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Bob Aaron *bob@aaron.ca*

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Don't take law into own hands over fence dispute

The Ontario Court of Appeal has written what may well be the final chapter in what I call The Case of the $100,000 Fence.

The case involved a dispute over a strip of land between two houses on Johnston Ave. near Sheppard and Yonge in North Toronto.

Laura Cantera bought her house on that street back in 1997. Seven years later, in 2004, Wendy Eller and Paul Wright bought the property next door, intending to demolish it and build a new home on the lot. An old post and wire fence marked the boundary between the two houses, but unfortunately it was not on the deeded property line.

In fact, the fence was shown to be in the wrong position on a land survey done in 1952. Another survey report done in 1994 confirmed that the fence was still sitting well into the Eller and Wright property.

The south point of the disputed fence near the street line was 2.5 feet west of the real lot line, and the north point was 0.8 feet west of the line in the back yard.

As a result, the Cantera lot appeared to have a street frontage of 52 feet on the ground, and the Wright and Eller lot had a frontage of only 48 feet.

Wright was aware of the disputed strip of land at least a month before his closing in February, 2004, but closed in spite of it.

Increasingly tense negotiations took place in the spring of 2004 between Wright and Laura Cantera's husband, Leneo Sdao, who is a Toronto real estate lawyer.

Sdao had placed Wright on notice that his wife was claiming the disputed strip based on adverse possession (commonly known as squatter's rights) since 1952, and that any attempt to remove the old fence would be considered a trespass.

A few days later Wright removed the fence without permission and replaced it with an orange construction fence on the deed line, in preparation for building his new house.

Eventually, Cantera sued Wright and Eller for a declaration that she owned the disputed strip, and for damages for trespass.

In March, 2007 the case came up for trial in Toronto before Judge Alison Harvison Young. After hearing evidence for three days, she concluded that Cantera and the previous owner had acquired ownership of the strip by possessory title.

She ruled that they and the previous owners had met the tests of having possession of the land which was "open, notorious (obvious), constant, continuous, peaceful and exclusive of the right of the true owner" for a minimum period of 10 years. As a result, the court ruled that they had ownership of that land.

The judge ruled that Eller and Wright had to deliver possession of the strip to Cantera, and ordered them to pay $1,000 in nominal damages, $5,000 in punitive damages for trespass, and costs.

Early into the proceedings, Cantera had made a formal offer to settle the case for $1 in damages and the return of the disputed property.

Since the offer was not accepted, the defendants were ultimately ordered to pay the plaintiff's full legal fees from that point forward. Eller and Wright eventually had to pay Cantera a total of about $34,000 in interest, damages and costs.

But that didn't end the dispute. Eller and Wright appealed to the Court of Appeal in December last year.

A three-judge panel did not even bother to hear from Alistair Riswick, counsel for Cantera, before dismissing the appeal in a four-line decision, and ordering Eller and Wright to pay a further $12,500 in costs.

Combined with the total of $46,500 Eller and Wright were ordered to pay Cantera, and the costs of their own lawyer, my estimate is that they are into this little fence dispute to the tune of close to $100,000.

The case provides an important lesson to homeowners who are tempted to take the law into their own hands over a fence dispute.

Bob Aaron** is a Toronto real estate lawyer and a director of the Tarion Warranty Corporation. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818.* ***Visit the column archives at http://aaron.ca/columns/toronto-star-index.htm for articles on this and other topics.

APPEAL DECISION [TRIAL DECISION FOLLOWS BELOW]

Cantera v. Eller, 2008 ONCA 876 (CanLII)

Print: PDF Format

Date: 2008-12-22

Docket: C47790

URL: http://www.canlii.org/en/on/onca/doc/2008/2008onca876/2008onca876.html

Noteup: Search for decisions citing this decision

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

Related decisions

- **Superior Court of Justice**

  Cantera v. Leah Eller, 2007 CanLII 17024 (ON S.C.)

CITATION: Cantera v. Eller, 2008 ONCA 876

DATE: 20081222

DOCKET: C47790

COURT OF APPEAL FOR ONTARIO

Laskin, Gillese and Blair JJ.A.

BETWEEN

Laura Cantera

Plaintiff (Respondent)

and

Wendy Leah Eller and Paul Wright

Defendants (Appellants)

R. Lachmansingh and H. Keith Juriansz, for the appellants

Alistair Riswick, for the respondent

Heard: December 16, 2008

On appeal from the judgment of Justice Alison Harvison Young of the Superior Court of Justice, dated May 15, 2007.

APPEAL BOOK ENDORSEMENT

[1] We agree with the reasons of the trial judge. She applied the proper test for adverse possession and her findings of fact are well supported by the record.

[2] On costs, the trial judge took a reasonable view of the offer to settle.

[3] Accordingly, the appeal is dismissed with costs fixed at $12,500, all inclusive.

TRIAL DECISION (SEE ALSO http://www.aaron.ca/columns/2007-07-07.htm)

Cantera v. Leah Eller, 2007 CanLII 17024 (ON S.C.)

Print: PDF Format
Date: 2007-05-15
Docket: 04-CV-272391CM1
URL: http://www.canlii.org/en/on/onsc/doc/2007/2007canlii17024/2007canlii17024.html
Noteup: Search for decisions citing this decision

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

Related decisions

- **Court of Appeal for Ontario**

  Cantera v. Eller, 2008 ONCA 876 (CanLII)

Legislation cited (available on CanLII)

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

Decisions cited

- Paradiso v. Talbot, 2003 CanLII 8923 (ON S.C.)
- Teis v. Ancaster (Town of), 1997 CanLII 1688 (ON C.A.) (1997), 35 O.R. (3d) 216 (1997), 152 D.L.R. (4th) 304 (1997), 103 O.A.C. 4

COURT FILE NO.: 04-CV-272391CM1

DATE: 20070515

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	

	)	
Laura Cantera Plaintiff **- and -** WENDY LEAH ELLER AND PAUL WRIGHT Defendants	)))))))))))))))	*Alistair Riswick*, for the Plaintiff *H. Keith Juriansz*, for the Defendants
	)	
	)	**HEARD:** March 5, 6, 7, 2007

Harvison Young J.

