

Adverse Possession, Dispossession, and the Interplay between the *LTA* and *RPLA*

In *Billimoria v. Mistry*, 2022 ONCA 276, the Court of Appeal considered adverse possession in the context of the *Real Property Limitations Act*, R.S.O. 1980, c. L.15 ("**RPLA**"), the *Land Titles Act*, R.S.O. 1990, c. L.5 ("**LTA**") and the *Partition Act*, R.S.O. 1990, c. P.4 ("**Partition Act**")

Because Section 51(1) of the *LTA* was not raised at trial, this article will be of interest to those considering whether to raise a novel issue on appeal, as well as to those looking for a recent review of the jurisdictional and practical interplay between the *RPLA*, *LTA*, and *Partition Act*, R.S.O. 1990, c. P.4 ("**Partition Act**") in disputes revolving around true ownership of real property.

Key Takeaways

1. The Court of Appeal accepted jurisdiction over all issues raised on appeal, despite the fact that appeals from orders made under the *Partition Act* lie to the Divisional Court, as the appeal from the final judgment with respect to ownership lies to the Court of Appeal and pursuant to s.6(2) of the Courts of Justice Act, the Court had jurisdiction to deal with all issues on appeal. The novel issue raised by the Respondents on appeal, as to the application of S. 51 of the *LTA* was permitted by the Court of Appeal because it did not depend on findings of fact nor was there any suggestion that prior counsel failed to raise it for tactical reasons.
2. S. 51 of the *LTA* prohibits new adverse possession claims for real property registered in the Land Titles System and supersedes all other Acts on this point. If real property is registered in the Land Titles System, (and is therefore subject to the *LTA*), adverse possession claims can only be made if open, notorious, peaceful, adverse, exclusive, actual and continuous possession of the land can be demonstrated for at least 10 years prior to the property being registered in the Land Titles System.
3. The appellant's attempt to create a distinction between adverse possession (*LTA*) and "dispossession" or "discontinued possession" under the *RPLA* was rejected and the principle of adverse possession and its temporal limitations set out in the *LTA* were upheld.

Trial and Background

The parties to this dispute were the owners of a residential property purchased as a joint business venture for either resale or rent (the "**Property**") in 1988. The parties took title as tenants in common, each paying for half of the deposit and receiving 50% ownership of the Property. Unfortunately, they were unable to sell or effectively rent the property. In 1991 they agreed to have the appellant, Homi Billimoria ("**Billimoria**") move into the property.

In 2016, Billimoria transferred his ownership in the Property to an unrelated party without the consent of the respondents, Maharukh and Firoze Mistry (the "**Mistrys**"). The Mistrys sought to sell the Property and extricate their capital. In response, Billimoria registered a mortgage on the Property and commenced an action seeking a declaration that he was the sole owner of the property because of his exclusive possession of the Property since 2010 as well as his alleged payment of all associated carrying costs. The Mistrys brought a counterclaim for partition and sale of the Property, which Billimoria opposed.

The trial judge refuted Billimoria's claims for exclusive possession under the *RPLA*, and proprietary estoppel. However, the trial judge also found that there was a proper basis, grounded in unjust enrichment, for the unequal

division of the property and granted Billimoria 65% ownership and the Mistrays 35% ownership of the value of the Property. The trial judge found that Billimoria's contribution to the property was higher than what a tenant would have paid. The trial judge ordered that the Property be sold with the sale proceeds being split 65/35 on the basis of the above finding.

Interestingly, despite the fact that the parcel register and transfer deed for the Property demonstrated that it was registered in Land Titles *prior to* the parties' purchase of the Property in 1988, and formed part of the trial record, the impact of s. 51(1) of the LTA was never raised at trial by any of the parties, nor considered by the Court in deciding the matter.

