CITATION: Andrews v. Rago, 2019 ONSC 800
COURT FILE NO.: CV-18-00604321
DATE: 20190222

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ANTONELLA ANDREWS	)	*Michael W. Carlson*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
JOE RAGO and JOSIE RAGO	)	*Megan Sanford*, for the Respondents
	)	
Respondents	)	
	)	
	)	**HEARD at Toronto:** January 29, 2019

REASONS FOR JUDGMENT

STINSON J.

Background facts

[1] This dispute concerns a three foot wide strip of land between two residential properties. The applicant owns the house at Street No. 99 and her neighbours, the respondents, own the house at Street No. 97. The three foot strip runs along the eastern border of the applicant's property, from the roadway to the back boundary line at the rear of both properties.

[2] It is undisputed that the three foot strip of land is owned by the applicant. The dispute between the parties centres on what rights the respondents enjoy in relation to the three foot strip and, in particular, whether that strip of land is subject to certain restrictive covenants that confer rights on the respondents as the owners of No. 97.

[3] The lot on which the applicant’s house at No. 99 sits was created pursuant to a 1965 decision of the Committee of Adjustment. Although the relevant municipal bylaw required a minimum lot frontage of 50 feet, that decision permitted a lot frontage of 37 feet for No. 99. In order for that 37 foot frontage to be attained, the owner of No. 99 was required to acquire a three foot strip of land along the western border of No. 97.

[4] In order to carry the transaction forward, a deed was registered on March 3, 1966 (as instrument number NY480231) by which the then-owners of No. 97 conveyed the three foot strip to the then-owner of No. 99. This original conveyance of the three foot strip was a grant of the fee simple title in the land to the "Grantee [i.e. the owner of No. 99], its heirs and assigns to and for its sole and only use forever". The deed also contains language encumbering the transferred three foot strip with restrictive covenants for the benefit of No. 97. Those covenants provide as follows:

> The Grantee [i.e. the owner of No. 99] hereby covenants and agrees for itself, its successors, or assigns not to interfere with, remove, damage, or otherwise alter fences, hedges, driveways, structures, trees, gardens now erected or to be erected upon the said lands or hereinafter erected or planted;
>
> The Grantors [i.e. the owners of No. 97] reserve unto themselves, their heirs, executors, administrators or assigns, they shall [sic] have a right-of-way for all purposes in, over, along and upon the lands hereinbefore conveyed.
>
> The Grantee [i.e. the owner of No. 99], for itself, its successors or assigns, hereby agrees not to erect, construct or maintain any interference or obstruction which will block the airspace above the right-of-way or interfere with or undermine the soil beneath the right-of-way.
>
> The Burden and benefit of these Covenants shall run with and be a Charge upon the lands hereinbefore conveyed.

[5] In October 1966, title to No. 99, including the three foot strip, was conveyed to the applicant's parents. In 1967, the applicant's parents made an application for first registration under *The Land Titles Act*, now R.S.O. 1990, c. L.5, in respect of No. 99. In the legal description of No. 99 on the Land Titles register, the title to No. 99 was said to be subject to a right-of-way in favour of the owners of No. 97, and the first registration notes expressly referenced the instruments creating the restrictive covenants.

[6] In 1981 and 2000, the respondents acquired title to No. 97.

[7] In 2008, following the death of her father and pursuant to a transfer from her mother, the applicant became the sole owner of No. 99. The 2008 transfer in favour of the applicant contained the following legal description:

> Parcel 251–1, Section B1764; Part Lots 251 & 252, Plan 1764 designated as Pts 1 & 2, 66R3075, Subj to Rt-of-Way in favour of Owners & Occupants of lands to East over Pt 1, 66R3075, & Subj to Covenants in NY480231 (B193477). Twp of York/North York, City of Toronto

Thus, the transfer in favour of the applicant contained express references both to the right-of-way in favour of the owners of No. 97 and the restrictive covenants, all as contained in the original 1966 deed.

The current dispute

[8] The distance between the foundations of the two houses at No. 97 and No. 99 is approximately nine feet. The property line between the two lots (i.e. the eastern edge of the three foot strip) is closer to the foundation of No. 97 than the foundation of No. 99. Thus the majority of the land between the houses is owned by the applicant: more than five feet (including the three foot strip) are owned by the applicant while less than four feet are owned by the respondents.

