007canlii28324/2007canlii28324.html

Decisions cited
Depew v. Wilkes, 2002 CanLII 41823 (ON C.A.) (2002), 60 O.R. (3d) 499
(2002), 216 D.L.R. (4th) 487 (2002), 162 O.A.C. 23
DATE: 20070720
DOCKET: 07-CV-332734PD2

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Donald Gary Fife (Applicant) v. Karen Cohan (Respondent)

BEFORE: Mr. Justice Belobaba

COUNSEL: Keith M. Landy for Mr. Fife /Applicant

Eric Fournie and Oleg Roslak for Ms. Cohan
/Respondent

HEARD: July 13, 2007

ENDORSEMENT

[1] The applicant, Donald Fife, lives at 205 Roslin Avenue, Toronto. The respondent, Karen Cohan, has recently purchased the house next door at 203 Roslin. This is an application by Mr. Fife for an order granting an easement that will allow him to continue to use the mutual driveway between the two houses to access his backyard parking pad and for an injunction prohibiting the respondent from erecting a fence that would block this access.

Background

[2] Mr. Fife has been living at 205 Roslin Avenue since 1984. He and the previous owners of 203 have been using the mutual driveway to access their backyard garages or parking pads and have been doing so amicably for more than 20 years.

[3] Registered on the title of both properties is a legal right of way that is 76 feet long and seven feet wide. The right of way was created in 1923 to allow the owners of 205 and 203 to encroach upon each other s land for 3 feet for the length of the 76-foot easement in order to access the backyard parking areas.

[4] The 76-foot right of way that is registered on title is not long enough to allow Mr. Fife to access his backyard parking. When the easement was registered in 1923, the 76-foot right of way was sufficient to allow the owners of 205 and 203 to drive up the laneway and turn into their backyards.[1] In my view, if no additions were built onto the back of the houses, both neighbours would have had ample room to drive up the right of way and turn easily into their respective backyards.

[5] The 1969 Survey shows a frame addition at the rear of 205. The measurements on the Survey suggest that after the frame addition was added to the back of the house, the 76-foot right of way was no longer long enough to allow the 205 owner to access his backyard parking area without driving over his neighbour s land.

[6] There is no evidence before the court as to when the frame addition was added to 205 or by whom. What is clear is that when Mr. Fife tore down this old frame addition and added his new and larger addition in 1985, the 76-foot right of way stopped well short of what he needed to drive into his backyard. Mr. Fife says he has been using an additional 39 feet of laneway to get past his 1985 addition and turn into his backyard. He has been doing this openly and continuously for more than 20 years. It is this additional 39-foot portion that is at issue on this application, or more accurately, the additional 39-foot strip that encroaches 3 feet onto 203 s property.

[7] In 2005, a builder purchased 203 with the intention of tearing down the existing structure. He proceeded to build a new three-story house with an integrated front-facing garage and front driveway. The old garage in the backyard that had been used for years by the previous owners of 203 was no longer needed and was torn down.

[8] In May, 2007 the respondent, Ms. Cohan, purchased the new home. About two weeks before the closing and again just after closing, the respondent s husband told Mr. Fife that he would be fencing his backyard down to the upper end of the 76-foot right of way. Part of the fence would come halfway across the mutual laneway and would effectively prevent Mr. Fife from accessing his backyard parking pad. The matter could not be settled by the parties, so Mr. Fife brought this application.

The issue

[9] Is Mr. Fife entitled to an order that will allow him to continue to use the mutual drive for another 39 feet beyond the 76-foot registered right of way so that he can access his backyard parking pad, something that he has been doing for more than 20 years?

Analysis

[10] If Mr. Fife s property had been registered under the Registry Act rather than the Land Titles Act, I would have had no difficulty granting the order that he seeks. Under a Registry Act registration, more than 20 years of open and continuous use will generally establish a prescriptive easement: s.31 of the Real Property Limitations Act. Here, however, both properties are registered under the Land Titles Act. Section 51(1) of the Land Titles Act makes clear that no title can be acquired by length of possession or by prescription.

[11] Counsel for Mr. Fife argues four grounds upon which an easement for the additional 39 feet can be created in favour of his client even though the properties are registered under Land Titles:

(1) the doctrine of lost modern grant ;
(2) necessity;
(3) common intention; and
(4) proprietary estoppel

[12] In my view, none of these arguments can succeed on the facts herein.