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REASONS FOR JUDGMENT

[1] The heart of the plaintiff s case is a claim of adverse possession of a narrow strip of property along the border between these neighbors lots in the Sheppard and Yonge area of Toronto. This is an area of the city that has been undergoing somewhat of a boom in recent years. The lots are typically large, approximately 50 feet x 130 feet, and the houses originally built were constructed during the period following the Second World War. During recent years, these small houses have increasingly been replaced by large houses.

[2] The plaintiff, Laura Cantera, purchased her property at 96 Johnson Street in August 1997. Since then, she has lived there with her husband, Leneo Sdao, and their young children. The defendants, Wendy Eller and Paul Wright, made an offer to purchase their property at 100 Johnson Street, next door to the west of the plaintiff, in November 2003 and closed on February 27, 2004. The defendants bought the property with a view to demolishing the existing house and rebuilding a new one, which they have since done.

[3] The plaintiff seeks the following relief in this action:

(a) a declaration that she is the lawful owner of the disputed land;

(b) an order requiring the defendants to deliver up possession of the land forthwith and to remove from the land all fences;

(c) general damages in the sum of $25,000 for trespass to her property and punitive damages in the amount of $5,000.

[4] The defendants deny that the plaintiff has established a claim of adverse possession, deny the allegations of trespass, and, in the alternative, submit that only nominal damages are warranted.

[5] The issues, then, may be summarized as follows:

(i) is the plaintiff s claim of adverse possession well founded? I conclude that it is, and that it had been established long before the plaintiff purchased the property in 1997.

(ii) are the plaintiff s assertions of trespass by the defendants made out? Yes. I accept the facts and photographic evidence submitted by the plaintiff and Mr. Sdao and find that the elements of trespass are established.

(iii) if the claims of trespass are made out, what damages should be ordered?

The Facts

[6] Most of the facts are not in dispute. I found that the witnesses who gave evidence were, for the most part, truthful and reliable in their recollections, and, unless I say otherwise, I have accepted their evidence as given. In order to deal with these issues, it will be useful to set out the background to the dispute and the chronology of the ill-fated relationship between these two families.

[7] Ms. Cantera had purchased the house in 1997 from the Connollys, an elderly couple who had lived there since 1962. As Mrs. Connolly testified at trial, they had always understood that the boundary between the two backyards was marked by an old post and wire fence. This fence appears on a survey done in August 1952, so it is clear that it was at least that old. The Connollys were not aware that this fence extended across the lot line, despite the existence of a survey done in 1994 that showed that the southerly point of the fence was 2.5 feet (30 inches) west of the lot line and the northerly point was 0.8 feet (approximately 9 inches) west of the lot line. Although Ms. Cantera and Mr. Sdao were not aware of this when the agreement of purchase and sale was signed as the survey was not attached, they became aware of it shortly thereafter. Mr. Sdao testified that he was not concerned about this, as he was satisfied that the property up to the fence had by that time become part of 96 Johnson through the operation of adverse possession. Although title to the house is held in Ms. Cantera s name, there is no dispute that it was primarily Mr. Sdao, a real estate lawyer, who dealt with the issues relating to the dispute.

[8] In addition to the old post and wire fence running north/south between the properties, which everyone agrees was decrepit, there was a wooden fence running east/west roughly perpendicular to the old fence between the western end of the house at 96 Johnson and shortly before it would have met the old fence to the west. Mrs. Connelly testified

that she and her husband had erected this fence to prevent neighborhood dogs from wandering into their backyard. This fence forms part of the claim of trespass as part of it extended over the lot line that appears on the 1994 survey, and this part was cut off by Mr. Wright at the same time as he and his father removed the post and wire fence to make way for the orange construction fence. A copy of the 1994 survey, which shows both fences as well as the original lot line, is attached to these reasons as Schedule A .

[9] In November 2003 Ms. Eller and Mr. Wright, who is a building contractor, agreed to purchase 100 Johnson, and immediately began planning the construction with a view to breaking ground in April 2004. Although they were not going to be moving into the new house for some time, they were already living in the general neighborhood, and sometime in December 2003 they contacted the plaintiff and Mr. Sdao and asked if they could get their children together. Both couples had daughters around the same age. It was clear from Mr. Sdao s evidence that he was somewhat on edge concerning the boundary issue from the start. When Ms. Eller contacted them, shortly after agreeing to purchase the property, to arrange for the children to get together, Mr. Sdao was suspicious of the real motives. He thought this was just an excuse to discuss the fence. According to him, Ms. Eller had said that they wanted the children to meet their new neighbors to prepare them for the move. Mr. Sdao thought this strange as the family was not going to be moving very far away. In any event, the plaintiff and Mr. Sdao put the defendants off on the basis that the children were sick and it was too close to Christmas.

[10] When Mr. Wright received the 1994 survey he noticed that the old fence was located on their side of the lot line. On January 19, 2004, Mr. Wright retained Mr. Kidd, who had done the 1994 survey, to do a survey for the purposes of locating the new house on the lot. Mr. Kidd, who testified, indicated that for the purpose of the 2004 survey, he relied on the measurements in his 1994 survey. Just after the survey, Mr. Sdao called Mr. Wright to complain that the surveyor had trespassed on his property and advised him that, as a result of adverse possession, he had a 52 foot wide lot while Mr. Wright had a 48 foot wide lot. Mr. Wright, who had made some inquiries but had not sought legal advice on this point, responded that Mr. Sdao could not have acquired the disputed land by adverse possession as he and Ms. Cantera had not owned it for ten years. He also apologized for the trespass. According to Mr. Wright, Mr. Sdao also told him that they intended to make a similar claim with respect to the property at the front of the house as well, although they did not.

