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October 18, 2008

Nail down right-of-access before purchase

A decision of the Superior Court of Ontario last month was a powerful reminder that real estate disputes can become very costly if they ever reach a courtroom.

Millstone Consulting Services Inc. is a corporation owned by Paula and Vico Von Stedingk. In 2002, the company bought a cottage property on Georgian Bay from the Township of Tiny under a tax arrears sale. The cottage is not waterfront property, but it has access to the water by way of a nearby public dock.

Across the road known as Shoreline Dr., just north of the Von Stedingk cottage, is a 30-foot-wide lot known as Lot 6, which provides access to the beach. That lot is owned by the Cleary family.

After the Clearys blocked beach access, Millstone sued them, claiming access to Georgian Bay through Lot 6. The claim is based on what is known in law as a prescriptive easement, which is a right to travel over a parcel of land based on long-term usage.

Immediately east of the Millstone property is a large triangular parcel of land which sits between the cottage and Point Rd., just east of the cottage. Running through this triangular lot is a 10-foot-wide driveway which provides access to the Millstone cottage.

Millstone sued the Clearys, claiming either ownership of the triangle by adverse possession (known colloquially as squatter's rights) or the continued right to use the driveway that cuts across the triangle. The rights over this driveway were not disputed in court, but everything else was, including ownership of the underlying land.

The trial was held over the course of six days last October before Justice Rose Boyko, with Ronald Flom representing Millstone and Gavin Tighe acting for the Clearys.

In July, Justice Boyko released her 17-page decision, which dismissed Millstone's claim for the right to access the beach through Lot 6, and for ownership of the triangle adjacent to the Von Stedingk cottage.

Perhaps just as interesting as the case itself is the judge's ruling on costs, released last month.

In her reasons, the judge noted that each party made offers to settle prior to trial.

Under Ontario law, the party winning a court case is entitled to receive partial payment of legal costs from the losing party. If, however, it turns out that prior to trial the loser rejected a settlement offer which was better than the final outcome, the loser has to pay substantially all of the winner's legal costs. This is known as an award of "substantial indemnity" costs.

In October 2003, the Clearys offered to sell the triangle to the Von Stedingks for $25,000 plus legal fees, and to provide an annual, renewable licence to use Lot 6 to access the beach for $1 a year. In 2007, they offered to sell the triangle for $5,000.

"Clearly," said the judge, "the plaintiff did worse than this at the end of the trial ... The plaintiff chose to go to trial in the hopes of obtaining a better result than was offered."

She awarded the defendants partial indemnity costs up to January 12, 2007, and substantial indemnity costs after that date.

In the end, Justice Boyko ordered the plaintiffs to pay costs of $191,013.09, including GST. The plaintiffs also have to pay their own lawyer's bill.

All of this relates to a cottage that the Von Stedingks bought for about $75,000. They have filed an appeal of the decision.

Anyone interested in buying a cottage would be well advised to learn from this case that a right-of-access to the cottage or to the beach should be nailed down before the purchase, not after.

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Millstone Consulting Services Inc. v. Cleary, 2008 CanLII 39957 (ON S.C.)

Date:	2008-07-28
Docket:	03-B 6246
URL:	http://www.canlii.org/en/on/onsc/doc/2008/2008canlii39957/2008canlii39957.html
Noteup:	Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Related decisions

- **Superior Court of Justice**

  Millstone Consulting Services Inc. v. Cleary, 2006 CanLII 31919 (ON S.C.)

Legislation cited (available on CanLII)

- Land Titles Act, R.S.O., 1990, c. L.5
- Registry Act, R.S.O., 1990, c. R.20

Decisions cited

- Mason v. Morrow, 1998 CanLII 1663 (ON C.A.) (1998), 114 O.A.C. 194

FILE NO.: 03-B 6246

DATE: 20080728

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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MILLSTONE CONSULTING SERVICES INC. Plaintiff	))))	R. Flom, for the Plaintiff
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PAUL DAVID CLEARY, FRANCIS LOYALA CLEARY AND JOHN MICHAEL CLEARY Defendants and - MURRAY EDWARD MCGEE Defendant to Counterclaim VICO AND PAULA VON STEDINGK	))))))))))))	G. Tighe, and J. Sirdevan, for the Defendants Claim dismissed prior to trial
Defendants by Counterclaim	))	R. Flom, for the Defendants by Counterclaim
	)	
	)	
	))	**HEARD:** October 11, 12, 15, 16,17, 18, and 2007

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ENDORSEMENT

Boyko J.

Background

[1] The Plaintiff corporation purchased the Millstone cottage property on Georgian Bay that is close to but is not waterfront property; they have access via a nearby public dock. The owners of the plaintiff corporation, the Von Stedingks, occupy the cottage as their family cottage which they maintain they use only as a recreational property. The plaintiffs claim prescriptive easement rights to access the beach across lot 6 which the defendants own, adverse possession of a contiguous triangular parcel of land (hereafter the triangle) which the defendants hold title to, and a prescriptive easement to their driveway that traverses the triangle. Their entitlement to use the driveway is not disputed by the defendants. The plaintiff s claim also refers to a roadway that bisects lot 6.

