Weidelich et al. v. de Koning et al.
[Indexed as: Weidelich v. de Koning]

Ontario Reports

Court of Appeal for Ontario,

Doherty, Laskin and Epstein JJ.A.

October 24, 2014

122 O.R. (3d) 545 | 2014 ONCA 736

2014 ONCA 736 (CanLII)

Case Summary

Real property — Easements — Encroachment on private right-of-way not actionable in absence of substantial interference with use of right-of-way as granted — No exception to that principle existing where encroachment is by permanent structure.

The respondents built an addition to their property which encroached on a private right-of-way which was granted "for the purpose of vehicular ingress and egress". However, the right-of-way remained at least 4.4 metres wide wherever the addition encroached on it. The applicants applied for a declaration that the respondents not obstruct the right-of-way and sought an order requiring the respondents to remove all structures built on the right-of-way. The application judge dismissed the application. The applicants appealed.

Held, the appeal should be dismissed.

An encroachment on a private right-of-way is actionable only if there is a substantial interference with the dominant owner's ability to use the right-of-way for a purpose identified in the grant. That is the case even when the encroachment is by a permanent structure. The application judge's unchallenged finding that the laneway remained as accessible and passable as it was before the construction compelled dismissal of the applicants' claim.

Celsteel Ltd. v. Alton House Holdings Ltd., [1986] 1 All E.R. 608, [1986] 1 W.L.R. 512 (C.A.), revg [1985] 2 All E.R. 562, [1985] 1 W.L.R. 204, 49 P. & C.R. 165 (Ch.); *Chester v. Roch*, [1975] N.S.J. No. 524, 20 N.S.R. (2d) 536, 27 A.P.R. 536 (S.C. (T.D.)); *Clifford v. Hoare* (1874), L.R. 9 C.P. 362; *Devaney v. McNab* (1921), 51 O.L.R. 106, [1921] O.J. No. 16, 69 D.L.R. 231 (C.A.); *Spencer v. Salo* (2013), 114 O.R. (3d) 226, [2013] O.J. No. 676, 2013 ONCA 98, 303 O.A.C. 374, 29 R.P.R. (5th) 1, 223 A.C.W.S. (3d) 891 [Leave to appeal to S.C.C. refused [2013] S.C.C.A. No. 174], **consd**

Albiston v. Liu, [2013] O.J. No. 3685 (S.C.J.), **not follld**

Other cases referred to

B & Q Plc. v. Liverpool and Lancashire Properties Ltd., [2000] E.W.H.C. 463, 81 P. & C.R. 20

(Ch.); *Donohue v. Robins*, [2012] O.J. No. 2133, 2012 ONSC 2851 (S.C.J.); *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417, [2003] O.J. No. 5206, 235 D.L.R. (4th) 263, 180 O.A.C. 101, 14 R.P.R. (4th) 208, 127 A.C.W.S. (3d) 778 (C.A.); *Keefe v. Amor*, [1965] 1 Q.B. 334, [1964] 2 All E.R. 517, [1964] 3 W.L.R. 183, 190 E.G. 301 (C.A.); *Lester v. Bond*, [2013] O.J. No. 6006, 2013 ONSC 7888 (S.C.J.); *Pettey v. Parsons*, [1914] 2 Ch. 653 (C.A.); *Voye v. Hartley*, [2002] N.B.J. No. 54, 2002 NBCA 14, 247 N.B.R. (2d) 128, 47 R.P.R. (3d) 227, 112 A.C.W.S. (3d) 170; *West v. Sharp* (1999), 79 P. & C.R. 327 (C.A. (Civ. Div.))

Statutes referred to

Land Titles Act, R.S.O. 1990, c. L.5 [page546]

Authorities referred to

Gaunt, Jonathan, and Mr. Justice Morgan, *Gale on Easements*, 19th ed. (London: Sweet & Maxwell, 2012)

La Forest, Anne Warner, *Anger & Honsberger Law of Real Property*, looseleaf, vol. 2, 3rd ed. (Aurora, Ont.: Canada Law Book, 2006)

APPEAL from the judgment of Stinson J., [2013] O.J. No. 5544, 2013 ONSC 7486 (S.C.J.) dismissing an application with respect to an encroachment on a right-of-way.

Harvey J. Ash, for appellants.

Rahul Shastri and *David Winer*, for respondents.

The judgment of the court was delivered by

[1] **DOHERTY J.A.**: — This litigation arises out of a dispute between neighbours over a right-of-way that runs behind a block of six row houses on the south side of Cottingham Street in Toronto. Cottingham Street runs east to west. The respondents own the easternmost house in the block (no. 69). The appellants own four of the other houses (nos. 71, 73, 77 and 79). The owners of the sixth home (no. 75) are not parties to the litigation.