[11] At this point, Mr. Sdao took pictures of the fences and areas between the properties, a number of which were introduced into evidence.

[12] Mr. Wright was, however, concerned about the issue as he was afraid that having even a slightly smaller lot could affect his ability to obtain permission to build as a result of the density rules. He later discovered that this would not be a problem. He was seeking a minor variance to reduce the set back required, and although Mr. Sdao was initially planning to oppose this variance, he advised later that he was withdrawing his objection. According to Mr. Wright, Mr. Sdao did so because he and Ms. Cantera plan to replace their present home with a bigger one and might also require a similar adjustment. In his evidence, Mr. Sdao stated that he and Ms. Cantera have not decided whether they will rebuild.

[13] This conversation marked the real beginning of the dispute between the parties. Mr. Wright s immediate concern in January 2004 was whether they should proceed with the closing in light of the boundary issue. He proceeded to make some inquiries. According to his evidence, everybody he spoke to told him that the fence should not be a problem. He spoke informally to the lawyer for some other neighbors who advised that he had settled a similar issue; the lawyer reportedly thought his neighbor would not have a claim and that it could get remedied after closing . The closing proceeded on February 27, 2004.

[14] According to Mr. Wright s testimony, the period from January until April 2004 was extremely busy and stressful. In addition to dealing with the concerns relating to the committee of adjustments and the closing, he was lining up trades and making all the other plans necessary to break ground in early April. The stress was exacerbated by the fact that the general contractor he had retained for the purpose of the project abandoned it, and so Mr. Wright assumed this job himself, in addition to his other professional projects.

[15] Mr. Wright was clearly aware that the fence between the two houses would have to be removed to make way for a construction fence to surround the construction site, and he realized that this could be an issue with Mr. Sdao and Ms. Eller. During this period he made some inquiries relating to his rights to remove the fence. His evidence was that he spoke to the head of planning for North York who told him that anytime he wanted to take that fence down, you go right ahead . He also consulted Mr. Kidd, and stated that Mr. Kidd told him that he should advise his neighbors that he was going to remove the fence, remove it and then use the property as though it was his own. Mr. Kidd s evidence on this conversation was somewhat different. He stated that he told Mr. Wright that there are a number of reasons that a fence is not on the lot line, of which adverse possession may be one, that this can be a problem, but that most such difficulties are worked out between the neighbors. He denied advising Mr. Wright to rip down the fence.

[16] Mr. Wright did not, however, obtain legal advice on this point, which I find highly surprising for an experienced businessperson in the residential construction industry. By Easter weekend 2004, Mr. Wright and Ms. Eller were facing a serious time crunch. Excavation was due to start immediately following the weekend. On Friday, April 9, 2004, Mr. Wright and Ms. Eller went over to speak to Mr. Sdao and Ms. Cantera about the fence. The discussion did not go well. The issue was not the removal of the fence per se, but where it would be rebuilt. It is common ground that Mr. Wright offered to rebuild the fence at his expense, but he was not prepared to agree to put it back where the old fence had been. Mr. Sdao made it clear that he was not prepared to agree to the removal of the fence in the absence of an agreement to put it back in the same place as the old fence. Mr. Wright maintains he was willing to agree to do so in the event that it turned out that Mr. Sdao and Ms. Cantera were correct on the adverse possession point. In his evidence, Mr. Sdao denied that Mr. Wright offered to put the fence back wherever it was determined it should go. The discussion was heated; Mr. Sdao was adamant that if Mr. Wright removed the fence he would be committing an act of trespass and breaking the law. It is clear that by the end of the meeting Mr. Sdao and Ms. Cantera had not agreed to the removal of the fence and no one thought they had. It is also clear that both sets of neighbors, and Mr. Sdao and Mr. Wright in particular, were angry and upset.

[17] Mr. Sdao went home and drafted a letter to Mr. Wright and Ms. Eller that Ms. Cantera typed. The letter, dated April 10, 2007, set out the Sdao/Cantera position. Of particular concern to Mr. Sdao was Mr. Wright s assertion that he was entitled to move the fence and that it would then be up to Ms. Cantera and Mr. Sdao to prove a claim for adverse possession. First, the letter pointed out that the Estate/Qualifier on the parcel register to the Eller/Wright property stated that they owned a fee simple estate LT Conversion Qualified . It continued:

> The meaning of that statement is that your fee simple estate or paper title is subject to the matters listed in the printout. For ease of reference, we have highlighted the relevant parts. The parcel register state that your title is subject to THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION .

[18] The letter went on to state that contrary to Mr. Wright s assertions, adverse possession does exist in the City of Toronto, and that the right of adverse possession had been specifically preserved by the legislation converting the Registry System to the Land Titles System. It also referred Mr. Wright to page 1509 of Anger and Honsberger s *Law of Real Property*, where the author states that when the paper title holder s remedy is gone so is his title, so that reentry by him would be a trespass , and referred Mr. Wright s lawyer to the case of *Beaudoin et al. v. Aubin et al.* (1981), 33 O.R. (2d) 604 (H.C.J.) as being on point and containing a good discussion of the law of adverse possession. I will discuss the law below, but it is useful to the reader of these reasons to state here that Mr. Sdao s summary of the law on adverse possession was accurate and fair.

