WINDOW ON CASE LAW

Real Property

From *Law Times*, Sept.12 - 18, 1994

EASEMENTS

Plaintiff was entitled to year-round-right-of-way.

DECISION: Right-of-way. Validity. Plaintiff owned cottage for 45 years and used access road on defendants' lands during that period. Plaintiff proved use and enjoyment of right-of-way and that use was year round, continuous, uninterrupted, open and peaceable and that owners acknowledged use and did not object. Plaintiff had year-round right-of-way.

Powell v. Leavoy (June 21, 1994, **Ont.Ct. (Gen.Div.),** Chilcott J., File No. 5493/92) **Order No. 094/196/020 (11p.).**

Supreme Court case--

Michael Anne MacDonald wins appeal

(Reprinted from the *Bracebridge Examiner*, 1994-06-01, with permission)

Bracebridge lawyer Michael Anne MacDonald was ecstatic when the Supreme Court of Canada ruled in her favour in a high profile case involving two Georgian Bay islands that had been mistaken since 1942.

The civil case over the ownership of two islands of the coast of Georgian Bay National Park at Honey Harbour, began in 1989.

Islands 99B and 99D have had their numbers mistaken for each other since 1942. In September 1964, owner Jean Strain purchased islands 99B and 99D. Island 99D can be described as a small island with a cottage on it and 99B as a rock island.

Later, Strain decided it wasn't worth paying $26 a year in taxes for a rock island and defaulted her taxes. Strain sold what she thought was the rock island (99B), but she was actually selling the cottage island.

> "...would have never happened if previous owners had had a survey done ..."

In the spring of 1987, Edda and Agon Zeitel and Claude and Nicole Henning purchased what they thought was the cottage island for $33,000. They cottaged there until another owner showed up two years later claiming they had purchased island 99D in a tax sale.

From the onset of Zeitel's and Henning's ownership, the two Midland couples were paying taxes on 99B-- the island of rock.

At the same time, Georgian Bay Township wasn't receiving taxes on island 99D, and hadn't been for some time. The township put the island up for a "tax sale".

MacDonald's clients, Susan Ellscheid and Donald Simmons, purchased the island from the Township of Georgian Bay for $999, the cost of unpaid taxes.

"My clients rented a boat and went out to the island. When they arrived the owners said you're wrong, this is island 99B".

In July 1989 in Bracebridge, the Ontario Court, general division Judge Hoolihan ruled in favour of the occupiers and against Ellschied and Simmons who purchased the island in a tax sale.

In August 1991, MacDonald took the ruling to the Ontario court of Appeal at Osgoode Hall, where it was overturned. "The Supreme Court of Canada upheld the Ontario court of appeal decision in favour of Simmons and Ellscheid and upheld the tax sale."

MacDonald said it was a long, drawn out battle that would have never happened if previous owners had had a survey done when they purchased the property.

"In the Toronto papers my clients were made to look like the bad guy, but they're good, decent people and this shows a real sense of people who paid good money for the island," said MacDonald.

In addition to getting to keep the tiny island and cottage, that MacDonald describes as a "shack", the Supreme Court also ruled that Ellschied and Simmons won the costs involved in the appeal and Supreme Court. "I would estimate they (Zeitel and Henning) owe us about $15,000."

WINDOW ON CASE LAW

The following summaries of cases were prepared by

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Please note that these are American summaries and that references and precedents may not be applicable to Ontario.

Holden Engineering and Surveying, Inc. v. Pembroke Road Realty Trust

628 A.2d 260 (NH 1993)

A survey practitioner prepared a subdivision plan for a developer. The practitioner sought periodic payment from the developer during the preparation of the plan. When the plan was presented for approval, the municipality determined that an endangered species inhabited part of the area. The municipality sought safeguards from the developer as a condition before approving the development. After submission of the plan for approval (but before approval) the practitioner sought payment of all outstanding amounts due from the developer. The developer refused to pay claiming payment was conditioned on approval and the plan had not been approved. The practitioner sued for payment (breach of contract). At trial it was held that payment was contingent upon approval of the plan. The practitioner was denied payment until the plan was approved. On appeal the appellate court reversed and held that the practitioner was entitled to payment regardless of the plans disposition.

