CITATION: Margaritis v.Milne, 2023 ONSC 5943
DIVISIONAL COURT FILE NO.: DC-23-217
DATE: 20231023

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sutherland, Leiper and Centa JJ.

BETWEEN:	)	
	)	
Theodosius Margaritis	)	*Andrew Wood*, for the appellant
	)	
Appellant	)	
	)	
– **and** –	)	
	)	
Donald Milne	)	*Paul Hancock and Latisha Cohen*, for the respondent
	)	
Respondent	)	
	)	**HEARD at Toronto:** October 19, 2023

Robert Centa J.

[1] Theodosius Margaritis and Donald Milne live beside each other in a lovely, leafy neighbourhood in Toronto. Their backyards share a border that runs south from their beautiful houses to a laneway. Along this border sits a strip of land that lies at the heart of this dispute. The area occupied by the disputed land is small, occupying two square metres. The strip of land is long (18.2 metres), but very thin (never wider than 21.9 cm, and often much thinner than that).

[2] Unfortunately, this small strip of land spawned a much bigger dispute between Mr. Margaritis and Mr. Milne. Each neighbour brought competing applications asking the court for various forms of relief. The parties filed ten affidavits. The cross-examinations on those transcripts filled over three hundred pages.

[3] On February 2, 2023, Dineen J. heard these applications. In careful and thorough reasons for decision, Dineen J. concluded that Mr. Milne had made lasting improvements to the strip of land in the belief that it belonged to him. [1] Justice Dineen exercised his discretion and granted title to the wedge of land to Mr. Milne pursuant to s. 37 of the *Conveyancing and Law of Property Act*.[2]

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[1] 2023 ONSC 1375.
[2] R.S.O. 1990, c. C.34.

2023 ONSC 5943 (CanLII)

As contemplated by s. 37 of the Act, Justice Dineen ordered that Mr. Milne compensate Mr. Margaritis for the value of the land to be retained by Mr. Milne.

[4] Mr. Margaritis appeals the order of Justice Dineen to this court as of right.[3] At their core, his submissions invite the court to reweigh all of the evidence before the application judge and to make different findings of fact.

[5] In my view, Justice Dineen correctly interpreted s. 37 of the Act. Justice Dineen's findings of fact, including that Mr. Milne had an honest and *bona fide* belief that the land was his, and that Mr. Milne made lasting improvements on the land, were reasonably open to him based on the record before him. I see no palpable and overriding error. Justice Dineen also properly exercised his discretion when considering what relief would be most just in the circumstances. Finally, I see no reason to interfere with Justice Dineen's discretionary decision to have each party bear their own costs of the applications. I would dismiss the appeal.

Subsection 37 of the Act

[6] The relevant portions of subsection 37(1) of the Act read as follows:

> 37 (1) Where a person makes lasting improvements on land under the belief that it is the person's own, the person…[is] entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

[7] Before exercising the discretion to allow a person to retain land owned by another, the court must be satisfied that:

a. the party must have genuinely believed that he or she owned the land;

b. the improvements must be of a lasting nature; and

c. the court must weigh the equities between the owner and the person making the improvements to determine whether it is appropriate to transfer the land to the person making the improvements.[4]

[8] Justice Dineen correctly interpreted s. 37. He cited the leading cases and considered each of these three elements.

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[3] Act, s. 37(2).

[4] *Armstrong, et al. v. Penny*, et al., 2023 ONSC 2843, at para. 100; *Dupuis-Bissonnette v. WM. J. Gies Construction*, 2010 ONSC 3680; *Corkery v. Moffitt*, 2022 ONSC 105; *Gay v. Wierzbicki*, [1967] 2 O.R. 211 (C.A.); *McGuire v Warren* (2006), CanLII 23923 (Ont. S.C.), at para. 7; *Ryan in Trust v. Kaukab*, 2011 ONSC 6826, at para. 217.

2023 ONSC 5943 (CanLII)

Mr. Milne had an honest belief that the improvements he made were on his property

[9] First, Dineen J. found that Mr. Milne honestly believed that the improvements he made were on his property. Justice Dineen noted that "this was not seriously disputed at the hearing." The existence of an honest belief is a finding of fact.[5]

[10] Mr. Margaritis submits that Dineen J. erred in law because he did not explicitly consider whether or not Mr. Milne's honest belief was objectively reasonable. I disagree.

[11] There is a debate in the caselaw regarding whether the honest belief needs to be reasonable.[6] Nevertheless, reasonableness is a relevant consideration when assessing the honest and *bona fide* beliefs of the person who improved the land. Reading the reasons as a whole, I have no doubt that Dineen J. found Mr. Milne's belief to be reasonable.

[12] In the alternative to his s. 37 argument, Mr. Milne's application asserted that he acquired possessory title to the disputed area through adverse possession. Justice Dineen carefully considered the evidence in support of that claim, including the historical background of the strip of land, whether or not Mr. Milne moved a fence line in 1996, the many surveys placed in evidence, the history of large maple tree that grew on both lots, a stone retaining wall that ran east-west, a different retaining wall that ran north-south, and the affidavit and cross-examination evidence of the parties.