The position of the plaintiffs

[2] In their statement of claim the plaintiff corporation and its owners, the Von Stedingks, seek:

a) a Declaration that the property described as Part Lot 19 Concession 21 in the Township of Tiny, County of Simcoe is entitled to a prescriptive easement to permit ingress and egress to and from the Georgina bay shoreline over property described as Lot 6 and Lot 21 on Plan 818 and Part of Broken Lot 19 Concession 21, Township of Tiny as more particularly described in Schedule A of the Statement of Claim;

b) a Declaration that the Plaintiff is entitled to title by adverse possession of property described in Instrument 13812 in Township of Tiny, County of Simcoe, as more particularly described in Schedule B of the Statement of Claim;

c) in the alternative to (b), a declaration that the property described as Part Lot 19, Concession 21, Township of Tiny, County of Simcoe, is entitled to a prescriptive easement over the property described in Schedule B of the Statement of Claim;

d) an Order directing the Registrar of County of Simcoe to amend the parcel registers for the properties described in Schedules A and B to reflect the matters referenced in (a), (b) and (c);

e) an interim and permanent injunction restricting the Defendants from blocking or otherwise obstructing the right-of-way referred to in (a), (b) and (c);

f) an Order requiring the Defendants to remove the fence and gate placed across right-of-way referred to in (a), or in alternative, requiring the Defendants to proved the Plaintiffs with a key to any lock that might be placed on fence or gate;

g) Costs of this action, plus G.S.T.; and

h) Any further and other relief as this Honourable Court deems just.

[3] Counsel for the plaintiffs maintains that these rights to access the beach across lot 6, and to use the triangle, including the driveway traversing the triangle, had crystallized by the time the plaintiffs purchased the property through a tax sale. The rely on these rights having been established by their predecessors in title, the Giffords and the McGees. The plaintiff claims not only that the previous occupants of what is now the Millstone cottage have used the triangle and driveway in question since 1947 or 1948, but have also used the triangle for access to the general store, which had been there for a very long time. The plaintiffs rely in large part on a Statutory Declaration filed as part of the purchase and sale closing documents, by a predecessor in title, Murray McGee.

The position of the defendants

[4] The defendants seek the dismissal of the plaintiff s action and nominal damages for trespass. Counsel for the defendants object to any finding of adverse possession of the triangle, and argue that such a claim has not been made out on the facts or the law. Also, they object to any finding of any easement over lot 6, arguing that permission negates prescription, and they maintain that lot 6 was on occasion closed off entirely, and that neighbours and friends walked across the lot only with the permission of the Cleary family, not to mention that a no trespass sign was posted on lot 6.

[5] They claim that the issue of an easement over the road (lot 21) that bisects lot 6 is academic and redundant since it is a road, not assumed by the municipality, and anyone can use it. This easement, if permitted, would significantly restrict what Clearys can do. Lot 21 is a road privately owned by the Clearys that has been used with permission by other cottagers, without anyone asserting title to it. The Clearys say that Mr. Von Stedingks can use the road like anyone else.

[6] With respect to the driveway crossing the triangle, the defendants will not object to its use and are not opposed to a finding that it becomes a part of the titled deed for an easement. The defendants are, however, strongly opposed to the plaintiffs acquiring a fee simple ownership of the triangle with any right to rent or sell it. The defendants claim that the plaintiffs are simply trying to increase the value of their property.

Issues

[7] It should be noted that the property in dispute has been surveyed at different times over the years and no one takes issue with the correctness of the surveys. In other words, this is not a case about the parties being unclear about where the property lines are. Rather, the issues are about whether prescriptive rights have been acquired through use by the plaintiffs, or their predecessors in title, to lot 6, and whether through adverse possession of the triangle, the defendants rights have been lost.

[8] There is no issue with respect to the driveway in question traversing the triangle. The defendants do not dispute that the plaintiffs have acquired a prescriptive easement right to this driveway.

Findings of fact

[9] On September 4, 2002 the Von Stedingks submitted their tender to the Township of Tiny and purchased the property on September 12, 2002.

[10] Prior to purchase the plaintiffs made inquiries from the Clearys about receiving formal beach access rights across lot 6. It was only after closing that they received the Statutory Declaration of Murray McGee as part of their closing documents. Upon reviewing the Statutory Declaration they believed they had entrenched rights to the triangle under the doctrine of adverse possession, and rights to use lot 6 for beach access.

[11] Although prior to submitting their bid on the tax sale, Vicko Von Stedingk and Paula Von Stedingk were attempting to obtain formal rights to access the beach via lot 6, it was only after Vicko Von Stedingk submitted his tender for the tax sale, that he received original purchase documents and a survey from the Giffords which revealed to him that the triangle was a separate piece of property. This was subsequent to the closing date and after they had become the registered owners. Mr. Von Stedingk denied that he saw the survey from O Dale & Pottage Ltd. dated November 28, 1997, until closer to the date that the Giffords moved out.

[12] Vicko Von Stedingk, a real estate sales representative and a management consultant, whose company, Millstone Consulting Services Inc., purchased what is now known as the Millstone property, together with his wife, rented the Porter cottage for four summers from June 1999 to 2002 prior to purchasing the Millstone property. From the Porter cottage they had beach access through lot 6 of the Cleary property although this was not a necessary route since the Porter cottage was beach front property.

[13] After they bought the Millstone property, no person impeded their access to the beach along lot 6 prior to the commencement of this litigation, at which time the Clearys installed a lock on their fence that went across lot 6.

[14] Access to the beach was the driving force behind this litigation. In August 2002, prior to purchasing the Millstone property, Mr. Von Stedingk sent an email to Paul Cleary asking for a more formalized access arrangement to the beach before deciding to submit his bid to purchase the property. The Clearys expressed reservation about granting him a formal permanent right but was prepared to allow beach access on some basis. Mr. Von Stedingk understood from his correspondence with them that the Clearys believed that none of his predecessors had any perfected rights to access the beach across lot 6. The discussion which was amicable at first deteriorated to the point where the Clearys refused them permission saying, you are not permitted to enter on any of our property unless specifically invited. We will involve police if necessary. Indeed the police were called when the Von Stedingks removed the padlock which the Clearys placed on their fence in 2003. Mr. Von Stedingk acknowledged that he broke the lock and was charged with mischief. The criminal charge was withdrawn.