[19] Having set out the legal context, the letter (a) disputed Mr. Wright s assertion that the Sdao/Canteras could have no title by adverse possession unless or until they had brought an application; (b) stated that the Eller/Wright s rights over the disputed property had been extinguished and had in fact been extinguished long before they had purchased the property; (c) advised them not to remove the existing fence until we agree on the type of replacement fence and on the understanding that the new fence is to be located in the exact location as the current fence ; (d) warned them that if they chose to remove the fence, they would be doing so in contravention of the law and that it would be an act of trespass providing a clear indication that you do not respect our rights ; and (e) invited them to provide any contrary legal views for their consideration, saying that [w]e do not want this matter to escalate any further .

[20] The next day was Saturday, April 10, 2004. Mr. Sdao went to the house and left the letter for Mr. Wright in his truck, which was in the driveway. Mr. Sdao then left the house with his family to go to a dog show as they were considering getting a dog. While they were gone, Mr. Wright and his father removed the fence and replaced it with an orange construction fence, which he placed along the lot line. The construction fence ran from a parking sign near the curb at the front south end of the properties to the very back end at the north.

[21] Mr. Wright and his father also sawed off the western 22 inches of the board fence because, according to Mr. Wright, it was going to be in the way. This was the board fence that ran perpendicular to the post and wire fence that the Connollys had constructed with a view to keeping dogs out of their backyard.

[22] Unfortunately, Mr. Wright chose not to read the letter from Mr. Sdao and Ms. Cantera before removing the fence, although he does not deny receiving it. His evidence was that he was under great pressure at the time and, in effect, the old fence had to come down that weekend, with or without the neighbors consent. He stated that he wanted to open the letter in the presence of a witness and that he did so some time later in the company of a neighbor who is a lawyer.

[23] Not surprisingly, Mr. Sdao and Ms. Cantera were extremely distressed and angry when they arrived home and found the fence gone. They seek punitive damages on the basis that this was high-handed, outrageous conduct that warrants such an award.

[24] If relations between these neighbors were already off to a poor start, this incident only made things worse.

[25] Mr. Wright finally read the letter on April 18, 2004. His evidence was that there was a lot going on and that the weekend of April 9 had not been the preferred weekend for

dealing with this. He did leave a message for Mr. Sdao saying that we are not ignoring you but have simply not had time over the last month to get seriously into this issue . He stated that [a]part from the hectic family schedule and building a house, we sold our house and packed up and moved to temporary accommodation on April 30, 2004 . In conclusion, he advised Mr. Sdao and Ms. Cantera that they had started the investigation process but had only got a short way down the path at this time . In closing, Mr. Wright stated that they would respond as soon as time and information allowed. His letter did not mention one significant additional stress that Mr. Wright alluded to at trial. On May 17, 2004, a roofer died after falling off the roof during the construction of the Eller/Wright house. Understandably, this was distressing for both Mr. Wright and Ms. Eller, and it resulted in the shutting down of the site pending an investigation.

[26] Mr. Wright s testimony at trial also referred to the fact that April 2004 had marked the tenth anniversary of Ms. Eller s sister s death and that the family had been planning a memorial, which was an added stress on the family.

[27] Mr. Sdao wrote a letter in response, which is dated May 24, 2004. That letter acknowledged the challenges facing their new neighbors but noted that they had been first alerted to the problem on January 19, 2004, and that in removing the fence as they had, despite my advice to you and without any legal authority to support your position , they had turned the matter into an adversarial one. Mr. Sdao stated that he and Ms. Cantera were prepared to delay proceedings for a few weeks in the hope of resolving the matter without resort to the courts, but were not prepared to let it drag on indefinitely, commenting that they felt that they had been patient in the matter considering your aggressive actions on April 10, 2004 . Finally, the letter stated that:

> If we do not receive written confirmation from you by June 15, 2004 that a proper fence will be erected in the original location and that you agree to pay for the replacement of the brown fence, we will proceed with legal action. Any settlement will be properly documented and will include a quit claim deed to the lands in question.

[28] Mr. Wright and Ms. Eller replied briefly on June 13, 2004, stating that [w]e do not agree with a number of statements made in your letters or with Mr. Sdao s position regarding the lot line and would therefore not be providing the written confirmation requested. It closed with the statement that, [w]e look forward to moving into our new home and establishing good and friendly mutual relationships with our neighbors and our respective children .

[29] The plaintiff Ms. Cantera issued the statement of claim commencing this action on July 14, 2004.

[30] In addition to the trespass relating to the removal of the old post and wire fence, the plaintiff is suing for a number of other alleged acts of trespass that occurred in the course of the construction of the Eller/Wright house. I will discuss the specific allegations in detail below, but it is fair to say that they were minor and would almost certainly never have resulted in legal action (or possibly even complaints) but for this context.

[31] It was very clear from the testimony of Mr. Sdao and Ms. Cantera that the incident with the removal of the fence was distressing and set a difficult tone for the rest of the construction process. The placement of the portable toilet on the Eller/Wright construction site is a good example. It was placed in front of the house near the eastern edge of their property where the driveway was located. Mr. Sdao was unhappy with this positioning of the portable toilet as he said it obstructed his vision as he backed out of the driveway. It was also evident from his testimony that he felt that the toilet was deliberately put there, close to his property, as further provocation. Mr. Wright denied that this was true and I accept his evidence. The explanation for the location of the portable toilet as being easily accessible to the disposal trucks makes good sense. Ms. Cantera also stated in her evidence that she felt that the defendants deliberately provoked them and ignored their feelings, citing the placement of the scaffolding as one example, which I will discuss further below. I mention this because, while I conclude that Mr. Sdao misconstrued the motives behind the location of the portable toilet, and that Ms. Cantera misconstrued the intentions of the defendants, their reactions illustrate the poisoning effect that the removal of the fence on April 10, 2004 had on the relationship between these neighbors. Apart from the removal of the fence, the trespasses of which Ms. Cantera complains all arose in the course of the construction of their neighbor s house in the course of 2004. One such trespass was the removal of some bushes that were adjacent to the old fence. These were removed shortly after the removal of the old fence and its replacement with the orange construction fence. The bushes have not been replaced per se, but the defendants have put in new landscaping and Mr. Wright indicated at trial that their position has always been that they would remove it if the adverse possession claim was upheld.

