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Bob Aaron bob@aaron.ca

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Who has the authority to correct land registry errors?

Perhaps the most fundamental principle of property ownership in Ontario is that users of the land registration system can rely on it for an accurate reflection of title. If an error occurs in the registry, the courts, or the Director of Titles should have the authority and even the obligation to correct it.

Those principles were turned upside down by a court decision in January, and stakeholders are anxiously waiting to see if the Court of Appeal will reverse the decision.

Some years ago, the owner of a large tract of land in Northern Ontario legally divided it into three parcels. At the time of the severance, a gravel road ran from the main highway across the first parcel, then the second parcel, and into the third.

In order to convert this gravel road into a registered right-of-way, the owner instructed his surveyor to prepare a reference plan of survey showing that the registered access was in the same location as the existing gravel path.

On the ground, the path takes a detour around a large rock outcrop. Unfortunately, the surveyor prepared and registered a plan describing the gravel drive with two straight lines going directly through the outcrop rather than around it.

Access to two of the three lots using the registered right-of-way would be impossible without blasting through the rock at considerable cost and inconvenience.

For many years, the owners of the three lots peacefully used the actual roadway on the assumption that it was located as described on the reference plan. Eventually, Kimberly MacIsaac, one of the owners, became aware that the registered road went through the rock rather than around it.

A dispute among the neighbours arose when construction equipment began to use the roadway. For several months in 2007 and 2008, Peggy and Gordon Salo barricaded the road with the result that there were numerous altercations, one of which involved a chain saw. The OPP was called.

With the road blocked, MacIsaac and her neighbours, the Johansens, had no means of access to their properties except over (or through) the rock outcrop.

Eventually, MacIsaac and the Johansens sued the Salos claiming rectification of the land registry by reason of the surveyor's error. The surveyor, also named a defendant, agreed with the plaintiffs that the plan should be amended to show the road going around the rock.

The issue for the court to decide was whether it had the power to amend the registration records over the objections of the Salos.
Last January, on an application by the plaintiffs, the Superior Court decided that it did not have the power to rectify the reference plan and title abstract.

The only alternative for the plaintiffs in light of this decision would be to dynamite a new road through the rock outcrop.

Speaking to hundreds of lawyers at a Law Society program last month, Toronto real estate lawyer Craig Carter said that members of the real property section of the Ontario Bar Association were "virtually unanimous in their condemnation of the decision."

"The MacIsaac case," he wrote in his case commentary, "threatens in a fundamental way the integrity of the (land registration) system and prevents the Director (of Titles) and even courts from fixing mistakes that occurred. Once registration occurs, according to (the) MacIsaac (decision), it is uncorrectable even if it is fair to do so, or unfair not to do so."

Carter noted that the court's decision is seen as "a fundamental attack on the system of title recording in Ontario that we rely upon to do our jobs and protect our clients."

In light of the court's ruling that the Director of Titles — and even the courts — have no power to rectify mistakes, the Ontario Bar Association asked for and received status to intervene and present its position when the case was argued at the Ontario Court of Appeal in September.

At press time, the court's ruling had not been released. It could be a dynamite decision.

MacIssac v. Salo, 2012 ONSC 337

COURT FILE NO.: C-10, 512-07

DATE: 20120120

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Hugh Spencer, Kimberly Ann MacIssac, Christina Johansen and Karsten Johansen Plaintiffs **– and –** Peggy Charlene Salo, Gordon Salo, S.J. Gossling and D.S. Dorland Limited	)	James Simmons and Rose Muscolino, for the Plaintiffs

Defendants		Frank E. P. Bowman, and Muriel Moscovich for the Defendants, S.J. Gossling and D.S. Dorland Limited Christopher D. McInnis, for the Defendants Peggy Charlene Salo and Gordon Salo
	)	
	)	
	)	**HEARD:** October 24, 2011

DECISION ON MOTION

CORNELL J.:

[1] This is an application for a declaration that a mistake was made in the description of a right-of-way and for rectification of a reference plan to have such plan amended to accord with the actual location of a right-of-way which has existed for many years. The existence of a rock outcrop prevents the right-of-way from being easily established within the confines of Part 4, Plan 53R-10717, the area designated for the right-of-way. This rock outcrop is a suitable metaphor for the hardness of the positions which have been taken by the parties to this action. It is also a suitable metaphor for the legislation which governs the request for rectification. Given the unyielding nature of the *Land Titles Act*, R.S.O. 1990, c. L.5, there is but one possible result. The application for rectification is dismissed for the reasons which follow.

Facts

[2] This dispute involves three adjoining owners. At one time, the land in question comprised one parcel which was owned by Veikko Kivikangas. Mr. Kivikangas provided instructions to the defendants D.S. Dorland Limited and S.J. Gossling (hereinafter collectively "Dorland") to prepare a reference plan to sever the land into three separate parcels with access to be provided via a right-of-way over an existing access road. The right-of-way was eventually designated as Part 4, Plan 53R-10717.