[15] The Von Stedingks at one point cut some bush to store a sailboat and trailer in the triangle. They also piled some excess logs lying around for some future use, and when they excavated the septic field located on the Millstone property they placed some of the dirt on the western portion of the triangle in order to level out some land. They also planted cedars along the road for privacy. Throughout, no one interfered with their use and the Von Stedingks never asked the Clearys for permission to use the triangle.

Statutory Declaration of Murray McGee

[16] It was the Statutory Declaration of Murray McGee dated in December 1, 1997, that caused the Von Stedingks to believe that they had certain legal rights to the triangle and lot 6. In His Statutory Declaration Murray McGee stated as follows:

> I, my parents, my sister and her children, have traversed the access driveway described in the surveyors real property report, by O Dale and Pottage Limited, dated the 28th day of November, 1997 and indicated as traversing the triangular shaped parcel designated as instrument No. 13812. My own and my family s utilization and possession of these lands has been open and continuous and in the manner of ownership for the period of time from 1947 to the date hereof.
>
> My use of the driveway portion of these lands has been continuous from on or about 1947 when my father caused the logged cottage, also known as the survey sketch, to be constructed and has been continued, on a regular and annual basis to the date hereof.
>
> In addition to the driveway portion designated on the said surveyors sketch, myself and members of my family and guests have utilized that strip of land for firewood, for playing horseshoes and generally maintained and treated these said lands as our own since on or before 1947 and continuing to the date hereof.
>
> In addition to the foregoing, myself and my sister and members of her family have, as to my sister and myself, regularly accessed the water front by traveling over part 6 on registered plan No. 818 for the Township of Tiny and she and I did so on a regular and annual basis from on or about 1947, and as to my sister, until approximately 1983 and as to myself, such travel over the said part 6 continued annually until the date hereof.

Both myself and members of my family, the occupants of the Cedar Point General store and various families living to the south have, as was my observation, regularly traversed these lands in order to access the beach for boating recreation and as to a farmer named Pose for watering cattle.

It was always my understanding and I verily believe that of the others mentioned herein, that this thirty (30) foot strip was intended as a public access-way to the water front.

[17] Murray McGee testified at trial that he first came to Cedar Point as a child with his father and that his mother, Ruth McGee, then purchased what is now the Millstone property in 1948, when he was ten years old. He recalled the property was forested and when shown the coloured sketch stated that the triangle portion, although demarcated in a different colour, was for all intents and purposes a part of the Millstone property. At trial Murray McGee adopted his Statutory Declaration.

[18] Murray McGee recalled that he went to his family cottage during the summers with his sister and mother and during other long weekends and vacations as well. He recalled as a child and teenager using the Millstone property and the adjacent and contiguous triangle to build a tree house. He also recalled accessing the beach not only through the Matheson s property on lot 3 but also through lot 6. He showed the court photos of boats he had access to over the years and said he often used lot 6 to get to the beach and would anchor and launch his boat at the beachfront on lot 6, recalling one photo was taken in the 1980 s and others being from the 1960 s and 1970 s. He recalled sometimes using the government dock to launch his boats.

[19] Murray McGee testified that no one stopped him from using lot 6 and that he never asked anyone s permission to use lot 6. He recalled other people using lot 6 as their access route to the Cedar Point store. He recalled that a local farmer would sometimes bring his cow down to the shore for water, using lot 6. He specifically recalled Jack Deschamps, who operated the store, taking him on a boat ride and accessing the boat on the beach via lot 6. He remembered that the store location moved; although unsure, he thought it might have been built in the 50 s or 60 s, but was unsure when its location was moved.

[20] He recalled that his sister, Ms. McCarthy, and her family used the cottage in the mid 50 s. He thought she might have continued going to the cottage when he began teaching in 1964.

[21] He obtained his property from his mother in 1985 but only registered it in 1997, days before he sold his property to Gifford. At trial he said it was only in 1997 that he saw a document showing the triangle as a separate parcel on a survey that Gifford obtained, and first realized that the triangle was not a part of his cottage property.

[22] Apart from using the cottage as recreational property and building a tree house on the triangle or accessing the beach, he recalled that his family also cut down some trees on the triangle to make a clear-cut area where a horseshoe pit was installed by his father.

[23] In cross-examination Murray McGee acknowledged that from 1955 to about 1959 his attendance at the cottage decreased because he was playing baseball during the summers in a senior league. He also acknowledged that he recalled seeing private property signs on trees on lot 6 in the mid 60 s and that after his father died in 1973, he learned that the Clearys had title to lot 6, and in the mid 70 s even approached them through an intermediary to see if they would sell him the 30-foot strip. He testified that the knew when he listed his property for sale that it was not being represented as having a deeded water access. He also testified that when he sold the property to the Giffords he did not intend to convey legal rights over lot 6.

[24] Murray McGee testified that his use of the cottage diminished when he obtained another property elsewhere in the late 80 s.

[25] In view of the above evidence presented at trial, I place very little weight on the Statutory Declaration of Murray McGee. It is clear that his evidence at trial differed from what he stated in the Statutory Declaration, and the evidence brought forth in cross-examination contradicted his statements in the Statutory Declaration. He did not go to his family cottage for many years and later after he acquired the cottage was also absent because he had a second cottage that afforded him better boating facility.