[9] For many years, the surface of the area between the houses, including the three foot strip, was covered by a combination of concrete and asphalt. In or around 2009 or 2010, the applicant installed weeping tile around the foundation of her house at No. 99. In the course of doing so she removed some of the asphalt and concrete on the surface of the land between the houses. Subsequent to this, and apparently in light of this disturbance of the surface, the respondents installed a six inch high concrete curb along the western edge of the three foot strip. Thus the concrete curb is located on the applicant's property, less than three feet east of the foundation of her house at No. 99.

[10] The respondents also installed a concrete walkway between their house at No. 97, and the edge of the concrete curb. As a result, between the two houses, the three foot strip owned by the applicant is now completely covered by the concrete curb and the concrete walkway installed by the respondents. As well, the walkway and curb installed by the respondents are approximately six inches higher in elevation than the remaining concrete adjacent to the applicant's house.

[11] Additionally, at the road side front of the properties, ahead of the houses, the respondents installed an asphalt driveway, which also completely covers the three foot strip.

[12] According to the applicant, she objected to these changes, without success. Over subsequent years, she became increasingly dissatisfied because, according to her, the respondents removed snow from the concrete walkway and left it adjacent to her house, which resulted in problems when it melted. She takes exception to this conduct because, in her view, although she is the owner of the three foot strip the respondents are treating it as their property and disregarding her rights.

[13] More recently, further conflict between the parties arose when the applicant's husband attempted to straighten up a wooden fence that had been erected by the respondents in the rear yards of the properties, also along the western edge of the three foot strip. According to the applicant, when the respondents objected to this activity, which she again viewed as further disregard of her property rights, she resolved to take legal action to enforce her rights. She consulted counsel and this application followed.

[14] I should mention that the respondents describe a lengthy period of congenial relations between them and the applicant's parents, extending over many years. They also dispute the applicant's characterization of the activities that led to the current dispute. For example, they note that the installation of the new concrete pathway between the houses ameliorated a problem that was caused when the applicant carried out the weeping tile work.

[15] For purposes of my analysis of the legal situation as it now stands, however, I need not resolve these divergent characterizations of the parties' conduct. Suffice to say that my responsibility is to assess the parties' current rights and obligations, based upon applicable legal principles.

[16] I should also add that, as confirmed by her counsel, the applicant does not dispute that the respondents continue to enjoy a right-of-way over the three foot strip. She does assert, however, that the restrictive covenants that were created in 1966 no longer have any legal effect on her use and occupation of her property and have not since March 3, 2006. As a consequence, she asserts, the conduct of the respondents in installing the concrete curb, concrete walkway and asphalt parking area amount to a trespass on land owned by her.

The 2018 decision of the land registrar

[17] Section 119(9) of the *Land Titles Act* states as follows:

> Where a condition, restriction or covenant has been registered as annexed to or running with the land and no period or date was fixed for its expiry, the condition, restriction or covenant is deemed to have expired forty years after the condition, restriction or covenant was registered, and may be deleted from the register by the land registrar.

[18] In 2018, the applicant submitted an application to the land registrar pursuant to s. 119(9), seeking to delete the restrictive covenants from the register. In light of the fact that more than forty years had expired since the registration of the restrictive covenants, the land registrar made an order that they be deleted from the title to No. 99. As a result, the property description for No. 99 under the *Land Titles Act* now recites merely that it is subject to the right-of-way in favour of the owners of No. 97 and no longer references that it is subject to the restrictive covenants.

[19] No notice was given by the applicant to the respondents in relation to her application to the land registrar for the deletion of the restrictive covenants pursuant to s. 119(9).

The present application

[20] In the present application, the applicant seeks an order that the respondents must remove all encroachments on the applicant's property or, in the alternative, an

order that the applicant has the right to remove those encroachments. The applicant also seeks an order that the deeded right-of-way to the benefit of the respondents is only for ingress and egress and not occupation, possession or exclusive control over the three foot strip. Effectively, the applicant wants an order that would result in the removal of all fixtures, chattels, paving stones, vegetation, structures, fences, canopies, gates and motor vehicles that encroach on the applicant's titled property.