The Appeal

Billimoria raised the following arguments on appeal:

- (i) That the trial judge erred in applying the principle of adverse possession to the dispute as the Mistrays were statute-barred from "recovering the property" pursuant to S.4 of the RPLA, which was the correct governing statute as opposed to the LTA.
- (ii) That the trial judge erred in ordering that the Property be sold pursuant to the *Partition Act* having found that there was an agreement that the appellant could live in the property on the condition that he pays the carrying costs.

Raising Novel Issues on Appeal

Given that the applicability of the LTA, particularly S. 51, was not addressed at the trial of the action, the respondents were required to raise it as a novel issue at the appeal.

Typically, appellate courts disallow a party from raising new issues because the opposing side is deprived of the opportunity to adduce evidence on the issue at trial.¹ The party seeking to raise the new issue bears the burden of showing that all the facts necessary to address the new issue are already before the court and it would be in the interests of justice to permit the new issue to be raised.²

The parcel register for the Property, which established when the property was first registered in Land Titles, was included in the trial record, so the facts necessary to the application of S. 51 LTA were already before the Court and no new evidence was required.

There was also no suggestion that prior counsel for the respondents failed to raise it for tactical reasons. Given the foregoing, and with the consent of Billimoria, the Court

exercised its discretion to allow argument on the novel issue.

Adverse Possession and S. 51 of the LTA

The test for successfully making out a claim for adverse possession set by the Ontario Court of Appeal in *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563; (leave to appeal to the SCC refused [1983] S.C.C.A.), and requires that claimants must have:

- (i) had actual possession,
- (ii) had the intention of excluding the true owner from possession, and
- (iii) effectively excluded the true owner from possession.³

The Ontario Court of Appeal also noted in *Teis v. Ancaster (Town)*, 1997 ONCA 1688, that the requirement of 'actual possession' means that a 10-year period, possession must have been "open, notorious, peaceful, adverse, exclusive, actual and continuous".

S. 51 of the LTA is highly relevant to adverse possession claims:

No title by adverse possession, etc.

51 (1) Despite any provision of this Act, the *Real Property Limitations Act* or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription. R.S.O. 1990, c. L.5, s. 51 (1); 2002, c. 24, Sched. B, s. 40 (2).

Operation of section

(2) This section does not prejudice, as against any person registered as first owner of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of the first owner took place. R.S.O. 1990, c. L.5, s. 51 (2).

So, does this mean that adverse possession claims cannot be made against real property registered in the land titles system (and therefore subject to the LTA)? Not quite. The status of adverse possession claims in Ontario is succinctly set out by Justice Perell in *Aragon (Wellesley) Development (Ontario) Corp. v. Piller Investments Ltd.*, 2018 ONSC 4607:

"[123] Where lands under the *Registry Act* become registered under the *Land Titles Act*, they will

be subject to matured claims of possessory title, matured claims of a prescriptive title to an easement or matured claims under the doctrine of lost modern grant. However, once lands are registered under the Land Titles Act, they become immune to unmatured claims of possessory title or prescriptive rights.

[124] In other words, once lands are registered under the Land Titles Act, a ripened claim for a prescriptive or possessory title survives, but an unripe claim for adverse possession or for prescriptive rights will never ripen.

[125] Pursuant to s. 51(1) of the Land Titles Act, for lands under the Act, a prescriptive easement or possessory title can arise from usage before, but not after the lands are transferred into the Land Titles System; ...

[126] The registration of lands under the Land Titles Act will interrupt the running of the 20-year period immediately preceding any action and will prevent the prescriptive right from crystallizing under the *Real Property Limitations Act...*”

In essence, if real property is registered in the Land Titles System, and is therefore subject to the *LTA*, adverse possession claims can only be made if open, notorious, peaceful, adverse, exclusive, actual and continuous possession of the land can be demonstrated for at least 10 years prior to the property being registered in the Land Titles System.

LTA vs RPLA in Real Property Ownership Disputes

Billimoria claimed that due to his long physical occupation of the Property, that he had in effect dispossessed the Mistrys of their interests in the property, or alternatively that the Mistrys had discontinued possession, within the meaning of s. 5 of the *RPLA*.