[26] In 1997 the McGee property was sold to David Gifford. In a letter dated September 21, 1999, Michael Cleary wrote to Messrs. Chris Gifford, Mike Gifford and David Gifford, advising them that Lot 6 was private property and asked them not to use Lot 6 to access Georgian Bay. Michael Cleary did not receive any response to his letter from the Giffords, however there were no further reports from the residents of Lot 5 or Lot 7 that any of the Giffords used Lot 6 after he sent them this letter.

[27] This is evidence of clear interruption in use and a withholding of permission when the Clearys denied access to the Gifford s over lot 6. I accept the evidence of the defendants that the Giffords never used it again. This is evidence that lot 6 was not used in a notorious and open fashion by the predecessors in title to the plaintiffs.

[28] Michael Gifford testified that he first went to Cedar Point when he was eight years old, some 42 years earlier. He was familiar with the Millstone cottage that his brother David owned, which he occupied between 1999 and 2002, including throughout the winter months. He testified that he used lot 6 for beach access and that no one ever prevented him from doing so and he never asked anyone for permission. He said he also saw other neighbours and First Nations people from Christian Island skidoo on lot 6 in the winter. He said he used the property up to the time his brother lost it in a tax sale in 2002.

[29] He acknowledged that in 1999 he received a letter to cease and desist from using lot 6 but said he did not pay any attention to it.

[30] He said he also walked across the triangle and stored his boat and some firewood wood on this piece of property. He said he placed his 10-foot boat in a small clearing but he never played horseshoes. He said until he saw a survey at the time of sale in 1997 that he did not know that it did not belong to his brother.

[31] In cross-examination Michael Gifford acknowledged that legal correspondence he found in the cottage stated that his brother had no deeded access to the driveway but only rights as set out in Murray McGee s Statutory Declaration. He said he read this but ignored the fact.

[32] I place little weight on Michael Gifford s evidence, which I find to be highly unreliable given his casual attitude about the contents of legal documents and the letter from Mr. Cleary. Also, evidence of the defendants contradicts his assertions that he continued to use lot 6 after receiving the letter from Mr. Cleary. Ultimately, his evidence lends little support to the plaintiff s claim.

[33] William Johnson testified that during the time his family had a cottage at Cedar Point he would sometimes use lot 6 to go to the store. However, this was prior to 1955 and not relevant to the plaintiff s claim.

[34] Janet McIntyre testified that that although her family had a cottage in the Cedar Point vicinity and she heard lot 6 being referred to as the right of way , that she did not use the Millstone property and never knew that lot 6 was privately owned. Her evidence is of no assistance to the plaintiffs.

[35] The defendants own some 160 acres of the lands adjacent and surrounding the Millstone property, which have been in the Cleary family since the mid 1950 s. In 1964 they purchased additional property which included the triangle and lot 6. It is clear from their evidence that they were familiar with the area having spent summers at their family cottage since the mid 1950 s. It is also clear that once they acquired the property in dispute in 1964, that they asserted their private ownership by erecting a fence and posting Private Property or No Trespass signs on lot 6. They also saw no use being made of the triangle, other than perhaps a horseshoe pit which they thought was partially on what is now the Millstone property.

[36] At trial Paul Cleary testified that he first recalled going to the Johnson cottage with his family around 1957 when he would have been about 9 years old. This was before his parents purchased their cottage at Cedar Point in the 1950 s from Jessie Culligan. He said his family maintained the original forested habitat of their property. Paul Cleary testified in his examination for discovery that his father had their property surveyed around 1964 and made it known to neighbours that lot 6 was private property.

[37] He was asked what use Mr. McGee made of lot 6 and acknowledged that he was not always at the cottage and that if Murray McGee said he made particular use of lot 6, that he might not know, as different individuals may have used it without his permission. He acknowledged that the Clearys had an agreement with Jack Deschamps and his family whom they permitted access to the water via lot 6. He said several families came to them and they gave their permission fairly routinely over the years. He mentioned Kirsten, Bruce from the store, and the Poses as example of people who received permission to use lot 6 to access the beach. He recalled that his father once called the OPP to eject people from their land. He further recalled one account from his father about excluding scuba divers from using lot 6 and that they had also excluded the Giffords. He also recalled that periodically his father would install a chain across lot 6 at the split rail fence or at another location further up the hill to assert their private ownership. He was asked and did not recall whether the triangle was used for a horseshoe pit or that any wood was cut down. He said that to his knowledge Butch McGee and his sister Mary Ellen were rarely present at their cottage.

[38] After his parents died, the Cleary brothers inherited the property and Michael Cleary became a 1/3 owner in 1992. He said he knew that lot 6 was not designated as a right-of-way by the Township of Tiny. There used to be a Cedar Point General Store near lot 6 with a footpath that still exists to where the store once was, from lot 6 and also to the water along lot 6. He met Murray McGee two to three times and over the years saw him by the store or at his property. He said he never saw Murray McGee cutting wood in the triangle area and that his family had never cut wood there. He said the Clearys used the triangle only to walk across it. He acknowledged he saw horseshoe facilities on the

triangle but never saw McGee s sister use the triangle. In the 1960 s and 1970 s he recalled that First Nations people from a nearby Indian Reserve would walk across the property and that his father spoke to the Chief about it, and although they thereafter limited their use they were never precluded from using it. During the previous fifty years, primarily when he was there during the summer months, he did see people walk across lot 6. He recalled that people asked his family for permission to walk across their property, usually on their way to the store to buy ice cream cones. He recalled first seeing the Millstone cottage 49 years prior to trial and was aware that the occupants used a driveway that crossed the triangle.

