MUTUAL MISTAKE DOESN'T BAR HOMEOWNER'S CLAIM FOR ADVERSE POSSESSION, ONT. JUSTICE DETERMINES

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TORONTO -- Homeowners here who built a pool fence on their neighbour's property through mutual mistake almost 11 years ago may acquire title to an 18-inch-wide strip of land by adverse possession, a justice of the Ontario Court (General Division) has ruled.

Mr. Justice Allan M. Austin said that the *Limitations Act* time period for an adverse possession claim runs not withstanding possession is by virtue of a mistake.

When Victor and Josephine Bristow bought their Etobicoke, Ont. house in 1971, there was a wooden fence between their property and that of their neighbour, William T. Mathers.

The wooden fence ran around Mr. Mather's side and rear lot lines.

In 1979, the Bristows decided to install a swimming pool in their backyard and advised Mr. Mathers that a local bylaw required them to install a fence.

Mr. Bristow told Mr. Mathers that he intended to install a vinyl-clad chain link fence around the perimeter of his yard, including on his own side of the wooden fence, Mr. Justice Austin said.

Mr. Mathers then proposed that, as the wooden fence was old and rotting, it would be better to remove it, leaving the corner posts.

Mr. Justice Austin said that this was done, but it was unclear by whom, leaving wooden fencing along the sides of Mr. Mather's property.

The chain link fence and the Bristows' pool were installed in July and August, 1979.

In the years following, Mr. Justice Austin said, both parties put in landscaping up to the new fence.

But the Bristows decided to sell in 1990, and told their neighbours, including Mr. Mathers, who then responded: "You know you have two feet of my land," the justice said.

Mr. Mathers had had a survey done which showed that the new fence encroached on his property by about one-and-a half feet, for a length of about 55 feet.

Mr. Mathers threatened to register a caution on the Bristows' property, which they then withdrew from the market.

The Bristows' counsel, Malcolm M. Mercer of Toronto's McCarthy and McCarthy, brought an application in the Ontario Court of Justice for a declaration giving the Bristows an interest in the land which they alleged they had acquired by possession.

He relied on the *Limitations Act* ss. 4 and 15, asserting exclusive possession of the land for more than ten years.

Mr. Justice Austin said that for seven years by means of the wooden fence, and for almost 11 years by the chain link fence they had "deliberately, openly and notoriously excluded from the land at issue, the holder of the paper title."

But counsel for Mr. Mathers, his son, William E. Mathers of Mississauga's Anderson Sinclair, argued that:

- the ten-year limitation period does not run when possession is the result of an error;
- acquiring title by possession should not be allowed because it defeats *Planning Act* s. 29(5) restricting acquisition in a subdivision plan to one or more whole lots; and
- possessory title should be limited to use as a shield and not as a sword.

Mr. Justice Austin said that he agreed with Mr. Justice William Anderson in *Beaudoin et al. v. Aubin et al.* (1981), 33 O.R. (2d) 604, and Mr. Justice James Southey in *Lewis v. Romita* (1980), 13 R.P.R. 188, that the *Limitation Act* time runs even when possession is by reason of a mistake.

And he ruled that the *Planning Act* concerns "the conscious act of conveying or transferring land," rather than with extinguishing property rights by adverse possession.

Finally, the justice noted that if he accepted the sword-shield argument, the Bristows would be forced to wait for Mr. Mathers to act, possibly "forever," before they could sell their property.

"I see no reason in common sense why they should not take the initiative in order to have [Mr.] Mathers' rights determined," he ruled.

The justice concluded that the Bristows were entitled to succeed, and extinguished Mr. Mather's right and title to the disputed strip of land.

He awarded costs to the Bristows, and invited counsel to speak to him to address costs, or if they could not agree on a description of the area in issue.

(Reasons in *Bristow v. Mathers*, 1032-003, 8 pp., are available from FULL TEXT.)

