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Badly placed fences make angry neighbours

Frank and Dolores Lipischak are next-door neighbours to Diana DeWolf and Joe Russ on Caille Ave. in the town of Lakeshore in Essex County. Their homes front on Lake St. Clair and their deep lots back onto the municipal street.

When the Lipischaks bought their house in 1969, there was a wire fence running north-south separating the two properties. Shortly afterward, Frank Lipischak replaced it with a new chain link fence in the same location. The fence that was intended to divide the two lots along the property line in fact extended into the DeWolf property by about 3.6 inches.

Due to this misalignment of the boundary fence over a period of many years, the Lipischaks claimed ownership by adverse possession (also known as "squatter's rights") to two specific areas of the DeWolf and Russ property, measuring a total of 192 square feet.

In Ontario, the right to acquire title to a part of a neighbour's property requires exclusive, open, continuous and obvious use without the neighbour's permission for a period of 10 years prior to the date title to the property was converted to the electronic Land Titles system.

DeWolf and Russ objected to the misalignment and eventually the boundary dispute wound up in court before Justice Anthony E. Cusinato in Windsor. The Lipischaks asked the court for a declaration that DeWolf and Russ had lost their title to the disputed area.

The evidence showed that the Lipischaks had occupied a narrow strip of land belonging to the lot next door for more than the minimum 10-year period, starting with their purchase in 1969. The judge concluded that this state of affairs continued for so long because neither of the owners bothered to obtain a land survey report from an Ontario land surveyor.

In his written decision in June 2010, the judge ruled that the Lipischaks owned the disputed strip and DeWolf and Russ were ordered to remove any fences, concrete, trees and other improvements they placed on that land.

Justice Cusinato noted in his decision, "To state that these neighbours . . . have been anything other than neighbourly is an understatement. Each . . . maintained a selfish view of their own rights. While their homes are their castles, it does not extend over the property rights of another."

The judge found that each neighbour was "overly sensitive to their property rights and did not conduct themselves in a manner that may have avoided the conclusion of these issues in a court of law . . . "

In court, DeWolf admitted that she had removed the chain link fence, cut the concrete sidewalk and installed a new fence in the space between the two homes. For this conduct, and her "arrogance to take the law into (her) own hands," the judge awarded her neighbours $5,934 plus taxes for the new fence and sidewalk, $7,500 in punitive damages for her " horrific and excessive conduct," and a further $15,000 in damages for trespass.

Following the release of the judge's decision, DeWolf was also ordered to pay the plaintiff's court costs of $89,371 for an 11-day trial. (The plaintiffs had asked for considerably more.)

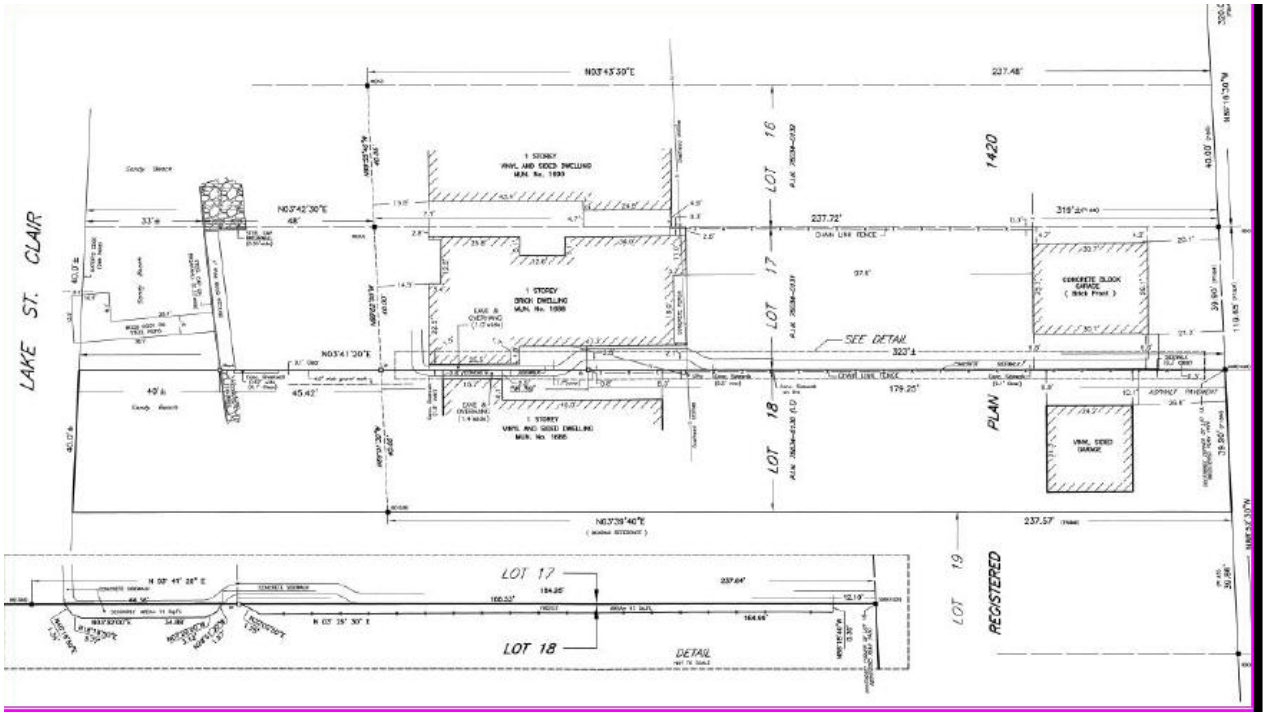
DeWolf and Russ appealed to the Ontario Court of Appeal. Last fall, a three-judge panel refused to interfere with the trial judge's findings, and dismissed their appeal, ordering them to pay appeal costs of $20,000 to the Lipischaks.