[39] In his evidence at trial, Michael Cleary testified that his parents purchased lot 13 where they built a cottage, and years later Michael Cleary built a cottage on lot 14. He recalled spending summer months at the family cottage, and later his own cottage, throughout much of his life. Lot 6 was purchased by his family in 1964 and was the smallest beach front lot, being only 30 feet wide. It had trees, bush, woods but no building on it. His family contacted the Ministry of Natural Resources to have several thousand trees planted on their property, including lot 6 and the triangle, to maintain its natural wooded habitat. He recalled that his family used their property, including lot 6 and the triangle, for personal enjoyment, privacy and protection of the natural habitat. He recalled there had been old logging roads going through their property. Apart from seeing a horseshoe pit that he thought might have been partially on the Millstone property, he did not recall seeing any other use being made by others of the triangle. He recalled seeing the split rail fence being installed a couple of years after his parents purchased lot 6 in 1964. He recalled that his father was sensitive about his privately owned property and would post No Trespass or Private Property signs, either on the fence on lot 6 or nearby. He testified that he never ever saw the McGees or the Giffords cross over lot 6.

[40] He testified about a letter his father, Frank Cleary Senior, sent to Ruth McGee on May 20, 1979 concerning the possible purchase of the McGee property. In this letter his father stated that he owned, the property immediately adjoining the western, as well as northern extremity of her property. He also mentioned that he owned the private road . This is further evidence that the predecessors in title of the Millstone property were aware that the Clearys owned the adjacent lands and contradicts the evidence of Murray McGee that he didn t know about this until the sale of their property to the Giffords in 1997.

[41] Michael Cleary also testified about the letter he sent to Jeanne McIsaac, a real estate agent, after being advised that the Millstone cottage was advertised for sale as a property having deeded water access in order to refute this. In this letter he wrote: I just want to ensure that there is no confusion our land is private property and we have had a fence constructed about 10 years ago to avoid any misunderstanding that it may be general public access. Ms. McIsaac confirmed in her reply dated November 21, 1996 that the property was not being advertised as having deeded water access . This is further evidence of the Clearys being vigilant and responsive to an possible encroachment on their property.

[42] Frank Cleary Junior testified that he recalled his parents bought lot 13 when he was 17 years old. After completing their cottage he recalled that they spent some 3-6 weeks there every summer until his mother died in 1981. In 1964 they acquired the property in dispute in this trial. He recalled that the triangle area was just a wooded area and that they intended to keep it that way. He recalled the split rail fence being installed on lot 6 and that it was his obligation to post a No Trespass sign or a Private Property annually on the fence or nearby.

[43] Upon reviewing the evidence of the Cleary brothers I find that it was straightforward, consistent, and although not always specific about the periods of time, as it spanned the years from 1955 to 2001, it had sufficient details of specific events and independent corroboration to satisfy this court that it is reliable and credible evidence.

[44] I find that the Clearys did give permission to other neighbouring cottagers to cross over various portions of their property including lot 6, in order to gain beach access or walk to a store that at one time was in the vicinity of lot 6. I also find that by giving permission and on occasion withholding permission and posting no trespass signs, the defendants restricted access and on occasion denied access absolutely to lot 6 respecting the predecessors in title to the Millstone property.

[45] Respecting the driveway, that crossed the triangle, the defendants acknowledge that they have permitted all occupants to what is now the plaintiffs property access to the driveway across the triangle. The Clearys knew that the Giffords, McGees and now Von Stedingks drove over it to get to their lot and do not dispute their established easement right to use this driveway.

[46] I find that any use of the triangle, for example to store boats was, at best, periodic and never continuous or notorious. I accept Michael Cleary s evidence that he never saw a boat stored on the Gifford property and that he walked past this area often on his way to the store.

Analysis

The relevant time period

[47] Concerning the chronology of title to the Millstone property, there were two predecessors in title to the plaintiffs. On April 28, 1948, sixteen years before the Clearys purchased their property, Ruth Devlin McGee purchased the parcel of land now owned by the plaintiff corporation, Millstone. She transferred the property to her son, Murray McGee, on May 30, 1985. Murray McGee did not register his deed until just prior to transferring title to Gifford on December 10, 1997. Mr. Gifford owned it until it was purchased by the plaintiffs, the corporation owned by the Von Stedingks, from the Township of Tiny in a tax sale on December 12, 2002. A year before the plaintiffs purchased the property, the Land Title system replaced Land Registry in the region, on October 9, 2001.

[48] In my view the plaintiffs claim is limited to the period immediately prior to the *Land Titles Act* taking effect over these lands.

i) Land Titles system

[49] Lot 6 and what the triangle were converted to the *Land Titles Act*, R.S.O. 1990, c. L.5 (the LTA) from the *Registry Act*, R.S.O. 1990, c. R.20 on October 9, 2001. Section 51(1) of the LTA provides:

> Despite any provision in this Act, the *Limitations Act* or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription.

[50] Since the plaintiffs had purchased the property in 2001, after it was transferred to the Land Titles system, whatever the Von Stedingks have done since conversion to the Land Titles system is therefore irrelevant. Their predecessors had one year to assert rights.

ii) Doctrine of lost modern grant

[51] The plaintiffs also rely on the doctrine of lost modern grant, which they claim extends the period of time beyond the limitation period that would otherwise apply for establishing a prescriptive right. In the present case, they claim that since their predecessor in title purchased the property in question in 1948 that this court can rely on any 20-year period during a span of close to fifty years between 1948 and 2001, to establish a claim for a prescriptive right as they can rely on the *Property Limitations Act* provisions for the establishment of prescriptive rights, together with the doctrine of lost modern grant.