[32] Mr. Sdao took numerous photographs of the construction site with a view to substantiating the trespasses. Other than the placement of the orange fence, the major complaint related to the scaffolding, which Mr. Sdao complains was placed on their property without any request for permission, and that it stayed there from roughly May to September 2004. He introduced photographs into evidence that document this. When he called to complain, Mr. Wright had it moved farther north on the property. On another occasion, Mr. Sdao called Mr. Wright because of lumber that was piled on the construction site and extended onto the plaintiff s property so that Mr. Sdao had trouble getting into his car. Mr. Sdao s evidence was that this was moved further north on the property so that while it was still effectively trespassing onto the disputed land, Mr. Wright did respond to this concern promptly. Another photograph shows debris piled along and leaning into the orange fence near the front south end of the property. It is clear from this photograph, as it is from most of them, that if Ms. Cantera and Mr. Sdao are correct in asserting their title to the disputed lands through adverse possession, this debris was in fact partly on their property. In the course of his testimony, Mr. Sdao stated that he did not complain about all the acts of trespass that occurred during the construction, only the ones that caused problems. He did call Mr. Wright to complain about lumber left that had nails in it. During his cross-examination by Mr. Juriansz, there was some question raised as to whether there had been nails in any of this lumber, but during a recess Mr. Sdao was able to refer to photos that he had produced which do, in my view, show this.

[33] Having heard the evidence and reviewed the exhibits, I reach a number of conclusions.

[34] First, there were a number of occasions during construction when the defendants trespassed onto the plaintiff s property. In most if not all of these incidents, this trespass was onto the disputed area, in other words, just east of the orange construction fence. This means that, but for my conclusion that the plaintiff s claim of adverse possession should be upheld, the other trespasses would have been more difficult, if not impossible, to make out

[35] In giving his evidence, Mr. Wright emphasized that he had done everything he could to minimize any difficulties with his neighbors. He did not claim, however, to have obtained the permission or consent of Mr. Sdao or Ms. Cantera.

[36] Second, I do not find that the defendants deliberately provoked the plaintiff and Mr. Sdao. I accept Mr. Wright s evidence that he tried to avoid exacerbating the tensions that already existed, at least after he had removed the fence, and that he moved as quickly as he could to address the problems that arose. Mr. Sdao did not dispute the fact that issues, such as the blockage to his car door, were addressed promptly. I find that the placement of the portable toilet was the normal and natural place for it for the reasons adduced by the defendant Mr. Wright, and was in no way intended to inflame matters.

[37] Having said this, I find that Mr. Wright rode roughshod on the rights of his neighbors on a number of occasions in a manner that I find remarkable for someone in the business of construction. He appears to have dismissed the merits of the Cantera/Sdao adverse possession claim on the basis of assurances that were not in the form of legal advice. His failure to read the letter left by his neighbors when he was about to demolish their fence is little short of astonishing. The letter referred to the law on the subject. Yet it appears that he did not retain counsel on the subject even at that point, when he knew that his neighbor was a real estate lawyer with some degree of expertise in this subject.

The Adverse Possession Claim

The Law on Adverse Possession

[38] The requirements for establishing possessory title by adverse possession are:

(a) actual possession for the statutory period by the claimants and those through whom they claim;

(b) that such possession was with the intention of excluding from possession the owner or persons entitled to possession;

(c) discontinuance of possession for the statutory period by the owner and all others entitled to possession.

[39] Adverse possession must be open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner : *Fletcher v. Storoschuk et al.* (1981), 35 O.R. (2d) 722 at 3 (C.A.) (QL).

[40] Before discussing these in detail, one preliminary issue should be addressed. At the outset, Mr. Wright appears to have had the impression that because the plaintiff had not owned the house for ten years, she could not have acquired title by adverse possession. This is mistaken, because as a real right, adverse possession is a right, which once acquired, affects the title itself. It is also mistaken because it fails to take account of the effect of the change from the Registry System to the Land Titles System. Section 51 of the *Land Titles Act*, R.S.O. 1990, c. L.5 prevents the creation of any new possessory titles through adverse possession once land has been placed under the Land Titles System, but preserves any rights to adverse possession acquired prior to the placement of the land under the Land Titles System.. The Land Titles System came to apply to the land in question in 2002, therefore any claim in adverse possession that arose prior to this date is preserved. If the owners of 100 Johnson had acquired title to the land in question by way of adverse possession prior to 2002, such title would be preserved by s.51. The fact that the plaintiff had not owned the property for ten years is irrelevant.

Actual Possession for the Statutory Period

[41] I find that the requirement of actual possession was met by the post and wire fence that had marked the boundary between the properties at 96 and 100 Johnson since 1952 at the latest. The survey done that year (the Gibson Survey) shows the structure and describes it as a post and wire fence. At that point, the house at 96 Johnson was described as unfinished . According to the Gibson Survey, the fence was located 0.6 feet west of the actual lot line at the northern tip of the property and 2.3 feet west of the actual lot line at the southern end of the fence.

