Fletcher v. Storoschuk et al.

(1982) 35 O.R. (2d) 722
ONTARIO COURT OF APPEAL
ARNUP, WILSON and GOODMAN JJ.A.
10TH NOVEMBER 1981

WILSON J.A.:— This appeal concerns the ownership of a strip of land 18 ft. by 200 ft. lying between the property of two adjoining owners.

The facts in brief are as follows. The plaintiff, who is the owner of a fairly substantial piece of farmland in the Township of Binbrook, in the County of Wentworth, sold off over a period of years various building lots on the perimeter of his farm including a double lot measuring 200 ft. by 200 ft. to a predecessor in title of the defendants. When the defendants acquired the double lot in 1967 there was already in place a permanent farmer's fence of 4 ft. cedar posts and wire mesh that ran parallel to the legal boundary between the plaintiff's land and the defendants' lot. That fence had been put there by the plaintiff, replacing a temporary electric fence, in order to prevent his cattle from wandering too close to the adjacent residential lots which were unfenced. It was 18 ft. inside his own boundary and created the strip 18 ft. by 200 ft. between his farm and the defendant's lot which is in issue on the appeal. The fence had a gate in it so that the plaintiff could enter on the strip for purposes of maintenance and repair of the fence. The plaintiff at all material times paid taxes on the strip as part of his own farm.

The defendants' predecessor in title never made any claim to the strip, it not being included in the description in his deed, but the male defendant after he bought the property planted a row of spruce trees along the southern boundary of his lot and continued it along the southern boundary of the 18 ft. strip. He also paid the township once or twice to cut the weeds along the bottom of the plaintiff's fence and in 1968 planted buckwheat on his lot and extending over on to the strip in order to keep the weeds down. At that time his lot was unimproved and in its raw state as farmland and he acknowledged that he attended to the weeds because the neighbours were complaining and he found out that he was responsible at law for keeping the weeds down on his property. He testified that when he bought the lot in 1967 he assumed that his boundary went right to the plaintiff's fence.

In 1969 the defendants built a house on their property and after they moved in erected a Frost fence 4 ft. high inside their own lot line, thus leaving a 22 ft. space between that fence and the plaintiff's fence. The defendants also planted a garden on part of the strip between the two fences.

It was clear from the evidence that at least from 1970 on the defendants knew that the disputed strip was not included in their deed but in fact belonged to the plaintiff. Indeed, when they found out in 1970 that the plaintiff owned the strip they offered to buy it from him but could not afford his price. Their offer to purchase, however, was not put into writing and hence could not constitute an acknowledgment of the plaintiff's title under s. 13 of the *Limitations Act*, R.S.O. 1970, c. 246 [now R.S.O. 1980, c. 240], for purposes of advancing the commencement date for the running of time under s. 4.

The dispute between the parties arose in October of 1978 when the plaintiff ordered the defendants to remove a cement pad the defendants had built on the strip for a filter for their swimming pool. The defendants refused and the plaintiff served his writ in December 1978, for a declaration that the defendants had no interest in the strip, for damages, and for a mandatory injunction requiring them to remove any structures they had erected on it. The defendants counterclaimed for a declaration that they were the owners of the strip and that the plaintiff had no interest in it.

The trial judge dismissed the plaintiff's claim and allowed the counterclaim. He found that the plaintiff's title to the strip of land was extinguished under ss. 4 and 15 of the Limitations Act by the adverse possession of the defendants which he found had continued for over 10 years and met the test established in the authorities of being "open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner."

With respect, I think the learned trial judge was in error in concluding that the defendants had discharged the onus upon them of establishing in excess of 10 years adverse possession. I accept the trial judge's findings as to the acts performed on the disputed strip of land by the defendants. But acts relied on to constitute adverse possession must be considered relative to the nature of the land and in particular the use and enjoyment of it intended to be made by the owner: see *Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273 at 288; *Kirby v. Cowderoy*, [1912] A.C. 599 at 603. The mere fact that the defendants did various things on the strip of land is not enough to show adverse possession. The things they did must be inconsistent with the form of use and enjoyment the plaintiff intended to make of it: see *Leigh v. Jack* (1879), 5 Ex. D. 264; *St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650; *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182. Only then can such acts be relied upon as evidencing the necessary "*animus possidendi*" vis-a-vis the owner.

The trial judge placed no emphasis on the plaintiff's evidence as to the purpose of the fence, that it was not intended to mark his boundary line but merely to restrain his cattle from wandering too close to the lots he had sold off for residential purposes. The effect of the plaintiff's evidence was that he intended to establish the strip as a buffer zone between the field on which he was grazing cattle and his neighbours, including the defendants. This was the

use he intended to make of it. Indeed, in his evidence at trial Mr. Storoschuk acknowledged that the plaintiff had the right to go on the strip and repair the fence which the plaintiff testified that he did. Mr. Storoschuk acknowledged also that the plaintiff would have been perfectly entitled to grow a garden on the strip alongside his garden and that he would not have objected if the plaintiff had done so.

It is trite law that the legal owner of property is in constructive possession of it even if he is not in actual possession of the whole of it. Wells J. affirmed in *Pflug et al. v. Collins*, [1952] O.R. 519, [1952] 3 D.L.R. 681, that a person claiming a possessory title as against the legal owner must not only establish actual possession for the statutory period but he must establish that such possession was with the intention of excluding the true owner and that the true owner's possession was effectively excluded for the statutory period.

In my view, the acts found by the trial judge to have been performed on the strip of land by the defendants posed no challenge to the use of it intended by the plaintiff. They lacked that quality of inconsistency with the intended use of the owner required to constitute adverse possession for purposes of the statute. Moreover, 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": see *Ledyard v. Chase*, 57 O.L.R. 268, [1925] 3 D.L.R. 794; *Raab v. Caranci* et al. (1977), 24 O.R. (2d) 86, 97 D.L.R. (3d) 154 [affirmed 24 O.R. (2d) 832n, 104 D.L.R. (3d) 160n].

I would therefore allow the appeal and set aside the judgment of His Honour Judge Sullivan. I would grant the plaintiff the declaration and mandatory injunction claimed in the action. The plaintiff, in my view, did not establish that he suffered any real damage as a result of the defendants' trespass on his land and I would therefore award him nominal damages in the sum of $1. I would give him his costs both here and in the court below.

Appeal allowed.