[21] The respondents resist the application, asserting that they should continue to enjoy the rights afforded by the restrictive covenants. In addition to an order dismissing the application, they seek an order requiring the land registrar to revise the title description for No. 99 to include the restrictive covenant, as if the land registrar's order of July 2018 had not been obtained. Although the respondents had not brought a formal cross- application seeking this relief, counsel for both sides agreed that the application could be argued as if such relief had been properly requested.

Analysis

Positions of the parties

[22] Counsel for the applicant acknowledges that his client is bound by the right-of-way in favour of the respondents and further that the applicant cannot interfere with the respondents' rights under the right-of-way. He further concedes that the restrictive covenants were effective and binding up until 2006. Despite the fact they were referenced in the deed by which the applicant became the owner of No. 99, however, by that point in time they no longer had any legal effect.

[23] The applicant contends that the section means what it says, namely, the "condition, restriction or covenant" represented by the restrictive covenants are "deemed to have expired forty years after" their registration. Since the restrictive covenants contained no period or fixed date for their expiry, s. 119(9) applies.

The respondents

[24] The respondents argue that the original conveyance by which the restrictive covenants were created was a grant to the "Grantee, its heirs and assigns to and for its sole and only use forever" (underlining for emphasis). The respondents submit that by including the words "forever" a period of time was specified, namely, forever. Thus, they submit, s. 119(9) has no application.

Discussion

[25] The applicant's case stands and falls on the interpretation of s. 119(9) of the *Land Titles Act.* For ease of reference, I restate that provision:

> s. 119(9) Where a condition, restriction or covenant has been registered as annexed to or running with the land and no period or date was fixed for its expiry, the condition, restriction or covenant is deemed to

> have expired forty years after the condition, restriction or covenant was registered, and may be deleted from the register by the land registrar.

[26] Both counsel informed the court that they had been unable to find any case in which this sub-section of the *Land Titles Act* has been judicially interpreted. Although s. 119(9) has been referred to from time to time, the court has not had occasion to interpret the sub-section's meaning: see *Robertson v. Graham*, 2017 ONSC 2177; *Girard, Re,* [2007] O.J. No. 5216 (S.C.J.); *Wiltshire v. McGill*, [2005] O.J. No. 2164 (S.C.J.). It is therefore necessary to return to first principles.

[27] The principles of statutory interpretation were recently discussed by Chief Justice Strathy in *Belwood Lake Cottagers Association Inc. v. Ontario (Environment and Climate Change)*, 2019 ONCA 70, at paras. 39 and following, as follows:

> [39] The modern approach to statutory interpretation requires a court to consider the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Montréal (City) v. 2952-1366 Québec Inc.,* 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 9-12, citing *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21.
>
> The grammatical and ordinary sense of the words
>
> [40] Both parties rely on the leading text by Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed. (Markham: LexisNexis Canada, 2014), who summarizes the "ordinary meaning" rule at §3.6:
>
> > It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
> >
> > Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations, including purpose, related provisions in the same or other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.
> >
> > In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.
>
> [41] Sullivan notes that ordinary meaning is not the end of the process of statutory interpretation, it is simply the beginning. She refers to the observations of Iacobucci J. in *Chieu v. Canada (Minister of Citizenship*

and Immigration), 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 34, in connection with the interpretation of the *Immigration Act*:

> The grammatical and ordinary sense of the words employed in s. 70(1)(b) is not determinative, however, as this Court has long rejected a literal approach to statutory interpretation. Instead, s. 70(1)(b) must be read in its entire context. This inquiry involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

> [42] Thus, the plain meaning of the words of the statute is only one aspect of the “modern approach”. … .

[28] Dealing first with the plain meaning of the words of the s. 119(9) of the *Land Titles Act*, the key words are “no period or date was fixed for its expiry” and “the … covenant is deemed to have expired forty years after the … covenant was registered”. In *Black's Law Dictionary*, the word expire is cross-referenced to the term expiration. The definition of expiration is "cessation, termination from mere lapse of time, as the expiration of the lease, insurance policy, statute, and the like. Coming to close; termination or end."

[29] The term "expire" was considered by the Saskatchewan Court of Appeal in *UFCW Local 1400 v. Walmart Canada Corp.,* 2010 SKCA 89. In that case the court noted (at para 36) as follows:

> It is also significant that the ordinary sense of the word "expire" is not restricted in the way suggested by Walmart. It can mean the termination of something through the passage of time. However, the *Shorter Oxford English Dictionary*, 4th edition 2002 also defines "expire" to mean "dies; come or bring to an end".