[42] Mrs. Connolly was called as a witness by the plaintiff. She impressed me as a truthful witness. She clearly remembered the fence being there when she and her husband moved into the house in 1962. Mrs. Connolly stated that she and her family always treated their property as extending to the post and wire fence, and the neighbors never suggested otherwise. She and her husband cut the grass up to the fence. Around 1968, they constructed a wooden fence that ran perpendicular to the post and wire fence separating the front yard from the back on the western side of the property, which she stated they did to try to discourage neighborhood dogs from entering their backyard. It is common ground that the wooden fence did not actually meet the post and wire fence, and the defendants took the position that this constituted evidence that the Connollys were not in possession of that strip, which Mrs. Connolly estimated to have been somewhere around eight inches. Her evidence was that the reason they did not extend the wooden fence all the way to the post and wire fence was simply that there was a depression in which water often collected, so that the wooden fence would have rotted if they had extended it west to meet the post and wire fence.

[43] I accept Mrs. Connolly s evidence that she always thought that the post and wire fence marked the property line and that families on both sides of the fence acted accordingly for many years. I conclude that the first requirement of actual possession for the statutory period was met by 1972 at the latest, by which point the Connollys had lived at 96 Johnson for ten years.

The Intention of Excluding the Owner from Possession

[44] The defendants, through Mr. Juriansz, argued that the plaintiff fails on the second limb of the test because there was never any intention or plan to acquire possession by adverse possession. The plaintiff, through Mr. Riswick, submitted that the law in Ontario draws a distinction between claims that arise from inadvertent and advertent conduct. An adverse possession claim arises from inadvertent conduct when the claimant takes possession of lands that the claimant mistakenly believes he or she already owns. The claim arises from advertent conduct when the claimant is a trespasser whose acts of possession have the purpose of acquiring ownership of lands that the trespasser knows he or she does not own.

[45] In my view, having reviewed the authorities submitted by the parties, the plaintiff is correct in asserting that a claim to adverse possession may be established by inadvertent or mistaken conduct. The underlying policy rationale makes good sense. The law of adverse possession should not favour a deliberate trespasser over an innocent or mistaken one by recognizing title acquired by the former but not the latter.

[46] Mr. Juriansz submitted that the plaintiff s claim must fail because the Connollys never intended to effectively dispossess the owners of 100 Johnson of the disputed property. He emphasized that Mrs. Connolly readily admitted during cross examination that, had her former neighbors informed her of the mistake and asked to move the fence to the actual lot line, she would have agreed. This argument cannot succeed. First, even if Mrs. Connolly would have agreed, there is no evidence to suggest that Mr. Connolly would have. Second, it appears that neither of them, in fact, had any idea that the fence was not actually on the lot line until the property was sold to Ms. Cantera in 1997. Third, and most important, the case law on this issue supports the plaintiff s position. Adverse possession can clearly be established through inadvertent or mistaken possession of the property of another.

[47] The facts of the case of *Beaudoin et al. v. Aubin et al., supra,* bear a remarkable similarity to the present case. As in this case, the plaintiffs as well as the defendants predecessors in title were under a mutual mistake as to the true boundary of their properties. Anderson J. found that the plaintiffs were in exclusive, open and notorious possession of the disputed strip of land from 1951 until at least 1973, which meant that they occupied the strip well in excess of the ten year period stipulated by ss. 4 and 15 of the *Limitations Act,* R.S.O. 1970, c. 246 within which the defendants should have brought an action to recover possession. Anderson J. also made the point that even if their possession until 1966 had inured to their landlord (at which time they purchased the lot that they had previously been renting), they purchased whatever interest their landlord thus acquired. After a very full review of the law, he concluded that ignorance of the true state of the title does not prevent possession that is open and notorious from ripening into title. Thus, the fact that there, the plaintiffs were under a misapprehension as to the true state of their title to the disputed strip, or that the plaintiffs and the defendants predecessors in title were under a mutual mistake as to the true boundary did not mean that the plaintiffs possession was not adverse. The learned judge was quite clear that in order to acquire title by adverse possession, it is not necessary to have an actual intention to exclude the true owner if the true owner is in fact excluded for the statutory period by a possession that is certain and unequivocal.

[48] Sharpe J. cited Anderson J. s analysis with approval in *Raso v. Lonergan*, [1996] O.J. No. 2898 (Ct. J. Gen. Div.) (QL) and addressed the argument that it had had been superceded by the later Court of Appeal decisions of *Masidon Investment Ltd. v. Ham* (1984), 45 O.R. (2d) 563 (C.A.) and *Fletcher v. Storoschuk, supra*. In his view, those cases were distinguishable because they were cases where the acts of possession relied upon were equivocal. In *Masidon*, the defendant was a tenant of adjoining lands who used the plaintiff s land as a private airstrip for a period of ten years. The defendant had claimed adverse possession when the plaintiff sought a declaration that it was the owner. The plaintiff had been unaware of the defendant s use of the property and was holding it only as an investment. The defendant was unsuccessful both at trial and at appeal because the plaintiff had not been excluded or prevented from making the kind of use of the land that it desired to make, which was to hold it as an investment. In *Fletcher*, the defendant constructed a fence 18 feet inside the plaintiff s property as a buffer zone between his and the plaintiff s properties. The defendants, who asserted a claim of adverse possession, had erected a high fence inside their own lot line, and at one point, had offered to buy the buffer zone from the plaintiff, who had refused. Wilson J.A. concluded as follows:

> even if they could be viewed as acts of adverse possession, it seems to me that they were at most seasonal and intermittent and did not meet the required test of being open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner (at 3) .