[13] Although Dineen J. held that he was unable to make any reliable determination of where the effective boundary was before the 1996 renovations, it is clear that Dineen J. found Mr. Milne's belief to be reasonable based on the evidence before him and the factual findings he made.

[14] Reading his reasons as a whole and considering them in light of the record before him, I am satisfied that Dineen J. considered the reasonableness of Mr. Milne's belief and concluded that it was reasonable.

Mr. Milne made lasting improvements on the land

[15] Second, Justice Dineen found as a fact that Mr. Milne made lasting improvements on the land.

[16] A lasting improvement is an addition to a property amounting to more than mere repair or replacement of waste. A "lasting" improvement is one that has permanence, in the sense of not being easily removable, as is the case with some fixtures.[7]

[17] Justice Dineen concluded that Mr. Milne had made lasting improvements by constructing a retaining wall, fencing, a c-channel; pouring concrete; and filling in the land by raising it four-

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[5] *Armstrong*, at para. 102.
[6] *Armstrong* at para. 102 and the cases cited therein.
[7] *Gay*, at para. 14.

2023 ONSC 5943 (CanLII)

feet to construct a parking pad. Each of these findings of fact was available to Dineen J. based on the evidentiary record before him. There is no basis upon which this court can interfere with those findings.

The equities of the parties and the justness of the remedy favoured Mr. Milne

[18] Third, Justice Dineen considered the equities and concluded that the balance of convenience strongly favoured allowing Mr. Milne to retain the land:

> I accept [Mr. Milne's] position that the balance of convenience strongly favours permitting him to keep the disputed area. The boundary stood for more than 20 years with no complaint. I would also observe that both lots appear to have minor encroachments from neighbours on the other side and that the evidence suggests some minor encroachments have been normal on [the street] historically.
>
> Awarding the disputed area to [Mr. Margaritis] would require significant renovations to [Mr. Milne's] backyard including modifying a gate and stairs and potentially a retaining wall for the purpose of adding an objectively insignificant area to [Mr. Margaritis's] property. When the [Mr. Margaritis's] wife Paola was cross-examined about her plans for the backyard, she was given every opportunity to explain why the disputed area was essential to them, and she could not articulate any compelling reason beyond wanting all of the space they were entitled to given that they have a large family. While this is an understandable point of view, I do not believe it is reasonable at this point in time to force [Mr. Milne] to do extensive work to undo the renovations he did in the honest belief that he was respecting the existing property line.

[19] The discretion under s. 37 of the Act is not to be exercised lightly. The court is required to use its discretion to grant the relief that is most just in the circumstances of the case.[8] In my view, Dineen J. exercised his discretion on appropriate principles, considering all of the relevant circumstances, and did justice to the circumstances of this case.

Costs of the application

[20] Mr. Margaritis submits that Justice Dineen erred by failing to award him his costs as the owner of land affected by an order under s. 37 of the Act. I do not think Dineen J. made an error in principle in declining to order costs to either party.

[21] The Act does not require the court to award the costs of a successful s. 37 application to be paid by the improver to the owner of the land. Indeed, the Act is silent on this point. In determining

[8] *McGuire v. Warren*, at para. 18.

2023 ONSC 5943 (CanLII)

the issue of costs, Justice Dineen was making a discretionary decision under s. 131 of the *Courts of Justice Act*.[9] In exercising that discretion, he may consider the result in the proceeding, any offer to settle or to contribute made in writing, and the factors listed in rule 57.01 of the *Rules of Civil Procedure*.[10]

[22] Mr. Margaritis's application was dismissed in its entirety. Mr. Milne's application was allowed in part. It is clear that success was divided, although Mr. Milne enjoyed more success than Mr. Margaritis.

[23] The parties uploaded their bills of costs to CaseLines and I am satisfied that they made submissions on costs, even if they were brief.

[24] Justice Dineen was entitled to consider all of the circumstances of the litigation and conclude that Mr. Margaritis should not be awarded his costs of the proceeding even though he will be compensated for the transfer of his land. I see no basis to interfere with his decision on costs.

Conclusion

[25] I would dismiss the appeal. If the parties are unable to resolve the issue of compensation, they should contact the judicial assistant for Dineen J. to make arrangements for an appointment with him.

[26] I would order Mr. Margaritis to pay costs of the appeal to Mr. Milne, fixed in the amount of $7,500, inclusive of disbursements and taxes.

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Robert Centa J.

I agree

_____

Sutherland J.

I agree

_____

Leiper J.

Date: October 23, 2023

[9] R.S.O. 1990, c. C.43.
[10] R.R.O. 1990, Reg. 194.

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Appellant

– **and** –

Donald Milne

Respondent

REASONS FOR DECISION

Date of Release: October 23, 2023