(i) The doctrine of lost modern grant

[13] The doctrine of lost modern grant is a legal fiction that was created before the advent of statutory limitation periods to counteract the harshness of the common law rule that required proof of continuous use from time immemorial: Ebare v. Winter, [2005] O.J. No. 14 (C.A.) at para. 29. The doctrine of lost modern grant is, in essence, a legal vehicle for finding easement by prescription: Henderson et al v. Volk et al, [1982] O.J. No. 3138 (C.A.). However, as already noted, an easement cannot be acquired by prescription on properties registered under the Land Titles Act: also see Cringle v. Strapko, [1994] O.J. No. 2119 (Gen. Div.) at para. 11. The lost modern grant argument does not succeed.

(ii) Easement of necessity

[14] Mr. Fife has not established an easement of necessity. I say this for two reasons. First, an easement of necessity is an implied easement that arises at the time of the original conveyance that is, when the two lots were originally severed and sold: Cringle, supra, at para.16. Here, the original 1923 conveyance included a registered right of way that was 76 feet in length. The additional 39 feet that has been used by Mr. Fife over the past twenty plus years was not part of the original conveyance. Secondly, a finding of necessity generally requires a showing that one s entire property would be land-locked or made otherwise inaccessible without the implied grant of an easement. Mr. Fife s inability to drive up the entire 115 feet and access his backyard parking pad is no doubt a serious inconvenience but this consideration does not satisfy the requirements that must be met in order to establish an easement of necessity: Barton v. Raine (1980) 29 O.R. (2d) 685 (C.A.) at para. 12.

[15] Counsel for the respondent also reminds the court that at the time the right of way was granted, it was sufficient. The 76-foot portion is no longer sufficient because Mr. Fife added an extension to the back of his house. It is difficult to argue necessity to get around a problem that you yourself have created.

[16] Counsel for Mr. Fife submits that the decision of the Court of Appeal in Barton v. Raine has been overturned by Depew v. Wilkes, 2002 CanLII 41823 (ON C.A.), (2002), 60 O.R. (3d) 499 (C.A.). In Depew, argues counsel for Mr. Fife, the court concluded at para. 24 that the appropriate test for necessity is not whether one s property would otherwise be land-locked and inaccessible, but whether the access to the parking area was reasonably necessary for the better enjoyment of the dominant tenement. In other words, all that Mr. Fife has to show is that accessing his backyard parking pad is reasonably necessary for the better enjoyment of his property.

[17] I do not read Depew this way. Nor do I agree that Depew has overturned the meaning of necessity as set out in Barton v. Raine. The two cases proceeded on a fundamentally different premise. In Barton, the plaintiff was unable to establish a 20-year prescriptive easement so the court had to consider whether an easement could be established on the basis of necessity or common intention. The Court of Appeal found that necessity could not be established because, absent the easement, the property was not land-locked and the denial of access to the backyard parking area was at best a serious inconvenience. In Depew, a 20-year prescriptive easement had been established. The discussion surrounding this issue on appeal was whether the appellants on the cross-appeal had to show that parking their cars in front of the cottages was reasonably necessary for the better enjoyment [of the property]: see para. 24. The discussion about reasonably necessary was simply an elaboration of the accommodation requirement (para. 19) that must be satisfied before an easement can be granted. Simply put, Depew preserves the distinction between easements acquired by prescription (where better enjoyment of the property may be a relevant factor) and easements of necessity (where you have to show that the denial of the easement would result in the property being land-locked and inaccessible): paras. 21 to 23.

[18] Returning to the facts herein, Mr. Fife cannot establish a prescriptive easement because the properties are registered under the Land Titles Act; he cannot establish an easement of necessity because, following Barton v. Raine, his property would not otherwise be land-locked; and, as the Court of Appeal has ruled, the denial of access to a backyard parking pad is at best a serious inconvenience and not a basis for an easement of necessity. The argument based on necessity does not succeed.

(iii) Common intention

[19] I turn next to the argument based on common intention. Counsel for Mr. Fife submits that in the circumstances I should infer a common intention that the registered 76-foot right of way would be extended as is required so that the owners of 205 and 203 could park their vehicles in their backyards. In Mr. Fife s case, says his counsel, the registered right of way should be extended another 39 feet to allow him to access his backyard parking pad.