[2] Each of the six properties backs onto a private laneway. Six garages (one for each home) stand on the south side of the laneway. Entrance to the laneway runs south from Cottingham Street directly to the east of the respondents' home. The laneway traverses lands owned by each of the six homeowners, and those lands are subject to a right-of-way described in each property's title documents. For example, the respondents' deed provides that their ownership is

> SUBJECT to a right-of-way in favour of the owners and occupants from time to time of [the other five properties] . . . over, along and upon . . . Part 19 . . . for the purpose of vehicular ingress and egress.

2014 ONCA 736 (CanLII)

[3] The part of the laneway that passes over the respondents' property, identified as Part 19 in the deed, is 3.6 metres at its narrowest point. The laneway continues west onto the appellants' properties where its narrowest point is 3.5 meters.

[4] In 2012, the respondents began a home renovation (the "addition"). They intended to add a three-story structure, an outdoor balcony on the second floor of the new structure, a ground-floor patio and an outdoor planter. The addition was largely complete when this application was heard in November 2013. [page547]

[5] The addition encroaches upon Part 19. However, the right-of-way remains at least 4.4 metres wide wherever the addition encroaches on it. Schedule B of the application judge's reasons depicts the right-of-way and the encroachment (the cross-hatched section). I have appended a copy of that schedule to these reasons.

[6] The appellants applied for a declaration that the respondents not obstruct the right-of-way and sought an order requiring the respondents to remove all structures built on the right-of-way. They also sought a declaration that they had certain ancillary rights -- for example, the right to use the right-of-way for snow removal.

> [7] The application judge found, at para. 11:
> *[T]he Encroachments caused by the Addition do not create a real or substantial interference with the use of the laneway for vehicular access: it remains as accessible and passable now as it was before the construction, subject to the obvious result that the portion of Part 19 on which the Addition has been constructed can no longer be driven over.* Despite that limitation, however, it is still possible for vehicles (including delivery trucks) to traverse across the remainder of Part 19 unimpeded for purposes of accessing the remainder of the laneway.

(Emphasis added)

[8] The appellants do not challenge the finding that the respondents' addition does not affect the appellants' ability to drive to and from their garages along the laneway. Counsel contends, however, that the encroachment is actionable even if it does not interfere with the appellants' ability to use the right-of-way for the purpose identified in the deed. Counsel submits that the appellants have a right to use the right-of-way's entire width for the purpose of vehicular ingress and egress. He maintains that the erection of a permanent structure on any part of the right-of-way necessarily compromises the right granted because the appellants cannot pass over that part of the right-of-way. In counsel's submission, the encroachment's practical effect on the appellants' ability to use the right-of-way for its granted purpose is irrelevant.

A: *Is There an Actionable Encroachment?*

[9] The application judge, referring to Canadian and English authority, found that there was not an actionable encroachment. He held that an encroachment on a right-of-way is actionable only if there is a substantial interference with the use of the right-of-way as granted. Quoting from *West v. Sharp* (1999), 79 P. & C.R. 327 (C.A. (Civ. Div.)), the application judge said, at para. 24: [page548]

2014 ONCA 736 (CanLII)

> There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction.

[10] I agree with the reasons of the motion judge. The authorities he cites and others fully support the conclusion that an encroachment on a private right-of-way is actionable only where the encroachment substantially interferes with the dominant owner's ability to use the right-of-way for a purpose identified in the grant. *Gale on Easements*, 19th ed. (London: Sweet & Maxwell, 2012), the leading English text on the topic, puts it this way, at para. 13-06:

> As regards the disturbance of private rights of way, it has been laid down that whereas in a public highway any obstruction is a wrong if appreciable, *in the case of a private right of way the obstruction is not actionable unless it is substantial*. Again, it has been said that for the obstruction of a private way the dominant owner cannot complain unless he can prove injury; unlike the case of trespass, which gives a right of action though no damage be proved. *In Hutton v Hamboro, where the obstruction of a private way was alleged, Cockburn C.J. laid down that the question was whether practically and substantially the right of way could be exercised as conveniently as before*.