[52] The defendant's counsel objected, arguing that without the plaintiff s reliance on the doctrine of lost modern grant being specifically pleaded, he is not sure which twenty-year period is being relied on, particularly since the plaintiff appeared to only rely on the twenty year period from 1948 to 1968.

[53] The doctrine of lost modern grant emanates from English common law:

> [It] sets up a fictional grant and allows courts in situations where time immemorial could not be established, to move from the fact of twenty or more years of use to the presumption that such use was based on an earlier grant which was lost.

[54] See: Anne Warner La Forest, ed. *Law of Real Property* 3rd ed., looseleaf (Aurora: Canada Law Book, 2008) at 17-11.

[55] However, the period of twenty years is not any twenty year period as the plaintiff asserts, but is taken to be the period immediately before the easement is challenged. See: Anne Warner La Forest, ed. *Law of Real Property* 3rd ed., looseleaf (Aurora: Canada Law Book, 2008) at 17-13. [my emphasis]. Consequently I find that this doctrine is of no assistance to the plaintiff as it does not expand the period to any 20-year period going back to 1948 as the plaintiff claims.

Whether the plaintiffs have a prescriptive easement right to access the beach via lot 6

[56] To succeed in a claim to an easement under the *Limitations Act*, the claimant must establish that the use of the property in question was continuous, uninterrupted, open, peaceable, with the knowledge of and without objection from the owner for 20 years. See *Skoropad v. 726950 Ontario Ltd.* (1990), 12 R.P.R. (2d) 225 (O.C.J.) at paras. 45 and 46, *McRae v. Levy* (2005), 28 R.P.R. (4th) 291 (O.C.J.) at para. 56, *Temma Realty Co. Ltd.* v. *Ress Enterprises Ltd. et al.*, [1968] 69 D.L.R. (2d) 195 (C.A.) at para. 6.

[57] Lot 6 and the triangle were converted to the *Land Titles Act*, R.S.O. 1990, c. L.5 (the LTA) from the *Registry Act*, R.S.O. 1990, c. R.20 on October 9, 2001. Section 51 of the LTA provides:

> Despite any provision of this Act, the *Real Property Limitations Act* or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription.

[58] Section 32 of the *Limitations Act* states:

> Each of the respective periods of years mentioned in sections 30 and 32 shall be deemed and taken to be the period next before some action wherein the claim or matter to which such period relates was or is brought into question, and no act or other matter shall be deemed an interruption within the meaning of those sections, unless same has been submitted to or acquiesced in for one year after the person interrupted has had notice thereof, and of the person making or authorizing the same to be made.

[59] Pursuant to this provision, a 20-year period must be an uninterrupted period that has existed immediately before an action is commenced. If there has been an interruption once a potential right has been created and that interruption has been submitted or acquiesced to, any potential right is extinguished if an action is not commenced within one year from that date. See *Temma Realty Co. Ltd.* v. *Ress Enterprises Ltd. et al*., [1968] 69 D.L.R. (2d) 195(C.A.) at para. 6, *McCulloch* v. *McCulloch* (1910), 17 O.W.R. 639 (Ont. H.C.J.) at para. 8, *McRae v. Levy* (2005), 28 R.P.R. (4th) 291 (O.C.J.) at para. 56.

[60] Bruce Ziff defines a right to an easement in *Principles of Property Law*, 4th ed. (Toronto: Thompson Carswell, 2006) at p. 362, as follows:

> The common law recognizes that rights to an easement may emerge out of continuous use, under a judicially-endorsed piece of pious perjury known as prescription. Put frankly, the law pretends that an easement was granted at some time in the past, as evidenced by long, uninterrupted use.

[61] The elements of an easement are defined as follows by Diana Ginn in *Law of Real Property*, 3rd ed., looseleaf (Aurora: Canada Law Book, 2008) at 17-3:

> At common law the essential characteristics of an easement are:
>
> a) There must be a dominant and servient tenement;
>
> b) An easement must accommodate the dominant tenement;
>
> c) The dominant and servient owners must be different persons; and
>
> d) A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant. (Internal citations omitted)

[62] As Ginn further explains at p. 17-3 17-4:

> An easement must have both a dominant tenement to which the easement is attached and a servient tenement over which the right is granted. The dominant and servient lands need not be side by side. However, there must be sufficient proximity to show that the dominant lands are capable of being benefited by the easement. (Internal citations omitted)

[63] A prescriptive right to an easement in other words involves the recognition of a right established by use over time.

[64] The plaintiffs claim for an easement over lot 6 fails for the following reasons:

[65] First, the Millstone property owners do not require this property in order to enjoy their own property because they have beach access via a public dock that is nearby; See *Rose v. Kriesser*, [2002] O.J. No. 1384 at para. 46 (Ont.C.A.):

> the easement must be reasonably necessary for the better enjoyment of the dominant tenement rather than merely conferring an advantage upon the owner and rendering his ownership more valuable.