MUTUAL MISTAKE CAN FOUND CLAIM OF ADVERSE POSSESSION

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TORONTO -- Mutual mistake in an adverse possession claim can *alone*, in the absence of evidence to the contrary, be sufficient to establish the requisite intent to exclude the true owner, the Ontario Court of Justice concluded here recently. Mr. Justice Michael J. Moldaver said this was an inference that could be drawn, but not a presumption, and that the trier of fact must look to the whole of the evidence of the claimant's intention.

He also ruled that the "test" of use of the land in a manner that is inconsistent with the intended use by the true owner does not apply in cases seeking possessory title because of mutual mistake.

The justice awarded a two-acre parcel of land in Uxbridge, Ont., to Douglas and Jane Wood, who had thought for 18 years that the land was theirs.

The justice based his ruling on reasons of Mr. Justice D. Gordon Blair in the Court of Appeal decision *Masidon Investments Ltd. et al. v. Ham* (1984), 31 R.P.R. 200:

"Occupancy under colour of right or mistake might justify an inference that the trespasser occupied the lands with the intention of excluding all others which would, of course, include the true owners."

Mr. Justice Moldaver rejected the argument that mutual mistake was fatal to an adverse possession claim, citing a lack of authority for this proposition.

And he said that the "inconsistency test" applied only to trespassers who occupied the land knowing that it belonged to someone else.

The Woods and their business, Wood Lumber Co., applied to the Ontario Court of Justice for possessory title after a new survey revealed that a two-acre wedge-shaped parcel of land they had thought was part of their property actually belonged to their neighbours to the south.

The parcel had been presumed to belong to the Woods, because a post-and-wire fence and a row of poplar trees appeared to be the boundary between their property and that of their southern neighbours.

The vendors who sold the property to the Woods in 1972 had also believed that the parcel was theirs, and had treated it as theirs from the time they bought in 1968.

Furthermore, the several-hundred-metre-long gravel driveway giving access to the Woods' house and barn, and a frame shed were located entirely within the disputed wedge of land.

The house and barn also encroached slightly on the two-acre parcel.

The parties used a 1967 survey which was accurate, Mr. Justice Moldaver said, but failed to show the buildings, fences, row of poplar trees, or the driveway, with the result that no one knew how these landmarks related to the legal boundaries.

From 1972 until their application to the court, the Woods had lived in the house which encroached and used the driveway daily.

For 15 years, they farmed the eastern half of the two-acre parcel, used the encroaching barn, and housed farm employees in the frame shed located entirely within the two acres.

In 1987, the Woods started a lumber business, and used the eastern portion of the two acres as a lumber yard, the barn to store lumber, and rented out the frame shed. They maintained the gravel driveway and mended the post-and-wire fence.

Mr. Justice Moldaver found that the Woods had "openly and continuously enjoyed the use of the disputed land" for the past 18 years.

The lot to the south of the Woods' property had been purchased by Mr. and Ms. Hester in 1973, who at all times believed that the two-acre wedge of land belonged to the Woods.

The Hesters did not occupy the property, but in 1977 leased the "vacant portions" to the Woods, who farmed it.

Mr. Justice Moldaver said that "they did not intend for the [leasing] agreement to cover the two-acre parcel."

In 1987, the Hesters sold the southern property to Mr. and Ms. Garro, who also honestly believed that the Woods were the true owners of the two-acre parcel.

The Garros did not occupy their property, but held it as an investment until 1989, when they sold it to The Gateway of Uxbridge Properties Inc.

Before purchasing, Gateway had a new survey prepared by H.F. Gander Company Limited, and it established beyond doubt that Gateway held paper title to the two acres.

Counsel for the Woods, M. Michael Title of Toronto's Aylesworth Thompson, then sought a declaration against Gateway extinguishing all its rights to the land, and for title to the property, relying on ss. 4 and 15 of the *Limitations Act*.

Mr. Title also named Gateway's mortgagees, who did not oppose the application.

Mr. Justice Moldaver said that to succeed, the Woods were required to show that continuously for ten years:

- they had been in actual possession of the property;
- they had intended to exclude the true owners; and
- the true owners were in fact effectively excluded from possession.