[49] The Ontario Court of Appeal decision in *Teis v. Ancaster (Town)* 1997 CanLII 1688 (ON C.A.), (1997), 35 O.R. (3d) 216 (C.A.) reinforces the principle expressed in *Beaudoin* and supports the distinction made by Sharpe J. (as he then was). The central issue in *Teis* was the question of whether the doctrine of inconsistent use as applied in *Masidon* and *Fletcher* (see also *Keefer v. Arilotta* (1976), 13 O.R. (2d) 680 (C.A.)) applied to a case of mutual mistake.

[50] As Laskin J.A. noted, the cases on inconsistent use were all cases in which the party claiming a possessory title had knowingly trespassed on the owner s land. Here, as in *Teis*, the evidence indicates that for a long time, the owners of both 96 Johnson and 100 Johnson thought that the post and wire fence was on the lot line and both behaved as though that was the case.

[51] Laskin J.A., writing for the court in *Teis*, held that the doctrine of inconsistent use does not apply to cases of mutual mistake. He stated that to do so would mean that a claimant in such cases could never make out a case in adverse possession, a result that would offend established jurisprudence, logic and sound policy (at 225), and concluded that:

> Policy considerations support a contrary conclusion. The law should protect good faith reliance on boundary errors or at least the settled expectations of innocent adverse posssessors who have acted on the assumption that their occupation will not be disturbed. Conversely, the law has always been less generous when a knowing trespasser seeks its aid to dispossess the rightful owner (at 225).

[52] In summary, the present case was clearly one of mutual mistake that went back at least to the time when the Connollys acquired 96 Johnson in 1962 and probably before. Accordingly, it is clear that the doctrine of inconsistent use cannot apply for the reasons set out in *Teis*. Rather, this is a case where the intention is presumed by the nature of the possession. As Anderson J. stated in *Beaudoin*:

> Where there is possession with the intention of holding for one s benefit, excluding all others, the possession is sufficient and animus is presumed. If it were necessary to say so, one could say of such a situation that the intention ipso facto included the intention to exclude the true owner even if his rights were unknown to the person in possession (at 2).

[53] It is clear that for many years, the owners of both properties treated the post and wire fence as the line between their properties. In this sense the fence did enclose the backyard at 96 Johnson. There is no need to establish any additional element of intention; it is inferred from the continuous, notorious and open possession, at least in a case such as this where the owners or their predecessors in title were operating under a mutual mistake.

Discontinuance of Possession by the Titled Owner for the Statutory Period

[54] There is no serious suggestion that this test was not met in the present case. No evidence was led at trial of any assertion of the owners of 100 Johnson to the disputed strip until the defendants purchased the property.

[55] For the foregoing reasons, I conclude that the owners of 96 Johnson had acquired title to the disputed land by adverse possession since well before Ms. Cantera purchased the property. There was no evidence at trial given as to the treatment of the fence at the time of its construction or before the Connollys purchased the property, so we cannot know for certain whether their predecessors treated the disputed land as their own. On the basis of Mrs. Connolly s evidence, however, I conclude that they had acquired title to the disputed land by adverse possession no later than ten years after they moved in to 96 Johnson in 1962, that is, by 1972. This means that the claim had been made out some 22 years prior to the 1994 survey.

[56] At trial, there was considerable discussion and evidence led concerning the accuracy of the 1994 survey, largely because there was some difference in the dimensions from the 1952 survey. The defendants implied that the plaintiffs had moved the fence. Mr. Kidd was called by the defence to testify. His evidence was that while surveying techniques had not changed significantly between 1952 and 1994, things do shift and that could have affected the measurements. When Mr. Kidd returned to the property in January 2004, he assumed that his 1994 survey measurements were correct. As this was not a complete survey, but a grading plan, he relied on his earlier measurements.

[57] In reviewing the evidence and the submissions, I conclude that there is no basis for disputing the accuracy of the 1994 survey. I cannot conclude that the plaintiff and Mr. Sdao moved the fence. For one thing, it is hard to understand why they would have moved it closer to the actual property line, which is what the difference suggests. The best explanation for the difference is that one of the posts was removed at some point. The photographs submitted as evidence seem to me to support this hypothesis. Certainly, given the age and derelict condition of the fence, it is not surprising that this could have happened at some point. In my view, nothing turns on this. The best evidence of the dimensions of the fence relative to the original lot line are found on the 1994 survey. Mr. Kidd was satisfied enough with his 1994 dimensions to rely on them in 2004. These are the dimensions that should define the boundaries of the two properties along the post and wire fence.

The Claims in Trespass

[58] Trespass is an intentional tort that is actionable without proof of actual damage. In this case, the plaintiff is seeking general damages in the amount of $10,000 and punitive damages in the amount of $5,000. The plaintiff s claims in trespass fall into two general categories. The first include the trespass relating to the removal of the post and wire fence, the bushes and the western 22 inches of the board fence that ran perpendicular to the post and wire fence that the Connollys had erected to discourage dogs from wandering into the backyard. The second category includes the incidents that arose during the construction.

The Removal of the Fence

[59] As a result of my conclusion that the plaintiff had title to the disputed land by adverse possession, it follows that the act the removal of the fence and the erection of the construction fence in the face of the express objections of Ms. Cantera and Mr. Sdao constituted an act of trespass. The plaintiff seeks punitive damages for this intrusion. The defendants argue that the removal of the fence was, at worst, a technical trespass or one committed with colour of right. With respect to the removal of the fence, and its replacement by an orange construction sense along the original property line, I cannot agree with this argument.