> *The practitioner should not allow themselves to be put in the situation where they are the client's bank.*

Several important points were mentioned during the appellate review:

1. The Court found that approval of the subdivision before payment would require there be a condition precedent in the agreement. As a rule, conditions precedent are strictly construed and not favored unless the language in the agreement indicate a condition precedent was intended. Language which generally indicates or signals a condition precedent include words or phrases such as "if," "on condition that," "subject to," and "provided."

2. Generally, where the contract allows: 1) the practitioner to stop services for non-payment, 2) periodic payment is agreed upon and sought, and 3) the condition precedent is not within the control of either party, a condition precedent before payment will not be read into the agreement. (*Note: Although favorable municipal approval may not be in the power of either party to guarantee, the practitioner is still required to take all reasonable steps to help attain approval.*)

Putting the points into practice will require the practitioner:

1. Avoid words that would suggest an unintended condition precedent before payment.

2. The practitioner should be aware that continuing to provide services where prior fees have not been paid adds to the problem. The failure of the client to pay past due amounts is usually a symptom to a bigger problem. It is better to walk away from a $500 amount due than to litigate a $5,000 fee, win, and owe an attorney $2,500. In the first case the practitioner has lost $500 to walk away and break even. In the second case the practitioner has lost $2,500 to walk away and break even (assuming the practitioner is successful in the litigation).

3. If a practitioner feels compelled to continue to provide services when the client has not paid past due accounts 1) obtain a promissory note for the outstanding amounts, 2) take the proper steps to file a mechanics lien, 3) don't provide the work product until payment is due. Always keep any amounts due or promissory notes made out for less than the maximum amount set by small claims court. The practitioner should not allow themselves to be put in the situation where they are the client's bank.

Bradley v. Waldrop

(Fl.App. 1992)

A landowner had a developer help sell his property. The developer hired a surveyor to subdivide the parcel into three lots. The surveyor performed the services and sought payment from the developer. When the developer refused to pay, the surveyor sued the landowner. The landowner denied responsibility for payment. The trial court sided with the landowner. The appellate court found that the developer was acting as an agent for the landowner. As a result, the landowner was responsible for the surveyor's fee. The appellate court said:

"It is well-established that an agent's authority may be inferred from acts, conduct and other circumstances. Further, an agency relationship may be found even though the principal and the agent deny the existence of such a relationship. [A] principal may be held liable for the acts of his agent, even though the acts were not authorized, if the agent was acting within the scope of his employment or apparent authority."

> *Proper instruction and training of the surveyor's employees are essential to prevent unwanted liability.*

Two important concepts should be learned from this case: (1) The surveyor may contract with persons other than the landowner for services (as many mechanics lien laws allow); however, the surveyor can avoid problems and misunderstanding by making the landowner aware of the contract through written notification directly to the landowner. (2) The surveyor's employees may bind the surveyor/employer as a result of acts or words, imposing unexpected obligations on the surveyor. Proper instruction and training of the surveyor's employees are essential to prevent unwanted liability.

WINDOW ON CASE LAW

Ivalis v. Harding

496 N.W.2d 690, 173 Wis.2d 751 (Wis. 1993)

This case involved an action to quiet title based on adverse possession that arose because of a negligent survey. In 1915 a county surveyor erroneously located a parcel of land in the wrong government lot. The monuments set by the county surveyor were used by subsequent survey practitioners for other surveys. In 1971 a subsequent surveyor relying in part on the county surveyor's monuments performed a retracement survey before the sale of a property. The title to the lot had to be based on adverse possession. The lot owner sought damages from the subsequent surveyor for the cost of asserting their claim and quieting their title. The trial court allowed adverse possession and found the subsequent surveyor liable for damages. The Wisconsin Supreme Court affirmed that adverse possession had ripened into title and that damages against the subsequent surveyor were proper.

The case dealt with several important points that are important to practitioners.

1. While the erroneous location was caused by the county surveyor in 1915, the subsequent surveyor may be held liable for all damages since the subsequent surveyor perpetuated the error.
2. When a practitioner provides services for a client knowing and intending that they be used by others (i.e., subsequent owners), the practitioner may be held liable in tort to the others.
3. In general, costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable from the other party barring a statute stating the contrary. However, under Wisconsin law a losing party may recover costs where: 1) the wrongful acts of the party have involved the opposing party in litigation with others, or 2) placed the opposing party in such relation with others as to make it necessary to incur expense to protect their interest. Should one of these two events occur the costs and expenses of litigation are treated as damages flowing from the negligent act.