(Emphasis added)

[11] Lord Cockburn's language echoes through the English and Canadian case law: see, *e.g.*, *Clifford v. Hoare* (1874), L.R. 9 C.P. 362; *Pettey v. Parsons*, [1914] 2 Ch. 653 (C.A.), at pp. 662, 665-66, 667-68 Ch.; *Keefe v. Amor*, [1965] 1 Q.B. 334, [1964] 2 All E.R. 517 (C.A.), at p. 347 Q.B.; *Celsteel Ltd. v. Alton House Holdings Ltd.*, [1985] 1 W.L.R. 204, [1985] 2 All E.R. 562 (Ch.), at pp. 216-18 W.L.R., revd on other grounds [1986] 1 W.L.R. 512, [1986] 1 All E.R. 608 (C.A.); *B & Q Plc. v. Liverpool and Lancashire Properties Ltd.*, [2000] E.W.H.C. 463, 81 P. & C.R. 20 (Ch.); *Devaney v. McNab* (1921), 51 O.L.R. 106, [1921] O.J. No. 16, 69 D.L.R. 231 (C.A.); *Voye v. Hartley*, [2002] N.B.J. No. 54, 2002 NBCA 14, 247 N.B.R. (2d) 128, at para. 25; *Donohue v. Robins*, [2012] O.J. No. 2133, 2012 ONSC 2851 (S.C.J.), at para. 58; *Lester v. Bond*, [2013] O.J. No. 6006, 2013 ONSC 7888 (S.C.J.), at paras. 30-33.

[12] The requirement that the dominant owner prove substantial interference to maintain a claim reflects the nature of the dominant owner's right. He or she does not own the right-of-way or the land upon which the right-of-way runs, but only enjoys the reasonable use of that property for its granted purpose. The dominant owner may only sustain a claim predicated on substantial interference with that reasonable use. The distinction is between the rights of ownership and the right of reasonable use for an identified purpose. [page549]

[13] Lord Brett, in *Clifford v. Hoare*, focused on the distinction between the rights of ownership and the right of reasonable use for an identified purpose in explaining why a dominant owner had no claim even though a building encroached some two feet onto the 40-foot right-of-way:

> [T]hat which is granted to the plaintiff by the conveyance of the 2nd of August, 1872, was, not a forty-foot road, nor the exclusive use of a forty-foot road; but a right to use it in common with others. He was to have an easement in the nature of an access or right of way over the road, by himself and his friends and servants, and nothing but an easement. If this were a grant of the road itself, any interference with the plaintiff's enjoyment of it would, no doubt, give a right of action. But all that is granted here is a right to a reasonable use of the road by

2014 ONCA 736 (CanLII)

> the plaintiff in common with others, who have equal rights with him; and I am of opinion that no substantial interference with his exercise of that easement has been made out.

[14] A court, when deciding whether an encroachment results in a substantial interference with the claimant's use of the right-of-way, will have regard to the terms of the grant and the nature of the encroachment. The determination is a factual one and will turn on the specific circumstances of each case.

[15] The significance of an encroachment depends on its impact on reasonable use. The dominant owner is entitled to every reasonable use of the right-of-way for its granted purpose. I would adopt as correct the inquiry captured in the following passage in *B & Q Plc.*, at 257:

> In short, the test, . . . is one of convenience and not necessity or reasonable necessity, Provided that what the grantee is insisting on is not unreasonable, the question is: can the right of way be substantially and practically exercised as conveniently as before?

[16] The facts of *Celsteel Ltd.* provide an excellent example of the proper application of the substantial interference test. In *Celsteel Ltd.*, the defendant lessee of the property decided to build a car wash that encroached on a right-of-way the plaintiffs used to access their parking garages. The defendant argued that the encroachment was not substantial as it related to one of the plaintiffs because, although the plaintiff would have to drive into and reverse out of the garage, contrary to his habit of reversing into and driving out of the garage, the plaintiff could still access his garage.

[17] Scott J. acknowledged that either approach to garage entry and exit was reasonable. He went on, however, to hold that the encroachment was actionable. He said, at p. 217 W.L.R.:

> In the present case the test is not, in my view, whether the means of access still possible is a reasonable means of access. The correct test is whether [page550] insistence by the third plaintiff [the holder of the right-of-way] on being able to continue to use the other means of access is reasonable. In my opinion, it is. I do not think it is open to the defendants to deprive the third plaintiff of his preferred means of entry to garage 52 and then to justify themselves by arguing that most other people would prefer some other still available means of entry. Such an argument might avail the defendants if the third plaintiff's preference was unreasonable or perverse. But, in my view, it is neither of these things.

[18] The application judge's unchallenged finding that the laneway "remains as accessible and passable now as it was before the construction" compels dismissal of the appellants' claim. Counsel for the appellants, however, makes three valiant attempts to escape the substantial interference requirement.

