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Good fences torn down make bad neighbours

"Good fences make good neighbours" is an old English proverb made popular by Robert Frost in his 1914 poem "Mending Wall." It was quoted again last year in an Ontario court case by Justice Wailan Low.

She was adjudicating a boundary dispute between two neighbours on Ellins Ave., near St. Clair Ave. W. and Scarlett Rd.

Low began her judgment with these words: "Good fences make good neighbours. The corollary of that adage is that when a neighbour tears down a fence, much more may be lost than the fence."

Maria Piekarczyk and Adam Zebrowski are neighbours on the north side of the street. Piekarczyk lives to the west of Zebrowski with her spouse David Peattie. Zebrowski lives next door to the east with his girlfriend Maryanne Small.

Between the two houses is a paved space about nine feet wide. Standing in front of both houses, it looks like the driveway belongs to the Piekarczyk house on the left, but in fact ownership is divided.

In fact, however, only about 7.4 feet of the driveway belongs to the Piekarczyk house on the left, and about 1.5 feet belongs to Zebrowski, whose house is to the right, or east. Unfortunately, due to rather sloppy land descriptions when the houses were built, a mutual right-of way was never created. On paper, neither neighbour has the right to use the other's portion of the driveway.

To the rear of the driveway both neighbours have backyards. In April 2008, Peattie took down the angled portion of a fence that visually separated the two back yards. The following month Zebrowski rebuilt it with a different configuration. The new fence made it more awkward for Piekarczyk to back her car into the rear yard.

Then, as the judge delicately explains it, "relations between the neighbours deteriorated rapidly."

Piekarczyk launched a court application for a ruling that she had an easement or right of way to use the neighbour's 1.5 feet of the paved driveway. She needed the easement to access the double garage she had built in 1999 behind the house.

Piekarczyk wanted the court to rule that she had acquired what is known as a prescriptive easement or right to use the neighbour's portion of the driveway. In order to do that, she had to prove that she and the prior owners of her house had used it for a period of 20 years prior to 2001, when the titles to the houses were converted to the Land Titles system by the government. Under the Land Titles system, there can be no adverse possession or what is commonly called squatter's rights unless those rights existed on the day before conversion.

Piekarczyk was also required to prove that the 20-year use of the strip by herself and the prior owners of her house was continuous, open, uninterrupted and peaceful — and was without the permission of the neighbouring owners of the 1.5 foot strip.

At the hearing, Piekarczyk did not call as witnesses the owners of her house back to 1981. As a result there was no evidence of uninterrupted use for a period of 20 years, and there was some evidence to the contrary.

Due to the lack of evidence, the court dismissed the application for a right to travel over the east 1.5 feet of the driveway. The effect of Piekarczyk losing her case means that Zebrowski could fence off his narrow portion of the driveway and Piekarczyk is restricted to using only the westerly 7.4 feet of the land — effectively preventing it from being used for vehicular access to the garage at the rear.

Low ended her judgment by expressing the hope "that common sense and some degree of wisdom will prevail and that (Zebrowski) will refrain from re-igniting an unfortunately inflammatory dynamic between these neighbours by building a fence down the boundary line."

I wonder what Robert Frost would have said about Justice Low's decision.

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Piekarczyk v. Zebrowski, 2010 ONSC 5423 (CanLII)

CITATION: Piekarczyk v. Zebrowski, 2010 ONSC 5423

COURT FILE NO.: CV-08-363390

DATE: 20100930

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: MARIA PIEKARCZYK, Applicant

AND:

ADAM ZEBROWSKI, Respondent

BEFORE: Low J.

COUNSEL: *Harvey J. Ash*, for the Applicant

Lubomir Poliacik, for the Respondent

HEARD: September 28 and 29, 2010

ENDORSEMENT

[1] Good fences make good neighbours. The corollary of that adage is that when a neighbour tears down a fence, much more may be lost than the fence.

[2] The applicant and respondent are next door neighbours. The applicant owns 144 Ellins Avenue, Toronto, and resides there with her spouse David Peattie. The respondent owns 142 Ellins Avenue and resides there with his girlfriend, Maryanne Small. Number 144 lies to the west of 142 and the houses face south. The houses are separated by a paved space of about 9 feet in width which the applicants have used since 1999 as a driveway to their garage located in their back yard.