[66] Secondly, the evidence relied on by the plaintiffs fails to show that their predecessors in title, on a balance of probabilities, have used lot 6 in the manner asserted by the plaintiffs, namely to access the beach via lot 6, in a continuous and uninterrupted manner for a period of 20 years. In a letter dated September 21, 1999, Michael Cleary wrote to Chris Gifford, Mike Gifford and David Gifford, respectively, advising them that Lot 6 was private property and asked them not to use Lot 6 to access Georgian Bay. Michael Cleary did not receive any response to his letter from the Giffords, however there were no further reports from the residents of Lot 5 or Lot 7 that any of the Giffords used Lot 6 after he sent them this letter. The 1999 letter from Michael Cleary to the Giffords, denying them the permission to use the property known as lot 6 effectively interrupted any prior use they made of lot 6. Also, in this same letter Mr. Cleary referred to his correspondence with the real estate agent three years earlier in which the Clearys confirmed that the Millstone property did not have deeded water access.

[67] This I find was an interruption in use and Mr. Gifford submitted or acquiesced to this interruption by failing to respond to the letter in any way. Accordingly, the plaintiff s claim to an easement over lot 6 must fail.

[68] There is no at all evidence that lot 6 was ever used in any way by the previous registered owners of the Millstone property, namely Ruth McGee or David Gifford. Accordingly the plaintiff has failed to establish that any use of lot 6 by its predecessors in title was continuous and uninterrupted for the requisite period of time.

[69] Mr. McGee s evidence was that, after 1955, he visited the Millstone Property on the Thanksgiving weekend and on the occasional weekend during the summer months. The plaintiff did not call Mr. McGee s sister or any other alleged users of the Millstone Property during the time it was owned by Mrs. Ruth McGee as witnesses at this trial. Mr. McGee s sister is alive and resides in the Province of Ontario. It can only be assumed that her evidence would not have assisted the plaintiff.

[70] The plaintiff has failed to establish that any use of lot 6 by its predecessors in title was open and with the knowledge of the Clearys. Each of the Clearys testified that they did not have any knowledge that Mr. McGee was traversing lot 6. Mr. McGee further testified that he never saw the Clearys on the intermittent and sporadic occasions when he might have been traversing Lot 6 (although he would not have recognized them). The Clearys also did not have any knowledge that Mr. Gifford was traversing Lot 6 after 1999, if he did in fact do so.

[71] The plaintiff has also failed to establish that any use of lot 6 by its predecessors in title was without objection by the Clearys. The Clearys each gave evidence that a split rail fence was erected across Lot 6 in the late 1960s. The Cleary s also gave evidence that Lot 6 was posted as private property or no trespassing during their time of ownership. Mr. McGee, Mr. Von Stedingk and Mrs. Von Stedingk all admitted that they saw a private property sign on lot 6. Accordingly, the Clearys clearly objected to the use of lot 6 by anyone who did not have their permission to use it.

[72] Express or implied permission by an owner to the use of a right of way prevents a user from acquiring a prescriptive right. While the use does not need to be exclusive, it must be as of right . As stated by the Ontario Court of Appeal in *Henderson* v. *Volk*, use permitted through good neighbourliness, and enjoyed on that basis, is not sufficient to acquire an easement by prescription. See: *Henderson v. Volk* (1982), 35 O.R. (2d) 379 (C.A.) at para. 21, *Mason v. Morrow* 1998 CanLII 1663 (ON C.A.), (1998), 114 O.A.C. 194 (C.A.) at para. 5, *Temma Realty Co. Ltd. v. Ress Enterprises Ltd. et al*., [1968] 69 D.L.R. (2d) 195(C.A.) at para. 9.

[73] The Clearys testified that they permitted their friends and neighbours to cross Lot 6 to go to and from the beach to the Cedar Point store. While the Clearys did not expressly permit Mr. McGee to cross Lot 6, nor could they have as they did not know Mr. McGee was traversing Lot 6, Mr. McGee was a resident of Cedar Point and a neighbour of the Clearys. Mr. McGee also had knowledge that Lot 6 was owned by the Clearys by at least the mid 1970s as he completed a title search of the property at that time. Mr. McGee also saw the private property sign on the lot and the fences across it. Accordingly, any use by Mr. McGee of Lot 6 could not have been as of right .

[74] In order to establish an easement, the user that is being relied upon must accommodate the dominant tenement. An easement cannot be established where the substantial user was by persons who had no interest in the dominant tenement itself. Accordingly, any evidence that residents of Cedar Point or residents of Christian Island traversed Lot 6 to access the store is irrelevant to the plaintiff s claim to an easement over Lot 6. None of this use (whatever it may be) was for the benefit of the Millstone property. See *Temma Realty Co. Ltd. v. Ress Enterprises Ltd. et al*., [1968] 69 D.L.R. (2d) 195(C.A.) at para. 17, *Skoropad v. 726950 Ontario Ltd*. (1990), 12 R.P.R. (2d) 225 (O.C.J.) at para. 41.

[75] In conclusion the test for prescriptive easement is not met with respect to lot 6.

Whether the plaintiffs have acquired any adverse possession rights to use the triangle

[76] Bruce Ziff defines the doctrine of adverse possession in *Principles of Property Law*, 4th ed. (Toronto: Thompson Carswell, 2006) at p.126, as follows:

> A person asserting a squatter s right must have an intention to possess (*animus possidendi*) and must demonstrate that requisite *factum.* The degree of physical control needed to maintain an adverse possession claim reveals the malleability of the possession concept and the manner in which its definition is informed by policy considerations. To succeed, the acts of possession must be open and notorious, adverse, exclusive, peaceful (not by force), actual (generally), and continuous. If any one of these elements is missing, at any stage during the statutory period, no rights against the paper owner can be successfully asserted. The precise nature of the required acts will depend on the type of property, so that the demanded level of control will be different for scrub land, farmlands, cottage property, or a residential lot. (Internal citations omitted)

[77] Following this definition, adverse possession allows for the extinguishment of the rights of the paper owner.