> *"... the practitioner should not take great comfort from a situation where they can and do rely on another practitioner's work ..."*

4. In his defense, the subsequent surveyor was allowed to show that the county surveyor's monuments were relied upon by other surveyors, including the experts testifying on the other side. However, the Court concluded that this situation does not mitigate the negligence of the subsequent surveyor and can not stand as a defense. Rather, the acceptance of the erroneous county surveyor's monuments by the other experts goes to the credibility of the other experts testimony and may in fact be evidence toward their own negligence.

From this case, the practitioner should consider the following:

1. It is not a defense and the practitioner should not take great comfort from a situation where they can and do rely on another practitioner's work even though the work: 1) is relied upon by other competent practitioners in similar situations and 2) has remained uncontested for a long time.
2. The practitioner should always consider the risk and damages they face for negligence not only from their client but also from subsequent reliant parties. For example, the practitioner who has blazed the approximate boundary in contemplation of logging may face considerable damages because homes are built in justifiable reliance on the blazes.
3. Some practitioners have argued that a surveyor is responsible for showing the client their ownership lines and not necessarily differentiate between possession and record lines. In effect, the surveyor may rely on adverse possession and monument these lines to fix the client's ownership boundary. They go on to state that where adverse possession has ripened into title, the surveyor should not confuse the client and raise dead issues by showing where the ownership, possession, and record boundaries may differ. This case is contrary to that argument. Here a party was awarded ownership based on adverse possession. The client was awarded everything the surveyor said the client should own. Nevertheless, the surveyor was held liable for the costs of making the title marketable. As a consequence the best practice is for a practitioner to locate the correct record boundary and, when present, show other record boundaries and possession boundaries that would call into question the title or marketability of the client's title.

WINDOW ON CASE LAW

Trico Surveying, Inc. v. Godley Auction Company, Inc.

431 S.E.2d 565 (SC 1993)

A realtor had a contract to purchase property for development. A survey practitioner entered into a contract with the realtor to map wetlands in contemplation of development. At the completion of the mapping service, the practitioners fees were $21,800. The realtor refused to purchase the property and consequently refused to pay the practitioner. The practitioner filed a mechanics lien against the owner (would-be seller) of the property. The landowner sought summary judgment against the practitioner seeking to remove the lien and compensate him for costs and attorney fees. The trial court determined the lien was improper under the circumstances and awarded the landowner attorney fees and costs. The appellate court affirmed the trial court. The Court found:

1. The practitioner never entered into a contract with the land owner or informed the land owner of their services or intent to file a lien if the fee was not paid. Under South Carolina law the owner must agree to the services in order for a mechanics lien to be placed on the property. Acquiescence or knowledge alone was not deemed to be sufficient to show an agreement.
2. South Carolina law provides that the successful party in litigation involving the validity of a mechanics lien will have their costs and attorneys fees paid by the loser up to the amount of the lien. (*Note: It actually cost the landowner $27,999.03 to litigate the validity of the mechanics lien. As a consequence, it appears the landowner was still required to pay over six thousand dollars to remove the lien resulting from the realtors failure to pay the practitioner.*)

The practitioner can learn several points from this case:

1. Breach of a valid contract is considered by many sophisticated business men and women to be a business decision and not a criminal act. As a consequence, the practitioner should always contemplate this possibility as part of their business dealings. Fees for professional services should not be allowed to exceed the point where they represent a sizable portion of earnings. As a rule, fees should never be allowed to exceed the amount that may be sought in small claims court unless there is undisputed collateral that will cover the amount of the fees. Furthermore, even when there is undisputed collateral that will cover the fee, the collateral for all intent and purpose is worthless if the cost to litigate equals or exceeds the amount sought.
2. Whenever there is a possibility to use a mechanics lien and the practitioner is not working directly for the landowner or their designated agent, the practitioner should seek to include the landowner in the agreement. Many states require a person that intends to use a mechanics lien notify the landowner of their intent at the time an agreement is made with a third party.
3. A practitioner should always retain possession of their work products until compensation or a negotiable instrument (e.g., check or promissory note) is received. In this case, the practitioner allowed the realtor to have possession of the map before they were paid.
4. Even after a practitioner has been paid, the practitioner should take steps to limit the use of their work products by other persons. In this case, copies of the map were given to and subsequently used by other realtors.