[30] These authorities suggest that the concept of “expiry” connotes the end of a legal right or obligation by reason of the passage of time. Thus, when the statute speaks of a covenant for which “no period or date was fixed for its expiry” the plain and ordinary approach would suggest that one should examine the covenant to see if it expresses a period or date for it to come to an end. If no period or date is expressed, then the automatic result dictated by s. 119(9) will follow.

[31] The respondents argue that the use of the word “forever” in the original deed by which the three foot strip was conveyed amounts to the specification of “forever” as the applicable period of time. I do not accept the respondents’ submission. The use of those words in the deed suggests that the rights granted were intended to be perpetual. In

turn, this would suggest that the covenants were not intended to be for a specified period of time or to a specified end date.

[32] I find that the covenants in dispute in this case do not have either a period or date fixed for their expiry. On the basis of the “plain and ordinary meaning” principle of statutory interpretation, therefore, the covenants are caught by the express language of s. 119(9) and are deemed to have expired forty years after their registration, or on March 3, 2006.

[33] I turn now to “the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue”. Section 119(9) is the current version of a provision that traces its history to a related section that was enacted in 1952. Prior versions of the statute contained no such provision. *The Land Titles Amendment Act,* S.O. 1952, c. 49, s.3 added the following subsection to what was then *The Land Titles Act*, R.S.O. 1950, c. 197, s. 101:

> s. 101(5) Where a condition or covenant has been entered on the register as annexed to or running with the land for a fixed period and the period has expired, the proper master of titles may, at any time after 10 years from the expiration of the period, remove the entry from the register.

[34] Thus, this amendment introduced a means for removing from the register an expired land obligation such as a condition or covenant. This provision was carried forward in *The Land Titles Act*, R.S.O. 1960, c. 204, as s. 122(5). Its current version appears in the *Land Titles Act*, R.S.O. 1990, c. L.5, as s. 119(8), which is in identical language to the 1952 enactment, except it now refers to the land registrar instead of the master of titles.

[35] Pursuant to *The Land Titles Amendment Act,* S.O. 1961-62, c. 32, s.122 was amended to add subsection 6, which provided as follows:

> s. 122 (6) Where a condition, restriction or covenant has been registered as annexed to or running with land and no period or date was fixed for its expiry, the entry of the condition, restriction or covenant may be deleted from the register by the proper master of titles upon an application being made by any person interested in the land at any time after forty years after the condition, restriction or covenant was registered, and the condition, restriction or covenant thereupon ceases to be enforceable.

[36] This amendment thus introduced the option for a party to apply for the deletion of a land obligation - such as a restrictive covenant - forty years after its registration, where the covenant did not itself specify a time for its expiry. This change brought this aspect of the Land Titles system into partial alignment with the land registry system where, with some exceptions, instruments registered outside of a forty-year search period were

extinguished. This new provision was carried forward into *The Land Titles Act*, R.S.O. 1970, c. 234, as s. 129(9).

[37] Section 129(9) of *The Land Titles Act*, R.S.O. 1970, c. 234, was further amended by *The Land Titles Amendment Act*, S.O. 1979, c. 93, s.34. Following that amendment, the provision stated as follows:

> s.129(9) Where a condition, restriction or covenant has been registered as annexed to or running with the land and no period or date was fixed for its expiry, the condition, restriction or covenant is deemed to have expired forty years after the condition, restriction or covenant was registered, and may be deleted from the register by the land registrar.

[38] Through this latest amendment, the Legislature introduced the concept of "deemed expiry". Unless the covenant contained a fixed period or a date for its expiry, it was "deemed to have expired" forty years after its registration. The foregoing provision was renumbered by R.S.O. 1980, as section 118 (9) of *The Land Titles Act,* R.S.O. 1980, c. 230. It has remained in the same form and is now cited as the *Land Titles Act*, R.S.O. 1990, c. L.5, s. 119(9). I observe that the "deemed to have expired" provision facilitates the provincial government's essentially completed project to transfer titles registered under the *Registry Act* to the Land Titles system.