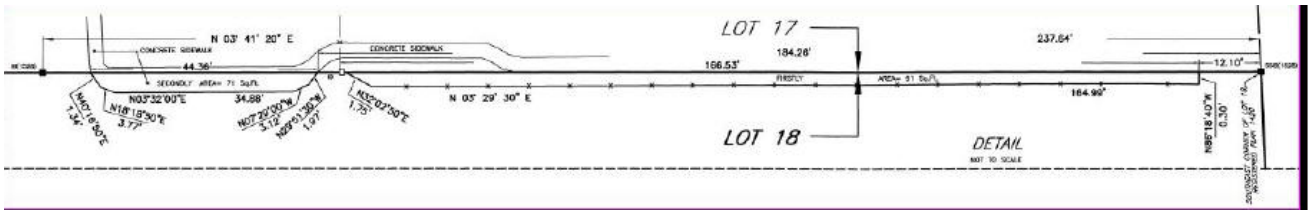
I calculate the damages and costs awards against the defendants at $138,577, in addition to their own lawyer's bill of perhaps another $100,000 plus.

But it looks like the case is far from over. After the trial, DeWolf and Russ sued the Lipischaks claiming the right to travel over the parcel of land they had lost. As well, they also sued the prior owners of their property for the cost of defending their title and for the loss resulting from the change in the property line.

Windsor lawyer James K. Ball acted for DeWolf at the trial and in the Court of Appeal.

In an email last week, he told me "there were no winners in this case." I tend to agree.





LIPISCHAK TRIAL DECISION

http://aaron.ca/columns/Lipischak trial decision.pdf

LIPISCHAK APPEAL DECISION

Lipischak v. Ross, 2011 ONCA 634 (CanLII)

Date:	2011-10-11
Docket:	C52464
URL:	http://canlii.ca/t/fncpj
Citation:	Lipischak v. Ross, 2011 ONCA 634 (CanLII),
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CITATION: Lipischak v. Ross, 2011 ONCA 634

DATE: 20111011
DOCKET: C52464

COURT OF APPEAL FOR ONTARIO

Feldman, MacPherson and Simmons JJ.A.

BETWEEN

Frank Lipischak and Dolores Lipischak

Plaintiffs (Respondents)

and

Diana DeWolf and Joe Russ
Defendants (Appellants)
James K. Ball, for the appellants
Allan Rouben and for the respondents
Heard and released orally: October 3, 2011
On appeal from the judgment of Justice Anthony E. Cusinato of the Superior Court of Justice, dated June 25, 2010, at Windsor.
ENDORSEMENT

[1] The appellants Ms. DeWolf and Mr. Russ appeal from the judgment of Justice Cusinato of the Superior Court of Justice, dated June 25, 2010, determining that Ms. DeWolf's title to two strips of land between the parties' adjoining properties was extinguished by the respondents' adverse possession and ordering general, special, and punitive damages against the appellants on account of trespass.

[2] The trial lasted 11 days, following which the trial judge made his findings of fact and legal conclusions in reasons that included 102 paragraphs. Importantly, he found that both the chain link fence and the sidewalk between the two houses were constructed by the respondents based on a mutual mistake by themselves and their neighbours at the relevant time (predecessors in title of the appellants), as to the exact location of the property line. Based on those findings, he concluded that the doctrine of adverse possession applied. We see no basis to interfere with his findings, or with his decision in relation to damages for trespass.

[3] That said, the finding of adverse possession was made without involving the appellants' mortgagee as party to the action. The order will also affect the overhang of the roof and eavestrough of the appellants' property over the sidewalk. In respect of the latter issue, the respondents have agreed to grant the appellants a permanent easement for the current roof and eaves configuration over the sidewalk. That easement will include the right to walk on the sidewalk in order to access the roof and the back of the house.

[4] With respect to the bank mortgagee, that party's permission will have to be sought before the title can be amended in accordance with para. 2 of the judgment. If there is any difficulty in that regard, a motion may be brought before a judge of the Superior Court in Windsor.

[5] The appellants also seek leave to appeal the order as to costs on the basis that the amount ordered was disproportionate to the claim in issue. Although the amount ordered was high, the trial judge gave careful consideration and full reasons for his order. Leave to appeal costs is denied.

[6] In the result, the appeal is dismissed with costs fixed at $20,000, inclusive of disbursements and H.S.T.

Signed: "K. Feldman J.A."

"J. C. MacPherson J.A."

"Janet Simmons J.A."