[78] A claim for adverse possession is founded on s. 4, 5 and 15 the old *Limitations Act*, which in combination provides that paper title to land can be extinguished if and when another adversely possesses that land for a period of at least 10 years. To succeed in a claim, a claimant to a possessory title must establish that he/she had actual possession of the disputed area for the statuary period; that he/she had the intention of excluding the true owner; and that the true owner s possession was effectively excluded for the statutory period. For the claimant to establish actual possession of the land, the possession of the land must be visible, open, notorious and continuous. Sporadic, seasonal, infrequent or temporary occupation is insufficient. See *Skoropad v. 726950 Ontario Ltd.* (1990), 12 R.P.R. (2d) 225 (Ont. Gen. Div.) at paras. 23 and 24, *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563 (C.A.) at paras. 14 to 18, *Lehal v. Murray*, [2001] O.J. No 4861 (S.C.J.) at paras. 7 to 9.

[79] Except for the driveway in respect of which a prescriptive easement right is not denied by the defendants, the plaintiffs claim for adverse possession to the triangle, fails for the following reasons.

[80] Between 1991 and 2001 the only evidence relied on by the plaintiffs is that of Murray McGee s Statutory Declaration and Michael Gifford, which are disputed by the evidence of the Clearys. I prefer the evidence of the Clearys that the triangle was not used in a manner asserted by the plaintiffs. As stated earlier, Murray McGee s Statutory Declaration was in effect discredited by his own evidence at trial.

[81] There was no clear evidence of Murray McGee, whose family owned the triangle beginning in 1948 until they sold it in 1997 to the Giffords, that they possessed the triangle as part of the Millstone property. I prefer the evidence of the Clearys that the only use they saw was a horseshoe pit on the grounds. The other use of cutting down trees or storing a boat for a period of time was simply not continuous use and even if it was done, I find it was not done with an intention to exclude the paper title owner from their use of the property. The evidence of all witnesses was that the triangle is largely comprised of brush, trees and vegetation. Gifford testified that he stacked wood and that he occasionally kept his small boat on the triangle. He did not say how long he did this for and it was not seen by the Clearys. McGee testified that he might have played horseshoes on a small portion of the triangle although there was no clear evidence that any part of the horseshoe pit was actually on the triangle. The Clearys testified that they were not aware of any of these uses of the triangle by McGee or Gifford. Accordingly, any such use cannot constitute open and notorious possession. The triangle is a forested area. It is apparent that prior to the Von Stedingks occupation it remained a forested area at all times and that no specific use whatsoever was made of the triangle by anyone adverse or otherwise.

[82] The degree of physical control needed to maintain an adverse possession claim was simply not established. The acts of possession alleged were not open and notorious, exclusive, or continuous. If any one of these elements is missing, at any stage during the statutory period, no rights against the paper owner can be successfully asserted. Any use by the plaintiff s predecessors in title to store a boat or stack firewood on the triangle therefore did not exclude the Clearys and was not adverse to their interests and title to the triangle.

[83] The precise nature of the required acts will depend on the type of property, so that the demanded level of control will be different for cottage property such as this where the cottagers only spend a few weeks on their property each summer. In the present case the cottagers, such as the McGees and even the Giffords were, I find, absent for significant periods of time, having consideration to normal cottage use. The plaintiff did not establish that its predecessors had actual possession of the triangle. There is no evidence whatsoever that the registered owners of the Millstone Property ever undertook any steps to adversely possess the triangle.

[84] While the plaintiffs do not dispute use of the driveway to the Millstone property, this does not establish actual possession over the entire triangle.

[85] David Gifford s evidence is that he bought the Millstone property in December 1997, at the same time that the property was transferred from Ruth to Murray McGee. Michael said he didn t move in until the summer of 2000 which is a period of more than one year and so there was a gap in use.

[86] McGee said he had no intention in his 1997 transfer to convey any rights over the triangle or lot 6 to Gifford. McGee evidently didn t believe he had a right over either of those properties, since he had no intention of conveying any right. Also, from his evidence he didn t use the triangle or lot 6 believing it was as of right. It can be taken that he only conveyed everything he had and he didn t believe he had further rights to convey.

Trespass

[87] Trespass is defined as any unjustifiable intrusion by one person upon land in possession of another and is actionable without proof of damage. Exemplary damages may also be awarded in a trespass action where the conduct of the trespasser has been malicious or high-handed or where the trespasser has shown a callous disregard for the plaintiffs and their rights. See *Pretu et al. v. Donald Tidey Co. Ltd*., [1966] 1 O.R. 191 (Ont. H.C.), *Lehal v. Murray* [2001] O.J. No 4861.

[88] I reject the defendants claim for a finding of trespass. I accept the evidence of the Von Stedingks that they traversed lot 6, believing that they could rely on the Statutory Declaration of Murray McGee. I am not satisfied that they had the requisite intent to trespass. I therefore dismiss the claim for trespass.

Conclusion

[89] In conclusion, only the plaintiffs claim for right to use the driveway is allowed. Their other claims of a prescriptive easement right to access the beach via lot 6 and rights acquired by adverse possession to the triangle, are dismissed. The defendants counter claim for trespass is also dismissed.

[90] Counsel are requested to arrange for an attendance before me, within 15 days of today s date to address the issue of costs. In the alternative, counsel may submit written submissions, no longer than five pages, and arrange for a follow-up teleconference to address the issue of costs.

_____

Madam Justice R. Boyko

Released: July 28, 2008