[3] Mr. Kivikangas has deposed by way of affidavit that he was advised by his lawyer to make sure that the reference plan included a right-of-way in order to provide access. He told Dorland to locate the right-of-way in the same location as the existing gravel road. When asked to provide approval of the draft plan, Mr. Kivikangas "reviewed the plan provided and approved same on the understanding that the existing road was situated on the area described as Parts 4 & 5. This was very important to me as my wife and I would also be relying upon the right-of-way."

[4] When Mr. Kivikangas proceeded to sell the three parcels in question, he advised each purchaser that the right-of-way was located over the existing gravel road. This is further evidence of the reasonable and common sense instructions that Mr. Kivikangas provided to the surveyor.

[5] Rather than follow these instructions, the surveyor proceeded to simply show Part 4, Plan 53R-10717 as something defined by two straight lines. In point of fact, the gravel road dips to the south at one point in order to avoid a large rock outcrop with the result that part of the existing right-of-way is not located within Part 4, Plan 53R-10717. Although for a number of years Dorland denied that they had been instructed to locate the road in its existing location, Dorland now admits that they did not follow the instructions provided by Mr. Kivikangas. It is upon the basis of this mistake that rectification is sought.

[6] The MacIssac's purchased their property in October of 1990. The Salo's purchased their property in March of 1992. The Johansen's purchased their property in September of 2000. For quite a number of years, everyone assumed that the right-of-way was located within Part 4, Plan 53R-10717. The MacIssac's became aware that Part 4 did not include the curved portion of the road which circumvented the rock outcrop when they had a survey prepared in May of 2005. This survey revealed for the first time that the registered right-of-way went directly over the rock outcrop. The Johansen's became aware of this discrepancy in October of 2007.

[7] Over the years, the right-of-way was improved with ditches and culverts, and in 1997 concrete was added to part of the surface. The width was also substantially increased over time. The dispute between the litigants arose as a result of the intensification of the use of the right-of-way, and in particular, the use of the right-of-way by commercial trucks and heavy construction equipment. The dispute rapidly escalated to the point where the Salo's barricaded the right-of-way from November 2007 to February of 2008 with the result that there were numerous altercations, one of which involved a chain saw. This led to the involvement of the Ontario Provincial Police.

[8] In order to relocate the right-of-way so that it would be located entirely within Part 4, it would be necessary to undertake substantial blasting of the rock outcrop, as well as the removal of trees and brush and the installation of suitable road base and surface material.

[9] It is against this factual background that this dispute is to be resolved.

Issues

[10] There are two issues to be determined:

1. Is rectification of the reference plan and the parcel abstract available?
2. If so, should rectification be ordered in this particular case?

Analysis

[11] Dorland now acknowledges that they failed to follow the instructions which were provided at the time that Plan 53R-10717 was prepared. They rely upon this mistake to ask the court to rectify the boundaries of Part 4 in order to avoid the rock outcrop and to reflect the actual location of the right-of-way. In asking the court to do this, Dorland relies upon the doctrine of mistake which requires:

(a) a prior agreement;

(b) a common intention;

(c) a final document which would not properly record the intention of the parties;

(d) a common or mutual mistake.

See *Armstrong v. Armstrong* (1978), 22 O.R. (2d) 223 (H.C.J.), at p. 229.

[12] Dorland cites *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al.* (1972), 2 O.R. 280 (C.A.), and *GT Group Telecom Inc. (Bankruptcy)*2004 CanLII 52533 (ON SC), (2004), 5 C.B.R. (5th) 230 (Ont. S.C.), for the proposition that the court may rely on its inherent jurisdiction to do justice as between and for the parties involved. Dorland then goes on to say that the court can rely upon the doctrine of rectification to address a situation where it has been determined that a mistake has been made provided that the court can be satisfied that the parties in question had, in fact, reached an agreement, the details of which are sufficiently apparent to the court: see *Canada (Attorney General) v. Juliar* 2000 CanLII 16883 (ON CA), (2000), 50 O.R. (3d) 728 (C.A.), aff'g *Juliar v. Canada (Attorney General)* 1999 CanLII 15097 (ON SC), (1999), 46 O.R. (3d) 104 (S.C.J.), leave to S.C.C. refused, 28304 (May 24, 2001), and *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291 (H.C.J.).