S. 5 of the *RPLA* provides,

Where the person claiming such land or rent, or some person through whom that person claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of the land, or in receipt of the rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession, or at the last time at which any such profits or rent were so received.⁴

Counsel for Billimoria went on to argue that the Mistrys were statute-barred from “recovery” of the Property pursuant to s. 4 of the *RPLA*, which provides,

No person shall make an entry or distress, or bring an action to recover any land or rent, but **within ten years** next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

Billimoria argued that the Mistrys either abandoned possession or were dispossessed of the Property since 2010 after which Billimoria had exclusive possession of the property. As over 10 years had lapsed since that time, Billimoria argued that the Mistrys were statute-barred from bringing any action to recover their interest in the Property due to the expiry of the S. 4 limitation period in the *RPLA*. In addition, a distinction was drawn between adverse possession, under the *LTA*, and “dispossession”, under the *RPLA*, with Billimoria maintaining that “dispossession” under the *RPLA* was the correct interpretation of events as he had maintained possession of the Property and the Mistrys had abandoned possession of the Property.

The Court of Appeal did not agree and found that this was an adverse possession case and that Billimoria’s claim to adverse possession was statute-barred by s. 51(1) of the *LTA*.⁵ The Court of Appeal further found that even if S. 51(1) of the *LTA* did not apply, that the trial judge did not err in her adverse possession analysis of the *RPLA* arguments presented to her at trial. Even if “dispossession”, as distinct from adverse possession, was possible in law, it would not have helped Billimoria in this case because he was not able to satisfy the Court that there had been dispossession on the facts of the case. In summary, the Court of Appeal refused to accept the distinction being made between adverse possession and dispossession/discontinued possession and reinforced the application of the principle of adverse possession to ownership disputes such as this.

Because the Property was registered in the Land Titles System prior to the parties’ purchase of the Property, Billimoria’s adverse possession claim was doomed to failure from the outset.

The Partition Act and Verbal Agreements

The second issue raised by Billimoria was that the trial judge erred in ordering the sale of the Property due to the verbal agreement between the parties that Billimoria could continue to live in the property if he paid the carrying costs. Billimoria argued that this verbal agreement was binding in perpetuity so long as the carrying costs were paid. The Court of Appeal rejected this argument and supported the trial judge's finding that the verbal agreement was intended to be temporary until they found an appropriate tenant.

Section 2 of the *Partition Act* provides,

All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.⁶

The party resisting the sale bears the burden of demonstrating why the property ought not to be sold, by establishing malicious, vexatious, or oppressive conduct by the party intending to sell their interest in the property.

As the trial judge found that there was no binding agreement allowing Billimoria to live at the Property in perpetuity, and that there was no evidence of malicious, oppressive, or vexatious actions on the part of the Mistrys, the Court dismissed this issue in its entirety and the Property was ordered sold.

Conclusion

The key takeaway here is that partition and sale of real property pursuant to S. 2 of the *Partition Act* is a discretionary remedy available to the court at first instance and to be granted deference by the appellate court.

¹ *Whitby (Town) v. G & G 878996 LM Ltd.*, 2020 ONCA 654, 5 M.P.L.R. (6th) 174, at para. 9.

² *Kaiman v. Graham*, 2009 ONCA 77, 75 R.P.R. (4th) 157, at para. 18.

³ *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563; leave to appeal to the SCC refused [1983] S.C.C.A. [“Masidon Investments Ltd.”].

⁴ *Real Property Limitations Act*, R.S.O. 1980, c. L.15, s. 5.

⁵ *Billimoria v. Mistry*, 2022 ONCA 276, at para 26 [“Billimoria”].

⁶ *Partition Act*, R.S.O. 1990, c. P.4, s. 2.

⁷ *Billimoria* at para 38; *Brienza v. Brienza*, 2014 ONSC 6942, at paras 24-27.

⁸ *Billimoria* at paras 38 – 42.



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