[39] Although there has been no judicial interpretation of these sections, what is now s. 119(9) was the subject of consideration by the Ontario Law Reform Commission in its 1989 *Report on Covenants Affecting Freehold Land*. In that report, the Commission discussed the subject of extinguishment and expiry of restrictive covenants and other "land obligations". The topic of expiry by operation of the recording statutes was discussed at pp. 56-7 of the Report, as follows:

> The *Land Titles Act* [then R.S.O. 1980, c. 230, s. 118(8)] provides that a registered restriction that is for a fixed period may be deleted from the register at any time after ten years from the expiration of the period.
>
> Until 1979, the Act [then R.S.O. 1970, c. 234, s. 129(9)] provided that a restrictive covenant that is not limited as to time could be deleted from the register upon application by any person interested in the land at any time after forty years after registration of the instrument containing the covenant. However, by an amendment in that year [*The Land Titles Amendment Act*, S.O. 1979, c. 93 s.34, now the *Land Titles Act*, R.S.O. 1990, c. L.5, s. 119(9)], such a covenant is deemed to have expired forty years after registration and may be deleted by the land registrar, presumably without notice. The effect of this provision is that, subject to the action of the land registrar in deleting the covenant, a restrictive covenant under the Land Titles system expires automatically after forty years.

[40] Although the Commission recommended that *The Land Titles Act* be amended to permit the renewal of a land obligation registered under that Act, to date that recommendation has not been implemented by the legislature.

[41] The foregoing history reveals that as long ago as 1952 the legislation provided for the removal of a restrictive covenant from the register when it expired by its terms. In 1962 the legislature took the next step of permitting a party to apply for the removal of a restrictive covenant forty years after its registration, if the covenant contained no period or date fixed for its expiry. The 1979 amendment went even further, such that a restrictive covenant is now deemed to have expired forty years after its registration where it contains no period or date for its expiry.

[42] The history of the legislation therefore reveals a progression over the years, in part to bring the Land Titles system into alignment with the registry system and to facilitate the predominance of the Land Titles system. The most recent amendments make the expiry of such a covenant automatic, with the only formality being the removal of registration of the spent covenant upon request.

[43] This interpretation of the Act is consistent with the plain and ordinary meaning of the words in s. 119(9) and gives additional support for my earlier conclusion that the covenants are caught by the express language of s. 119(9) and thus are deemed to have expired on March 3, 2006.

Conclusion and disposition

[44] Based on the foregoing analysis, I reach the following conclusions:

(1) The restrictive covenants did not expressly contain a period or date fixed for their expiry; rather, they purported to be permanent or perpetual.

(2) In light of (1) above, the restrictive covenants fall within the scope of s. 119(9) of the *Land Titles Act*.

(3) As a result of (2) above, by operation of law and the passage of time, the restrictive covenants were deemed to have expired and ceased to have any legal force or effect on March 3, 2006, forty years after their registration.

(4) In light of (3) above, the deletion of the restrictive covenants by the land registrar was proper.

(5) The applicant is no longer bound by the restrictive covenants and the respondents no longer enjoy their benefits.

(6) As a result, the only rights enjoyed by the respondents in relation to the three foot strip are a right-of-way for all purposes “in, over, along and upon” the three foot strip for the usual purposes associated with such a

> right, namely, ingress and egress. Those rights do not include the right to construct or alter improvements or conditions on the three foot strip, to park vehicles along the three foot strip or otherwise to interfere with the use of that portion of the applicant's property.

[45] For these reasons, the application is granted. If the parties are unable to agree upon the contents of an order incorporating my disposition or should they be unable, on or before April 15, 2019, to agree upon the appropriate steps to implement my disposition, counsel should arrange a case conference with me by contacting my judicial assistant.

Costs

[46] Both sides submitted cost outlines. The applicants sought partial indemnity fees and disbursements totalling $27,261.25, while the respondents sought a total of $19,064.66. Recognizing that some additional work by the applicant was required in order to present the case and taking into account the complexity of the issues, the amount of time spent, the reasonable expectations of the parties and the *Boucher* factors, I conclude that a fair and reasonable cost order would be to direct the respondents to pay costs to the applicants in the total amount of $24,000, inclusive of fees, disbursements and applicable taxes.

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Stinson J.

Released: February 22, 2019

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