[20] I am entitled to find an implied easement on the basis of a common intention if I can conclude by necessary inference from the circumstances in which the original 1923 conveyance was made that there was a common intention that the 76-foot right of way could be extended to whatever length would be required to allow the parties access to their backyard parking areas: I am paraphrasing the language in Barton v. Raine, supra, at para. 21.

[21] It would certainly be easier to find such a common intention if the original 1923 conveyance did not already specify a fixed-length right of way and all you had was the shared expectation that the mutual drive would be used to allow the neighbouring owners to access their backyard parking areas: this was the situation in both Barton and Cringle, supra. However, where the original conveyance provides for an explicit 76-foot easement that at the time of grant is sufficient for its purpose, how can I now find as a necessary inference that the original grantor also intended that the explicit easement could be extended indefinitely to accommodate an owner who chooses to add an addition to the back of his house? In the face of the express dimensions of the right of way that is registered on title, and in the absence of any supporting evidence, I cannot in good faith find or infer any common intention that the 76-foot right of way could be extended to whatever length would be required to allow the parties access to their respective backyard parking areas.[2] The argument based on common intention does not succeed.

(iv) Proprietary estoppel

[22] I now turn to Mr. Fife s final argument proprietary estoppel. In order to establish an equitable easement on the basis of proprietary estoppel, Mr. Fife has to show three things: (1) that the owner of 203 induced or allowed him to believe that he will have some right or benefit over that owner s property; (2) that he relied on this belief and acted to his detriment with the owner of 203 knowing that this was the case; and (3) that it is now unconscionable for the owner of 203 to deny Mr. Fife the right or benefit that

he expected to receive: Eberts v. Carleton Condominium Corp. No. 396, [2000] O.J. No. 3773 (C.A.) at para. 23.

[23] Mr. Fife says that the builder who purchased 203 as a tear-down reassured him, in essence, that he would continue to have access to his backyard parking area after the new house was built and that he relied on this reassurance to his detriment. In my view, the evidence does not support this submission. At the Committee of Adjustments hearing in October, 2005, the most that the builder said was that the parking garage at the rear of 203 was going to be demolished. Nothing else was said or promised. Nor did Mr. Fife ask for any more information or seek any reassurance from the builder that he would be able to continue to use the full length of the mutual laneway to access his backyard parking.

[24] Even if something more had been said by the builder, Mr. Fife had not filed an objection to the minor variance that was being sought by builder and had no grounds on which he could have objected to the variance which was on the other side of the property. In sum, neither the first nor the second prerequisite for proprietary estoppel has been satisfied there was no promise or reassurance; there is no evidence of detrimental reliance. And, the answer given by the Committee of Adjustment to Mr. Fife s question about the purpose of the mutual driveway (to allow the owners of both properties to access their backyard parking areas) does not preclude the new owners of 203 from exercising their strict legal rights and insisting that the right of way between the houses be confined to the 76-foot easement that is registered on title. Estoppel has not been established on the evidence. The argument based on proprietary estoppel does not succeed.

Disposition

[25] The application is therefore dismissed.

[26] I do, however, offer this comment. Mr. Fife and the previous owners of 203 have been using the mutual drive amicably and in good faith for more than 20 years to access their backyard parking areas. Because of the Land Titles registration, Mr. Fife cannot be granted a prescriptive easement and the Cohans can legally build a fence across the top end of the laneway even though this will block the access to Mr. Fife s backyard parking pad. In these circumstances, I would hope that Mr. and Mrs. Cohan would give Mr. Fife permission to park his car on the registered right of way. The Cohans no longer need this laneway and it would be the right thing to do.

[27] If the parties are unable to agree on costs, I will be pleased to receive brief written submissions. Ms. Cohan should deliver her costs submission within 20 days, and Mr. Fife within 10 days thereafter. I will be interested to learn what if any arrangements have been made to accommodate Mr. Fife s parking concerns.

[28] I thank counsel for their assistance at the hearing and for their efforts in trying to reach a settlement.

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Belobaba J.

Released: July 20, 2007

FOOTNOTES

[1] I say this because the 1969 Survey shows that the registered right of way extends well beyond the rear wall of 203 and based on the scale being used about nine feet or so beyond the original rear wall of 205.

[2] If Mr. Fife had shown that the frame addition was not an addition but was actually part of the original building when the right of way was registered, and thus the registered right of way was never sufficient for its intended purpose, the argument of common intention may well have succeeded. But no such evidence was offered, and frankly, I doubt if any such evidence exists. After all, most additions are added after the original building has been completed.