[3] Of the 9 foot wide space between the two houses, 7.42 to 7.44 feet of it is within the property owned by the applicant and 1.53 to 1.55 feet of it is within the property owned by the respondent.

[4] The applicant has owned and occupied 144 since 1998. The respondent has owned and occupied 142 since 2007.

[5] In or about April, 2008, the applicant's spouse, David Peattie, took down a fence that had visually separated the respondent's back yard from the applicant's property. The fence was located on the respondent's property. In May 2008, the respondent built a new fence within his property, but altered the configuration such that the angled portion of the fence running in a northwesterly direction from the northwest corner of his house to a point 1 inch inside his western property line was about 8 feet long rather than about 12 feet long which was the length of the angled portion of the fence that David Peattie had dismantled.

[6] The new fence made it more awkward for the applicant to back her car into her back yard as it sharpened the turn angle needed to be made once the corner of the respondent's house was cleared. After a volley of lawyer's letters from the applicant and complaints by the respondent to municipal authorities and to police about the activities of the applicant and her spouse, the applicant started this application.

[7] The two main heads of relief sought by the applicant were a declaration that the paved driveway between the two houses is an easement in favour of 144 and a declaration that the applicant is the owner by adverse possession of a triangular strip of land from the northwest corner of the respondent's house to the previous location of the applicant's garage.

[8] Affidavits were filed and cross-examinations were held. Subsequently, this court ordered a trial of the issues with the affidavits filed serving as pleadings. The affidavits were also to serve as evidence in chief but the parties were at liberty to supplement the evidence with *viva voce* testimony.

[9] The applicant and her spouse, Mr. Peattie, testified. The respondent testified and called the evidence of a neighbor, Daniel Cowan, who has lived at 146 Ellins Avenue since 1986.

[10] The respondent also relied on the evidence of Caterina Bellissimo, the owner and occupier of 142 Ellins Avenue from 1989 to 2007 when she sold the property to the respondent. Her affidavit was filed and she was cross-examined on it. On consent of counsel for both parties, the evidence of Ms. Bellissimo went in by way of affidavit and transcript.

[11] When Caterina Bellissimo took possession of 142 Ellins Avenue in 1989, there was an old frame garage lying approximately 12 feet to the rear of the house on 144 Ellins Avenue near the eastern property line of 144. There was a board fence between the northwest corner of the house on 142 Ellins Avenue and the southeast corner of the frame garage on 144. The board fence thus lay on an angle to the boundary line between the properties.

[12] In 1998, the applicant and Mr. Peattie moved into 144. Shortly thereafter, Mr. Peattie dismantled the frame garage on 144 and tore down the board fence. His intention was to build a larger garage at the northern end of the back yard at 144.

[13] This left the back yard of 142 open to the back yard of 144 and to the lane space between two houses which led to the street. Ms. Bellissimo had a small child and she was concerned about his safety. She asked Mr. Peattie to replace the fence. Mr. Peattie did so in the winter of 1999, following the prior location of the board fence that angled from the northwest corner of the house at 142 to the place within Ms Bellissimo's property that was nearest to the southeast corner of the frame garage on 144 that he had torn down.

[14] In the spring of 1999, Mr. Peattie completed construction of a new two car garage at the northern end of the parcel of 144 and thereafter he and the applicant used the space between 144 and 142 to drive into and out of their garage.

[15] In 2007, Caterina Bellissimo sold 142 to the respondent. In April, 2008, Mr. Peattie approached the respondent indicating that he wanted to tear down the fence between the two properties. The respondent was not prepared to agree to this as he had other priorities. On or about April 21, 2008, the respondent returned home from work to find that the fence had been dismantled and was lying on the ground on the property of 144. Mr. Peattie testified that he had found part of the fence leaning into the driveway impeding his progress into his garage and he decided to remove the whole fence.

[16] The respondent built the new fence described in paragraph 5 above and, although he has not to date done so, at one point said that, if he could, he would fence the western boundary of 142, enclosing the 1½ foot strip of the paved driveway lying on his property.

[17] From this point on, relations between the neighbours deteriorated rapidly. While solicitors for the applicant had earlier communicated with the respondent's solicitor with a request that the respondent stop construction of the new fence and negotiate an agreement, the applicant's demands escalated and on June 19, 2008 her solicitor sent a letter that can only have been perceived as overreaching and inflammatory.