[60] By the end of November 2003, the defendants knew that there was an issue with respect to the location of the fence. Having made an unsuccessful attempt to negotiate a solution with Mr. Sdao and Ms. Cantera, and having refused to undertake to put a new fence where the old one had been, Mr. Wright resorted to self-help. He waited until the plaintiff and her family were out, then he along with some relatives removed the fence and erected an orange construction fence. This was not a merely technical act of trespass as in the case of *Henderson v. Volk* (1982), 35 O.R. (2d) 379 (C.A.), which was cited by Mr. Juriansz. Unlike that case, this was not a case of understandable mistake . Mr. Wright knew that Mr. Sdao, a real estate lawyer whom he might have expected to have some knowledge of the law on such matters, strongly believed that he had title by adverse possession. Nevertheless, and despite the fact that he knew of the issue many months before he removed the fence on April 10, 2004, he failed to obtain legal advice on the subject. Moreover, he failed to read the letter from Mr. Sdao which Mr. Sdao left for him on the day that he removed the fence, saying that he pretty well knew what it contained. The facts of this case are very analogous to those in a number of cases that were cited by the plaintiff: see *Furgal v. Angel* (2005), 42 R.P.R. (4th) 213 (Ont. Sup. Ct. J.); *Saly Estate v. Flabiano* (2006), 149 A.C.W.S. (3d) 156 (Ont. Sup. Ct. J.); *Paradiso v. Talbot*, 2003 CanLII 8923 (ON S.C.), 2003 CanLII 8923 (Ont. Sup. Ct. J.); *Hanna v. Muir* (2000), 99 A.C.W.S. (3d) 713 (B.C.S.C.); *Glashutter v. Bell* (2001), 110 A.C.W.S. (3d) 478 (B.C.S.C.).

The Construction Phase Trespasses

[61] I am satisfied that the defendants did commit a number of acts of trespass on the plaintiff s property during the period in which their house was under construction. I am satisfied, having examined the photographs, that the scaffolding did encroach on their property for a period of time. I am also satisfied that the materials and debris stacked along the construction fence encroached at times onto the plaintiff s property. I do not think that these incidents, recurring as they were, would warrant an award of punitive damages in themselves. While the plaintiff and Mr. Sdao believed that the defendants were deliberately provoking them in various ways with these acts of trespass and by locating the portable toilet where they did, I accept the evidence of Mr. Wright that he went out of his way to avoid trespassing on the plaintiff s property during construction. As he pointed out during his testimony, it is extremely difficult to avoid some encroachments during such construction. This reality, however, does not excuse or justify trespassing on one s neighbor s property. Rather, it underlines the importance of ensuring that one obtains the necessary consents ahead of time. The circumstances, and Mr. Wright s removal of the fence in the face of the specific objections and warnings by his neighbors, added to the stress that the subsequent, and minor, acts of trespass incurred to Ms. Cantera and Mr. Sdao.

Damages

[62] The plaintiff seeks general damages in the amount of $10,000 and punitive damages in the amount of $5,000.

General Damages

[63] It is well established that trespass to land is actionable per se: see, for example, Anthony M. Dugdale *et al.*, eds., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1145, and G.J.L. Fridman, *The Law of Torts in Canada*, Vol.1 (Toronto: Carswell, 1989) at 7). There is, however, some controversy as to whether damages for trespass are at large or whether a plaintiff must prove a loss suffered in order to recover damages other than nominal or punitive. Despite the decision of the Alberta Court of Appeal in *Band of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* (1991), 120 A.R. 241 at 259, the prevailing view in Ontario is that general damages must be proved: see *Hudson s Bay Co. v. White,* [1997] O.J. No. 307 (Ct. J. Gen. Div.) (QL) per Lederman J.

[64] The plaintiff did not lead evidence of any loss or damage associated with the trespass to their property other than the stress that the entire series of events caused to them. The defendants have re-landscaped the area to the west of the orange construction fence, which has remained there. The plaintiff and her family will enjoy the benefit of this landscaping once a new fence is erected further west, although this is a very narrow strip of land. In short, I cannot find any basis for awarding general damages in this case, and accordingly I would deny that aspect of the claim. Rather, I would award nominal damages totaling $1,000 for the various minor acts of trespass committed as well as the trespass involved in moving the fence.

Punitive Damages

[65] The claim for punitive damages in the amount of $5,000 is made out on the facts of this case. As I have discussed above, the defendants acted knowingly, deliberately and willfully. While they clearly did not accept the plaintiff s assertions that she had adverse possession, they knew that the plaintiff and Mr. Sdao were making these claims long before April 10, 2004. The fact that Mr. Wright may have had an honest belief that the claim of adverse possession was ill-founded does not in any way mitigate his conduct. Nor does his feeling that the plaintiff and Mr. Sdao were trying to bring undue pressure on him to sign a quit claim at that point. In removing the fence, he chose to bear the risk that his conduct was unlawful. In short, the defendants have acted in a high-handed and arrogant fashion and their conduct justifies an award of punitive damages: see *Furgal v. Angel, supra, Saly Estate v. Flabiano, supra, Glashutter v. Bell, supra.*

Conclusion

[66] As discussed above, the plaintiff has successfully established that she is the lawful owner of the land between the post and wire fence and the lot line as shown in the 1994 Kidd survey, and a declaration shall issue accordingly, along with an order that the defendants deliver up possession of the land, for nominal damages in the amount of $1,000, and for punitive damages in the amount of $5,000.

[67] If the parties are unable to agree as to costs, they may make brief submissions to me as follows. The plaintiff is to deliver her bill of costs along with brief submissions of no more than two pages within 14 days of the date of this judgment, the defendants are to deliver their responding submissions within seven days thereafter and the plaintiff may reply within three working days after that.

Harvison Young J.

Released: May 15, 2007

COURT FILE NO.: 04-CV-272391 CM1

DATE: 20070515

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

LAURA CANTERA

Plaintiff

- and -

WENDY LEAH ELLER AND PAUL WRIGHT

Defendants

REASONS FOR JUDGMENT

Harvison Young J.

Released: May 15, 2007