[19] First, counsel submits that an encroachment by a permanent structure is a substantial interference whether or not the encroachment actually interferes with the dominant owner's reasonable use. The case law does not support that proposition. Several of the cases that have set down and refined the substantial interference requirement involve encroachments by permanent structures: see, *e.g.*, *Clifford*; *Celsteel Ltd.*; *B & Q Plc*.; *Devaney*. Moreover, the authors of the current edition of *Gale on Easements* do not distinguish between encroachments by permanent structures and other forms of encroachment onto private rights-of-way.

2014 ONCA 736 (CanLII)

[20] The appellants rely on *Albiston v. Liu*, [2013] O.J. No. 3685 (S.C.J.), which does draw the appellants' desired distinction. In that case, the trial judge held a trivial interference by a permanent structure may not be substantial if the defendant inherited the encroaching structure, but a trivial interference by a permanent structure is substantial if the defendant deliberately built on the right-of-way. This decision stands alone in relying on the deliberateness of the defendant's conduct, rather than on the degree of actual interference, to define substantial interference. I think *Albiston* was wrongly decided.

[21] The appellants also rely on *Chester v. Roch*, [1975] N.S.J. No. 524, 20 N.S.R. (2d) 536 (S.C. (T.D.)), at para. 8, and, in particular, the trial judge's reference on an extract from the text *Anger & Honsberger Law of Real Property*. The quoted reference supports the appellants' contention that an encroachment by a permanent building is *per se* actionable.

[22] Counsel has, however, fairly included the latest version of the same text in his materials: Anne La Forest, *Anger & Honsberger Law of Real Property*, looseleaf, vol. 2, 3rd ed. (Aurora, Ont.: Canada Law Book, 2006), at 17:20.30(b). In the latest edition, the author accepts that interference with a private right-of-way is actionable only if substantial. She notes that [page551] if an obstruction is permanent, it may substantially interfere with the use of the right-of-way even if the actual interference is not great. I have no quarrel with this observation, insofar as it identifies the nature of the obstruction as relevant to the "substantial interference" inquiry. However, given the application judge's finding that the addition does not interfere with the appellant's use of the right-of-way for its granted purpose, the commentary does not assist the appellants.

[23] Counsel's second argument rests on Middleton J.'s reasoning, at p. 237 D.L.R. in *Devaney v. McNab*. His Lordship commented [at para. 24]:

> Where the thing that is complained of is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears to me to be almost impossible to say that there is not a real and substantial interference with the right conveyed.

[24] Anything said by Middleton J. deserves careful attention. In the sentences immediately before the appellants' cited passage, he writes:

> It is well settled that the rights of the parties must be determined according to the true construction of the grant; and it is to be observed that the grant here is in the widest possible terms. It follows, I think, that the grantor must not derogate in any way from his grant.

(Citation omitted)

[25] The right-of-way in *Devaney* was granted "at all times and for all purposes". Middleton J. had to measure the effect of the encroachment on the right-of-way in the light of that very broad grant. Given the broad purpose of the grant, he could not say that the obstruction (a fire escape projecting some three feet four inches into a 20 foot right-of-way) did not substantially interfere with any potential reasonable use of the right-of-way.

[26] In my view, the analysis of Middleton J. is consistent with the substantial interference test described in the authorities cited above. Indeed, Middleton J. (and Latchford J. in a concurring

2014 ONCA 736 (CanLII)

judgment) relied on *Clifford v. Hoare*, one of the seminal cases in the "significant interference" line of authorities.

[27] The third argument advanced by counsel relies on this court's judgment in *Spencer v. Salo* (2013), 114 O.R. (3d) 226, [2013] O.J. No. 676, 2013 ONCA 98, leave to appeal to S.C.C. refused [2013] S.C.C.A. No. 174. *Spencer* involved a motion brought by a land surveyor to rectify a misdescription of a right-of-way contained in a reference plan registered on title under the *Land Titles Act*, R.S.O. 1990, c. L.5. The appeal turned on the appellant's right to a rectification order. [page552]

[28] At para. 50 of his reasons, the chief justice observed that the territorial limits of easements, including rights-of-way, are boundaries in every sense of that word. Counsel relies on this passage to support the contention that the encroachment in this case was actionable.

[29] I have no difficulty accepting the chief justice's observation about the nature of a right-of-way's boundaries. However, this case is not about defining the boundaries of the right-of-way. They are clearly delineated in the deed and are not in dispute. Nor is there any dispute that the respondents' addition encroaches over the boundary line onto the right-of-way. The sole issue here is whether that encroachment is actionable. Nothing in *Spencer* assists in that determination.

[30] The appellants have not persuaded me that encroachment by a permanent structure is actionable absent actual, substantial interference with the granted right. On the trial judge's factual findings, the appellants cannot meet that burden.