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Marino
v.
Dwyer-Berry Construction Corp.
597 N.Y.S.2d 466 (1993)

An engineer prepared a subdivision plan that erroneously showed that soil conditions would support a septic system. The discovery of the error sometime later resulted in a permit for house construction being revoked. The lot owner sued the engineer for breach of contract alleging they were a third-party beneficiary of an agreement between the engineer and the developer. The engineer made a motion to dismiss claiming there was no privity with the lot owner and the lot owner was not a third party beneficiary. The motion to dismiss was rejected by the trial court. The engineer appealed the trial court's decision. The appellate court reversed the trial court's decision and held the cause of action for breach of contract should be dismissed. The appellate court in reaching their decision stated:

"As a general rule, a claim for breach of contract can only arise between the parties forming the contract ..."

1. A subsequent lot owner could not bring a breach of contract action against a practitioner since the subsequent lot owner was not a party to the terms of the contract, was not contemplated in the contractual arrangement between the engineer and developer, and was not intended to benefit from the contract.

2. The lot owner and engineer had no privity between each other since there was no contract or agreement between the lot owner and the engineer. When applying these points to a survey practice, the practitioner should consider the following:

1. As a general rule, a claim for breach of contract can only arise between the parties forming the contract (in privity with each other). An exception to this rule arises where the purpose for the contract was to benefit a third party (e.g. insurance policy) and that party is named or otherwise clearly identified in the contract. (*Note: Another option that was not mentioned would have been for the lot owner to obtain a "chose in action" from the developer and sue the engineer in the developers stead.*)

2. The "privity of contract" defense has been discussed extensively in surveying articles because the defense has been rejected in litigation involving the tort of negligent misrepresentation. However, privity of contract continues to be a valid defense for breach of contract actions.

Highways

From *The Lawyers Weekly*, Sept. 30, 1994

ACCESS ROADS - Application to close access road, thereby cutting off all road access to respondents' cottage, dismissed on appeal - Refusal to close access road did not grant a right of way or interest in land - No statutory authority in Road Access to impose conditions on road closures.

At issue was the right of respondents to make use of an access road crossing applicants' property to gain access to respondents' cottage. When respondents purchased the property, the only road access was by way of a road on applicants' property. Applicants applied to have the access road closed under s.3 of the Ontario *Road Access Act*. The trial judge did not allow or dismiss the application, but ordered that applicants could close the access road, by means of a gate, for a portion of the year, but that respondents were to have a key to the gate for that portion of the year so they could use the road. Respondents were to be responsible for maintaining the road during the time they had a key to the gate, and were to pay applicants $250 per year. Applicants appealed the refusal to close the road all year round and respondents cross-appealed for the use of the access road all year round. The Divisional Court allowed the appeal and granted an order closing the access road all year round. Respondents appealed, arguing that the Divisional Court incorrectly interpreted the previous order as conferring a "right of way" or interest in land.

HELD: appeal allowed; application to close access road dismissed. The Act was not intended to convey any right in respect of ownership of land on persons using an access road to get to their property. The effect of refusing to order closing of a road was not to grant a right of way which was an interest in land, but rather a recognition that persons in the position of respondents enjoyed the privileges created by the Act of not being considered trespassers. Persons using an access road they did not own could not allow or deny others permission to use the road. While a judge could, upon application, order a road closed if satisfied that closure was reasonably necessary to prevent substantial damage to the applicant or for some purpose in the public interest, there were no such concerns here. Further, the Act provided only for an application to close an access road to be either granted or dismissed. Therefore, there was no statutory authority for the terms and conditions imposed.

***Whitmell v. Ritchie*, Ont. C.A., Weiler J.A. (Dubin C.J.O. and Doherty J.A. concurring) Sept.8/94. Full Text Order No. 1420-033 (8pp.)**