[18] There were two issues at trial. First, did the applicant own, by adverse possession, a triangular strip of land formed by the property line between 144 and 142, a line formed by the angled board fence running from the northwest corner of the house on 142 to the southeast corner of the garage on 144 existing up to 1998 and a line running from the northwest corner of the house on 142 to the property line between the houses and parallel to the southern property line? Second, had a prescriptive easement been acquired in favour of 144 over the 1½ foot strip of the paved driveway between the houses and lying within the property of 142?

[19] Both 142 and 144 Ellins Avenue were converted to Land Titles on October 22, 2001.

[20] Acquisition of proprietary rights by adverse possession is unavailable under the Ontario Land Titles system. Accordingly, acts indicative of adverse possession or giving rise to a prescriptive easement over property converted from registry to the Land Titles system must have occurred prior to the date of conversion (see *Land Titles Act*, R.S. O. 1990 c. L.5 Sections 44 and 51 and *Morray Investments Ltd. v. Zerwas*, 66 O.R. (3d) 521 at para. 39).

[21] In the case at bar, the relevant period is October 22, 1981 to October 22, 200.

[22] In order to show adverse possession, one of the constituent elements that the applicant must establish on a balance of probabilities is exclusion of the registered owner. There was no evidence to show exclusion. At the end of the evidence and at commencement of argument, counsel for the applicant advised that this head of relief was no longer being pursued.

[23] During argument, counsel for the applicant advised that applicant was asserting an easement of necessity as well as a prescriptive easement.

[24] No easement of necessity arises. There is no issue of lack of access to the applicant's property.

[25] To establish an prescriptive easement, the applicant has the onus to establish that for a period of at least 20 years prior to first registration in the Land Titles system and starting no later than October 22, 1981, there was continuous, open, uninterrupted and peaceful use by the occupiers of 144 of the 1½ foot strip of land owned by the owners of 142

and that the use was without permission by the owners of 142.

[26] The applicant and her spouse testified that from 1998 when they moved into 144, they used the driveway to obtain automobile access to their garage. Accepting that they drove, without permission, over a portion of the 1½ foot strip owned by the owners of 142, that accounts for 3 years of use up to 2001 when the properties were converted to Land Titles.

[27] The applicant's predecessors in title were Danuta Sikora, who owned 144 from December 28, 1990 to November 2, 1998, Jane Park, who owned from July 28, 1989 to December 28, 1990, and Francesco and Rosa Mercaldo, who owned from June 30, 1981 to July 28, 1989. None of these individuals was called to testify and there was no explanation therefor. I infer that their evidence would not have assisted the applicant.

[28] The evidence of Daniel Cowan was called by the respondent. Mr. Cowan has lived in 146 Ellins Avenue since July 1986. He testified that the garage at 144 was dilapidated and leaning and that he did not ever see the applicant's predecessors in title use the garage for parking. He stated that the prior owners of 144 parked in the driveway at the front of the house and not between the houses. He stated that he had been in the garage at 144 two or three times when "Donna" owned the property and that it was used for storage and yard tools. Mr. Cowan's evidence was credible and supports an inference that from 1986 to 1998, there was not a continuous use of the driveway by the owners of 144 to obtain automobile access to the frame garage at the back of the property.

[29] Counsel for the applicant urges that because a segment of fencing had existed on the 142 property from the northwest corner of the house angling north and west to the western property line from as early as 1947 as shown on a plan bearing that date depicts Lot 10 and Part of Lot 9 (142 and 140 Ellins Avenue), an inference should be drawn that there has been continuous, open, uninterrupted and peaceful use of the 1½ foot strip of the land on 142 and of the triangular piece by owners of 144 for at least 50 years. I am not able to draw that inference. The existence of the segment of fencing is irrelevant to use of the driveway for vehicular access to the back yard of 144. Not only is there no evidence of uninterrupted use for a period of 20 years, there is credible evidence to the contrary.

[30] The application will therefore be dismissed and there will be no order requiring the respondent to remove the fence that he has built on his property. That said, it is hoped that common sense and some degree of wisdom will prevail and that the respondent will refrain from re-igniting an unfortunately inflammatory dynamic between these neighbours by building a fence down the boundary line.

[31] If the parties are not able to agree on costs, submissions may be made in writing by the respondent within the next 10 days and by the applicant within 10 days thereafter.

Low J.

Date: September 30, 2010