B: *The Ancillary Rights Claim*

[31] The application judge indicated, at para. 28, that the only ancillary right pressed by the applicants at argument concerned snow removal and that the respondents had conceded a right to use the right-of-way for the purpose of snow removal. Although the application judge indicated he would make a declaration to that effect, the judgment makes no reference to any ancillary rights, but simply dismisses the application in its entirety.

[32] In their factum, the appellants reasserted a claim to various ancillary rights. The respondents argued against any declaration concerning ancillary rights in their factum. Neither party said much about ancillary rights in oral argument.

[33] Ancillary rights are those that are reasonably necessary to the enjoyment of the right-of-way granted: *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417, [2003] O.J. No. 5206 (C.A.), at para. 11. The determination of the existence and scope of any claimed ancillary right is a factual one. This record does not admit of the kind of factual inquiry necessary to essay a definitive declaration as to any ancillary rights associated with the appellants' use of their right-of-way. If disagreements arise in the future, hopefully common sense and neighbourly goodwill will find a solution. If not, the court will have to settle the dispute by reference to the specific facts revealed by the evidence. [page553]

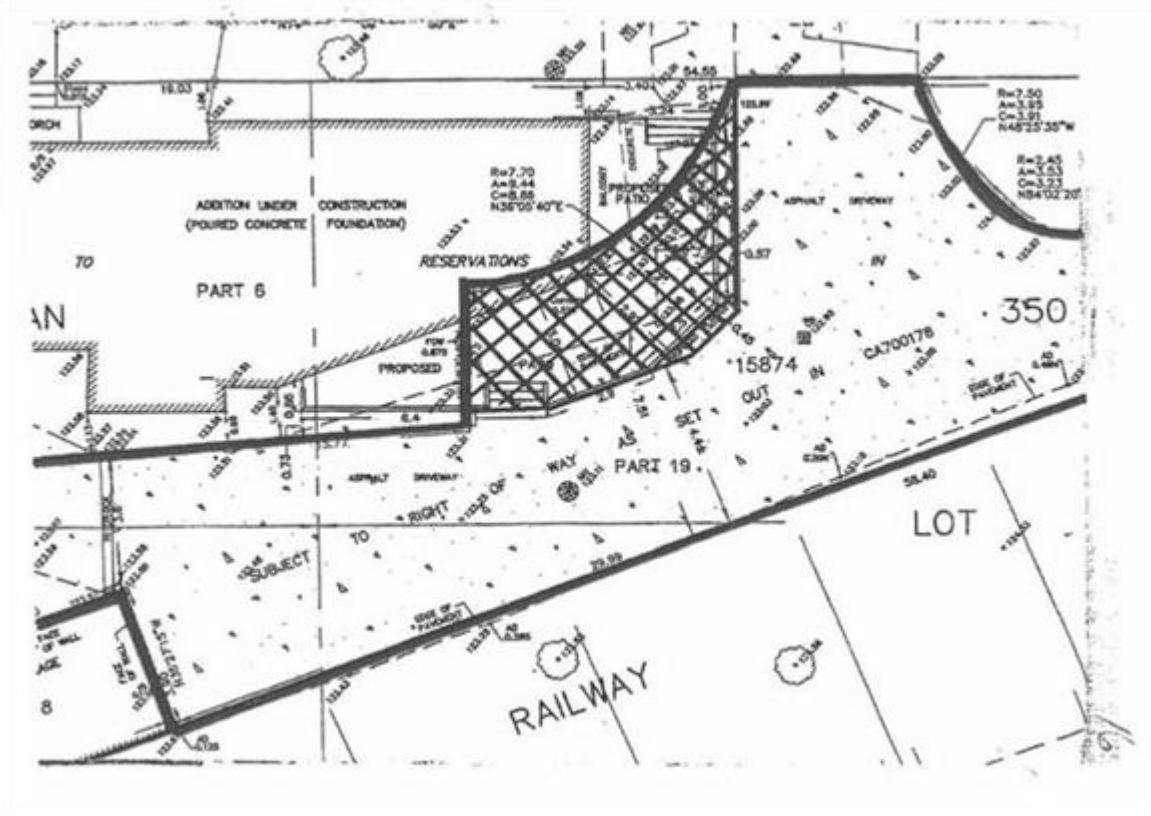
C: *Conclusion*

2014 ONCA 736 (CanLII)

[34] For the reasons set out above, I would dismiss the appeal. As agreed between the parties, the respondents, as the successful party on appeal, are entitled to their costs fixed at $12,000, inclusive of disbursement and relevant taxes.

Appeal dismissed.

Schedule B



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2014 ONCA 736 (CanLII)