MUTUAL MISTAKE cont'd

Counsel for Gateway, Irving Marks of Toronto's Robins Appleby, argued that it was legally impossible for them to intend to dispossess the true owners when they believed they were the true owners.

Mr. Marks cited reasons of Mr. Justice Stark in *Kosman et al. v. Lapointe* (1977), 1 R.P.R. 119, who ruled there could be no acts of adverse possession where the applicants believed themselves to be the true owners of the land.

But Mr. Justice Moldaver said that Mr. Justice Stark had "cited no authority for this proposition," and that the decision had been criticized in an annotation to the decision at p. 120.

The author, A. Knox, calling the decision a "dubious proposition," had said: "There would seem to be no clear law to suggest that a necessary element in the *animus possidendi* of the squatter is an intention to exclude a specific owner from possession."

Mr. Justice Moldaver said he preferred the reasoning in *Beaudoin et al. v. Aubin et al.* (1982), 21 R.P.R. 78.

In that decision, Mr. Justice William J. Anderson disagreed with Mr. Justice Stark, after he had "thoroughly and carefully reviewed the history of sections 4 and 15 of the *Limitations Act.*

Mr. Justice Anderson had also found support by inference in the case law that mutual mistake was not fatal to an adverse possession claim.

But Mr. Justice Moldaver said that he would go further than Mr. Justice Anderson, and found that evidence of mutual mistake was "both relevant and material on the issue of intent."

He cited Mr. Justice Blair's reasons in the *Masidon* decision, and concluded: "Evidence of mutual mistake may justify an inference that the party seeking possessory title did in fact intend to exclude of all others, including the true owners."

Mr. Marks also argued that the Woods must prove that their use was inconsistent with the intended use of the property by the true owners.

However, this was a legal impossibility, he argued, because none of the owners had had any intended use for the property.

But Mr. Justice Moldaver said he could not accept this proposition because it would mean that in cases of mutual mistake, no action could ever lie for possessory title.

And the justice cited many examples where possessory title had been awarded in cases of mutual mistake.

He noted that there is no mention of the "inconsistency" test in cases of mutual mistake.

He said that if inconsistency was a test at all, it was restricted to situations where a trespasser using land *knowing* it belongs to someone else, applies for possessory title.

He said that in that situation, the law has applied a "very high onus," because of the "shocking proposition" that someone using property knowing that it belongs to someone else, would rely on acts as an illegitimate user to dispossess the true owner.

Therefore the "inconsistency" test arose to avoid apparent injustice and "to prevent the unjust enrichment of wanton trespassers."

He ruled that a divergence in jurisprudence as to whether inconsistent use related to the quality of possession, or to the requisite intent, or both, need not be reconciled in this case.

He ruled that the "test" had no application to cases founded on mutual mistake as to title.

He went on to rule that the Woods had in fact established the effective exclusion of the true owners of the two-acre parcel.

Mr. Marks had argued that the lease with the Hesters for their vacant land included the two acres.

Therefore, the Woods could not establish that they had effectively excluded the true owners for a continuous ten-year period, he argued.

But Mr. Justice Moldaver said that the Hesters did not intend the disputed parcel to be included in the lease, nor could they, because they honestly believed that it belonged to the Woods.

He concluded that the Woods' possession was "open, notorious, constant, continuous, peaceful and exclusive of the rights of the true owners for almost eighteen years."

And he said that not only did they intend to exclude the true owners, they in fact did so.

Within the ten-year limitation period, the true owners "did not awake from their own inaction," he said, and when the problem was revealed in 1989, it was too late.

He granted an order against Gateway and its mortgagees extinguishing all their rights and title, and a declaration that the Woods "are entitled as against the respondents to ownership of the said property."

The justice asked to be spoken to for costs if counsel could not agree.

(Reasons in *Wood v. The Gateway of Uxbridge Properties Inc.*, 1036-016, 30 pp., are available from FULL TEXT.)