[13] The cases relied upon by Dorland do not deal with rectification when it involves a land titles property. In an effort to extend the rectification principles to this area, Dorland relies upon the case of *White v. Fisher-Banville*, 2003 BCSC 606 (CanLII), 2003 BCSC 606. The defendants Peggy Salo and Gordon Salo take a much narrower approach to the subject. They rely upon *Wise v. Cant*, [1954] O.J. No. 273 (C.A.), for the general proposition that the equitable right to rectification cannot prevail against the registered title and is lost if it affects the rights of third parties. Beyond that, they rely upon the leading case of *Durrani v. Augier* 2000 CanLII 22410 (ON SC), (2000), 50 O.R. (3d) 353, to establish that the purpose of the *Land Titles Act* is to enshrine its three core principles:

(a) the mirror principle:

Under this principle, the register is a perfect mirror of the state of title.

(b) the curtain principle:

Under this principle, a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted in the register.

(c) the insurance principle:

Under this principle, the state guarantees the accuracy of the register and provides compensation where an aggrieved party suffers loss through fraud, misdescription, or an entry error by the registrar.

[14] From a legislative perspective, the starting point for the inquiry can be found in s. 78(4) of the *Land Titles Act* which states:

> [s. 78(4)] When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

[15] The court does have the ability to rectify the register as outlined in ss. 159 and 160 of the *Land Titles Act*:

> [s. 159] Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of the opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just.
>
> [s. 160] Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

[16] It is noteworthy that both of these sections begin with the words "Subject to any estates or rights acquired by registration under this Act." This is consistent with the very basis of a Torrens land titles system which fundamentally provides that an owner is entitled to rely upon the title abstract as an accurate reflection or mirror of the state of title. This approach stands in stark contrast to the registry system of title which is designed to simply provide notice. This notice based system provides the basis for a title to be altered based upon the doctrine of adverse possession or a right-of-way to be created based upon prescriptive use. This is not the case with a land titles system. Unlike the registry system, the parcel register in land titles is deemed to be conclusive and indefeasibility of title is a consequence of, or incident of, registration.

[17] This issue was addressed in *Moisan v. Antonio Sanita Land Development Ltd.*, 2010 ONSC 3339 (CanLII), 2010 ONSC 3339, where P.B. Kane J. stated at para. 36:

> The title of a registered owner in Ontario[,] who is a *bona fide* purchaser for value, is [i]ndefeasible under the *Land Titles Act*, R.S.O. 1990, c. L.5. The court does not have jurisdiction to rectify the register if to do so would interfere with the registered interest of the *bona fide* purchaser for value in the interest as registered. The powers of the court to order rectification [are] limited by the rights acquired by registration under the *Land Titles Act*.

[18] This issue was also addressed in *Durrani v. Augier*, where Epstein J. stated at para. 49:

> It is significant that both sections dealing with the power to rectify the register start with the words "subject to any estates or rights acquired by registration under this Act". These words relate back to the concept of indefeasibility of title and to the fundamental objectives of the land titles system discussed earlier. Their import is as follows. Where a *bona fide* purchaser for value succeeds in becoming a registered owner, the fact of registration is conclusive. Indefeasibility of title is a consequence or incident of that registration. Accordingly, the court

does not have jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered.

[19] The position taken by Dorland amounts to this: all of the parties using the right of way assumed that the right of way lay entirely within the limits of Part 4. In that sense, all of the current owners involved in this matter are innocent parties in that the mistake occurred between a previous owner and Dorland. The fact of the matter is that none of the current registered owners are innocent parties in the sense that if any of them had obtained a location plan survey at the time that they purchased the property, this title problem would have become readily apparent. A party who fails to obtain a current location plan survey as in these circumstances can hardly be characterized as innocent. Even if that characterization was available, the interests shown in the title register prevail and there is no jurisdiction to rectify title or balance the interests of various innocent parties: see *Durrani*, at para. 51, and*Moisan*.

Conclusion

[20] There is nothing to suggest that Peggy Salo was anything other than a *bona fide* purchaser for value. To now permit rectification of a mistake which did not even involve the parties to this action would seriously undermine the very foundation upon which the Ontario land titles system is based and be contrary to the governing legislation and established legal principles. In view of this, the motion seeking rectification of the reference plan and title abstract is dismissed.

Costs

[21] Costs of the motion are payable by Dorland to Peggy Salo and Gordon Salo on a partial indemnity basis.

[22] If the parties are unable to agree on costs, they may contact the trial coordinator within 30 days to make an appointment to make cost submissions. If they fail to do this, it shall be assumed that the issue of costs has been resolved.

Mr. Justice R. Dan Cornell

Released: January 20, 2012

CITATION: MacIssac v. Salo, 2012 ONSC 337

COURT FILE NO.: C-10, 512-07

DATE: 20120120

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Hugh Spencer, Kimberly Ann MacIssac, Christina Johansen and Karsten Johansen

– and –

Peggy Charlene Salo, Gordon Salo, S.J. Gossling and D.S. Dorland Limited

DECISION ON MOTION

Cornell J.

Released: January 20, 2012